HIGH COURT OF AUSTRALIA

GLEESON CJ,
GAUDRON, McHUGH, GUMMOW, KIRBY, HAYNE AND CALLINAN JJ

STATE OF NEW SOUTH WALES APPELLANT

AND

ANGELO LEPORE & ANOR RESPONDENTS

New South Wales v Lepore [2003] HCA 4
6 February 2003
S108/2002

ORDER

1. *Appeal allowed in part.*

2. *Paragraph 2 of the order of the Court of Appeal of New South Wales made on 23 April 2001 set aside, and in its place, order that the judgment entered in the District Court on 16 April 1999 be wholly set aside and that there be a new trial.*

3. *Appellant to pay the costs of the appeal to this Court.*

4. *Costs of the new trial to abide its outcome.*

On appeal from the Supreme Court of New South Wales

Representation:

M G Sexton SC, Solicitor-General for the State of New South Wales with C T Barry QC and N L Sharp for the appellant (instructed by Crown Solicitor for the State of New South Wales)

A S Morrison SC with J Oakley for the first respondent (instructed by Milicevic Solicitors)

No appearance for the second respondent

Interveners:

B M Selway QC, Solicitor-General for the State of South Australia with J G Masters intervening on behalf of the Attorney-General for the State of South Australia (instructed by Crown Solicitor for the State of South Australia)

B M Selway QC, Solicitor-General for the State of South Australia with J C Pritchard intervening on behalf of the Attorney-General for the State of Western Australia (instructed by Crown Solicitor for the State of Western Australia)

HIGH COURT OF AUSTRALIA

GLEESON CJ,
GAUDRON, McHUGH, GUMMOW, KIRBY, HAYNE AND CALLINAN JJ

Matter No B20/2002

VIVIAN CHRISTINA SAMIN — APPELLANT

AND

STATE OF QUEENSLAND & ORS — RESPONDENTS

Matter No B21/2002

SHEREE ANNE RICH — APPELLANT

AND

STATE OF QUEENSLAND & ORS — RESPONDENTS

Samin v Queensland; Rich v Queensland
6 February 2003
B20/2002 & B21/2002

ORDER

Appeals dismissed with costs.

On appeal from the Supreme Court of Queensland

Representation:

D O J North SC with R C Morton for the appellants (instructed by Shannon Donaldson Province Lawyers)

P A Keane QC, Solicitor-General of the State of Queensland with P J Flanagan for the first and second respondents (instructed by Crown Solicitor of the State of Queensland)

No appearance for the third respondent

Interveners:

B M Selway QC, Solicitor-General for the State of South Australia with J G Masters intervening on behalf of the Attorney-General for the State of South Australia (instructed by Crown Solicitor for the State of South Australia)

B M Selway QC, Solicitor-General for the State of South Australia with J C Pritchard intervening on behalf of the Attorney-General for the State of Western Australia (instructed by Crown Solicitor for the State of Western Australia)

CATCHWORDS

New South Wales v Lepore

Negligence – Liability of school authority – Alleged sexual assault on pupil by teacher – Whether school authority in breach of non-delegable duty of care – Concept of non-delegable duty – Whether school authority vicariously liable – Test for imposition of vicarious liability.

Practice and procedure – Trial – Negligence – Trial of issues of liability and damage severed – Failure to make necessary findings of fact – Retrial.

Words and phrases – "non-delegable duty", "vicarious liability".

Samin v Queensland; Rich v Queensland

Negligence – Liability of school authority – Sexual assault on pupil by teacher – Whether school authority in breach of non-delegable duty of care – Concept of non-delegable duty – Whether school authority vicariously liable – Test for imposition of vicarious liability.

Words and phrases – "non-delegable duty", "vicarious liability".

1 GLEESON CJ. If a teacher employed by a school authority sexually abuses a pupil, is the school authority liable in damages to the pupil? No one suggests that the answer is "No, never". In Australia, at least until recently, an answer "Yes, always" would also have been surprising. More information would have been required.

2 One potentially important matter is fault on the part of the school authority. The legal responsibilities of such an authority include a duty to take reasonable care for the safety of pupils. There may be cases in which sexual abuse is related to a failure to take such care. A school authority may have been negligent in employing a particular person, or in failing to make adequate arrangements for supervision of staff, or in failing to respond appropriately to complaints of previous misconduct, or in some other respect that can be identified as a cause of the harm to the pupil. The relationship between school authority and pupil is one of the exceptional relationships which give rise to a duty in one party to take reasonable care to protect the other from the wrongful behaviour of third parties even if such behaviour is criminal[1]. Breach of that duty, and consequent harm, will result in liability for damages for negligence.

3 We are not presently concerned with such a case. Our concern is with the more difficult problem of liability in the absence of such fault. The presence of fault on the part of the school authority, causally related to the harm to the pupil, will result in liability. In what circumstances may there be liability notwithstanding the absence of fault? In other common law jurisdictions, that question would be understood as a question about vicarious liability. The assumed relationship between authority and teacher is that of employer and employee. A further assumption is that there has been no want of care on the part of the authority, either in appointing or supervising the teacher, or in any other relevant aspect of the arrangements made for the care of pupils. The teacher has been guilty of intentional criminal conduct that has caused harm to a pupil. An employer is vicariously responsible for the wrongful act of an employee in some circumstances, and not in others. Either the law imposes vicarious responsibility on the school authority, or it does not. Does that conclude the matter? It has been argued that there is another possible basis upon which the authority may be found liable, even though there has been no want of care on its part, and even though the law refuses to treat it as vicariously responsible for the tort of its employee. If it exists, this must be a form of liability even more strict than vicarious liability. It must be, or at least encompass the possibility of, liability for the intentional wrongdoing of an employee in circumstances where the ordinary principles of vicarious responsibility do not entitle a plaintiff to succeed. This, it is contended, is the

---

1 *Modbury Triangle Shopping Centre Pty Ltd v Anzil* (2000) 205 CLR 254 at 265 [26].

legal consequence of what has been called the non-delegability of a school authority's duty of care. The argument is that the authority's duty to take reasonable care for the safety of pupils, because it is non-delegable, may become a source of liability for any form of harm, accidental or intentional, inflicted upon a pupil by a teacher.

4 Three appeals in cases involving sexual abuse of pupils by teachers were heard together by this Court. The first is from a decision of the Court of Appeal of New South Wales[2]. Because of defects in the manner in which the case was decided at first instance, it was an unsatisfactory vehicle for the resolution of the issues involved. However, a majority of the Court of Appeal (Mason P and Davies AJA, Heydon JA contra) accepted in principle that the school authority (the New South Wales government) was liable on the basis of non-delegable duty. The extent of the liability was expressed by Mason P (with whom Davies AJA agreed) as follows[3]:

> "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)."

5 That is a proposition with wide implications. Because of the principle upon which it is said to rest, its significance extends beyond schools, and beyond activities involving the care of children. The ambit of 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.

6 The other two appeals are from the Court of Appeal of Queensland, which heard the cases together, and which declined to follow the decision of the New South Wales Court of Appeal[4]. There is thus a conflict of authority between intermediate courts of appeal in this country that requires resolution.

The plaintiffs' claims

7 In the first matter, the first respondent sued the appellant (the State of New South Wales) and the second respondent (the teacher) in the District Court of New South Wales. The events complained of occurred in 1978, when the first respondent, then aged seven, was attending a State primary school. He alleged

---

2 *Lepore v State of New South Wales* (2001) 52 NSWLR 420.

3 (2001) 52 NSWLR 420 at 432.

4 *Rich v State of Queensland; Samin v State of Queensland* (2001) Aust Torts Reports ¶81-626.

that he was assaulted by the second respondent. The assaults were said to have occurred in the context of supposed misbehaviour by the first respondent, and the imposition of corporal punishment for such misbehaviour. On a number of occasions, the first respondent, after being accused of misbehaviour, was sent to a storeroom, told to remove his clothing, smacked, and then touched indecently. On some occasions, other boys would be present, also ostensibly being punished.

8 The behaviour of the second respondent was reported to the police. He was charged with a number of offences of common assault. He entered pleas of guilty. Sentence was deferred upon his entering into a recognizance to be of good behaviour. He was also fined $300. He resigned as a teacher.

9 The second respondent took no part in the proceedings in the District Court, or in the subsequent appeals. Judge Downs QC, who was about to retire, dealt separately with the issue of the liability of the State and the teacher, and deferred questions as to damages to be heard by another judge. He heard evidence, and then delivered a judgment which found that the second respondent had assaulted the first respondent. Regrettably, the judgment left unresolved the nature and extent of the assaults. The learned judge did not accept all the evidence of the first respondent, but it was not disputed that the second respondent had struck the first respondent on his bare bottom. This was found sufficient to justify a finding of assault, and it resulted in liability on the part of the second respondent.

10 As to the liability of the appellant, Judge Downs found that there was no failure on the part of the State to exercise proper care. He said:

> "It remains now for me to consider if the first defendant breached the duty it owed to the plaintiff. The evidence discloses that the second defendant in or about September 1978 firstly was a qualified teacher aged 23 years; secondly with between one and a half to two years experience as a primary school teacher; thirdly he worked under the direct supervision of the head mistress of … Infants School and the general supervision of the principal of its primary school; fourthly and that there were guidelines as to the nature of the supervision. As to this the inspector's report indicates that so far as the first defendant was aware the second defendant worked within those guidelines.
>
> The assaults alleged were deliberate and isolated acts of abuse which occurred in an enclosed room and which were inimical or totally foreign to the second defendant's duties as a teacher. Furthermore there was not any evidence before me: (1) over what period the various assaults took place; (2) the length of time that any one of the assaults might have lasted; (3) that any member of the staff at the school or of the department had any opportunity to witness the assaults; (4) that any member of the staff or of the department knew of the assaults; (5) that any member of the staff or of

> the department had any reason to believe that the second defendant might commit the assaults. For example there was not any evidence that any parent warned any member of the staff and the inspector, as I have already stated, found him to be a teacher with above average potential; (6) that the second defendant had a predisposition to commit such assaults; and finally (7) there is not any evidence as to what system of work or supervision might reasonably have been implemented so as to avoid the isolated assaults which took place.
>
> Bearing in mind all of these matters together with the fact that the evidence of the isolated acts fell from the lips of children who were aged 7 or 8 years more than 20 years after the event, the only conclusion I can come to is that there is no evidence that the first defendant breached the duty that it owed to the plaintiff. That completes my judgment on the issues that were before me."

11 Regrettably, Judge Downs did not make any detailed findings about the nature of the teacher's conduct. That some assaults occurred was not in dispute. His Honour was apparently content to let the judge who was to deal with the issue of damages work out the extent of the assaults. The judge also failed to deal with an argument based on breach of a non-delegable duty. The first respondent appealed against the decision in favour of the appellant. The Court of Appeal was left with an unsatisfactory factual basis for a review of the decision. There was no challenge in the Court of Appeal to the factual findings absolving the Department of Education of negligence. The principal complaint was that the trial judge failed to address the issue of breach of a non-delegable duty of care.

12 Neither at first instance, nor in the Court of Appeal, was the case against the appellant put on the basis of vicarious liability. There may have been an arguable case based on vicarious liability, even on a narrow view of the potential scope of such liability. Chastisement of a pupil is within the course of a teacher's employment[5]. On the account given by the first respondent, the inappropriate conduct seems to have taken place in the context of punishment for misbehaviour. However, no such argument was advanced, and the factual findings necessary for the purpose of considering such an argument were not made. Indeed, the judge was told by counsel that he "[did not] have to get into the area of the case about the barmaid and the hotel". This was obviously a reference to *Deatons Pty Ltd v Flew*[6].

13 The second and third matters both arose out of the conduct of a teacher (the third respondent) at a one-teacher State primary school in rural Queensland.

---

5 *Ryan v Fildes* [1938] 3 All ER 517.

6 (1949) 79 CLR 370.

In each case, the appellant was a young girl attending the school. At the relevant times (between 1963 and 1965) the appellants were aged between seven and ten. The third respondent has taken no part in the proceedings. He was sentenced to a lengthy term of imprisonment[7]. Each appellant alleged serious acts of sexual assault by the third respondent. Those acts, as particularised in the Statement of Claim, occurred, at school, during school hours, and in a classroom or adjoining rooms. Because no evidence has been taken, the full circumstances of the alleged assaults are not apparent. For example, it is not clear whether the third respondent's behaviour allegedly occurred in front of other pupils, or how he came to be in intimate physical contact with the appellants.

14 In each case, the former pupil commenced action, in the District Court of Queensland, against the State of Queensland, the Minister for Education of Queensland, and the former teacher. We are not presently concerned with the action against the teacher. In relation to the claims against the State and the Minister (which reflected some uncertainty as to the identity of the school authority) each Statement of Claim alleged, in terms of a non-delegable duty, that the State was under "a duty to ensure that reasonable care was taken of [the appellant] whilst she was at the school" and that, in breach of the State's duty, the teacher sexually assaulted the appellant. It then alleged psychiatric injury and other harm to the appellant. There was no allegation of fault on the part of the school authority in relation to its conduct of the school, or appointment of the teacher, or failure to respond to warnings or complaints. It was simply alleged that the teacher sexually assaulted the appellants at school, and that this constituted a breach of the duty owed by the school authority to the appellants.

15 Applications were made by the first and second respondents to strike out each Statement of Claim. Those applications failed in the District Court. There were appeals to the Court of Appeal of Queensland. The appeals were successful. The Court of Appeal (McPherson, Thomas and Williams JJA) ordered that each Statement of Claim be struck out, and that each plaintiff have leave to deliver a further Statement of Claim. The claims were argued solely on the basis of non-delegable duty. No reliance was placed on vicarious liability. In noting that fact, McPherson JA said:

> "Nothing can be clearer than that the assaults alleged to have been committed here were independent and personal acts of misconduct by [the teacher]. They were in no sense capable of being regarded as methods of conducting his teaching function, but were done in utter defiance and contradiction of it and of his duties as an employee of the State."

---

7 *D'Arcy* (2001) 122 A Crim R 268.

16 The Court of Appeal of Queensland declined to follow the reasoning of the majority in *Lepore*, preferring the minority opinion of Heydon JA.

17 In this Court, counsel for the appellants in the cases of *Samin* and *Rich* indicated that, pursuant to the leave to re-plead, reliance would be placed on vicarious liability. The Court was shown the proposed form of Amended Statements of Claim. The only difference from the original pleadings is that they assert that the school authority is vicariously responsible for the assaults perpetrated by the teacher, and give as particulars the opportunity which the school afforded the teacher to abuse his authority, the intimacy inherent in the relation between teacher and infant pupils, the power of the teacher and the vulnerability of the pupils, the fact that the teacher had sole control of the school, and the fact that the assaults occurred during school hours and at school premises. By reason of those matters, it is contended, the assaults "occurred in the course of or were closely connected with" the teacher's employment. Once again, there is no allegation of any act or omission of the school authority involving a want of care for the safety of the pupils. Apparently, the appellants did not, and do not, intend to take advantage of the opportunity to re-plead to seek to make out a case of direct liability based on some act or omission of the school authority.

18 In all three cases, the issue is whether, there being no allegation of any fault on the part of the school authority in its systems or procedures, its appointment and supervision of staff, its arrangements for responding to complaints or warnings, or any other matter which might have given rise to a claim that the authority itself was guilty of a want of care, the acts of the teacher make the authority liable. In this Court, primary reliance is again placed on the principle of non-delegable duty, and the reasoning of the majority in the New South Wales Court of Appeal. However, in the alternative, it is now argued that the school authorities are vicariously liable. Recent decisions of the House of Lords[8] and of the Supreme Court of Canada[9] are said to support that alternative approach. It is not suggested that there is any procedural unfairness involved in permitting that argument to be raised at this stage.

The non-delegable duty of care

19 For more than a century, courts have described certain common law duties of care as "non-delegable" or "personal"[10]. The purpose and effect of such a

---

8 *Lister v Hesley Hall Ltd* [2002] 1 AC 215.

9 *Bazley v Curry* [1999] 2 SCR 534; *Jacobi v Griffiths* [1999] 2 SCR 570.

10 *Kondis v State Transport Authority* (1984) 154 CLR 672 at 685 per Mason J.

characterisation of a duty of care is not always entirely clear[11]. However, in a number of cases, members of this Court have so described the duty owed by a school authority to its pupils.

20 In *Dalton v Angus*[12], Lord Blackburn referred to the inability of a person subject to a certain kind of responsibility to "escape from the responsibility attaching on him of seeing that duty performed by delegating it to a contractor". His Lordship's reference to a responsibility of "seeing" a duty performed has echoes in later judicial statements. The concept was taken up in relation to the duty of an employer to take reasonable care for the safety of a workman. In *Wilsons and Clyde Coal Co v English*[13], Lord Wright described the duty as "personal", and said that it required the provision of competent staff, adequate material, and a proper system of effective supervision. Lord Thankerton[14] said that such duties "cannot be delegated", explaining that "the master cannot divest himself of responsibility by entrusting their performance to others". It would, perhaps, have been more accurate to say that the duties cannot be discharged by delegation. At all events, to describe a duty of care as "personal" or "non-delegable", in the sense that the person subject to the duty has a responsibility either to perform the duty, or to see it performed, and cannot discharge that responsibility by entrusting its performance to another, conveys a reasonably clear idea; but it addresses the nature of the duty, rather than its content.

21 This point was made in relation to another class of case in which resort was had to the concept of a personal or non-delegable duty: cases concerning the relationship between hospital and patient. Cases of that kind caused difficulty for the application of the principle of vicarious liability because of the variety of professional skills and arrangements that may be involved in a hospital organization. In *Gold v Essex County Council*[15], Lord Greene MR, referring to the duty of care undertaken by a hospital, said:

> "Apart from any express term governing the relationship of the parties, the extent of the obligation which one person assumes towards another is to be inferred from the circumstances of the case. This is true

---

11 Glanville Williams, "Liability for Independent Contractors", (1956) *Cambridge Law Journal* 180.

12 (1881) 6 App Cas 740 at 829.

13 [1938] AC 57 at 84.

14 [1938] AC 57 at 73, adopting the statement of the Lord Justice-Clerk in *Bain v Fife Coal Co* [1935] SC 681 at 693.

15 [1942] 2 KB 293 at 301-302.

> whether the relationship be contractual (as in the case of a nursing home conducted for profit) or non-contractual (as in the case of a hospital which gives free treatment). In the former case there is, of course, a remedy in contract, while in the latter the only remedy is in tort, but in each case the first task is to discover the extent of the obligation assumed by the person whom it is sought to make liable. Once this is discovered, it follows of necessity that the person accused of a breach of the obligation cannot escape liability because he has employed another person, whether a servant or agent, to discharge it on his behalf, and this is equally true whether or not the obligation involves the use of skill. It is also true that, if the obligation is undertaken by a corporation, or a body of trustees or governors, they cannot escape liability for its breach, any more than can an individual, and it is no answer to say that the obligation is one which on the face of it they could never perform themselves. Nor can it make any difference that the obligation is assumed gratuitously by a person, body or corporation which does not act for profit … Once the extent of the obligation is determined the ordinary principles of liability for the acts of servants or agents must be applied."

22 His Lordship's insistence that the first step is to identify the extent of the obligation that arises out of a particular relationship, whether contractual or non-contractual, is important. In the context of employment, for example, a duty to take reasonable care for the safety of workers cannot be discharged by delegation; but delegation does not transform it into a duty to keep workers free from all harm. A duty to see that reasonable care is taken for the safety of workers is different from a duty to preserve them from harm. Some confusion may result from describing it as a duty to "ensure" that reasonable care is taken for the safety of workers, which may give rise to the misconception that the responsibility of an employer is absolute.

23 Because the hospital cases were treated by Mason J (of this Court), in *The Commonwealth v Introvigne*[16], as analogous, it is useful to note the state of the Australian law in relation to the duties owed by hospitals to patients at about the time *Introvigne* was decided. This appears from the decision of the Court of Appeal of New South Wales in *Albrighton v Royal Prince Alfred Hospital*[17], which was decided two years before *Introvigne*. Reynolds JA, with whom Hope JA and Hutley JA agreed, said that the concept that a hospital fulfils its duty of care to persons treated in it by selecting and appointing competent medical staff had been discarded[18]. Referring to an argument that the hospital

---

16 (1982) 150 CLR 258 at 270.

17 [1980] 2 NSWLR 542.

18 [1980] 2 NSWLR 542 at 557.

was in breach of a duty which it owed to the plaintiff, and of which it could not divest itself by delegation, he said that the precise content of the responsibility assumed by a hospital might vary with individual cases, and had to be determined by reference to the particular facts[19]. It is significant that the duty of care is personal or non-delegable; but it is always necessary to ascertain its content.

24 The case of *Introvigne* raised an unusual problem. The plaintiff, a schoolboy aged 15, attended the Woden Valley High School in the Australian Capital Territory. One morning before class, he and some friends entertained themselves by swinging on a flagpole in the school grounds. As a result of their exertions, the truck of the flagpole became detached, and fell on the plaintiff's head. He was injured. The plaintiff's case was originally based on the allegedly defective condition of the flagpole. He sued the Commonwealth as occupier of the school premises. He also sued the designer of the flagpole. On the first day of the hearing, the plaintiff obtained leave to amend his Statement of Claim by alleging negligence on the part of the teachers. In particular, he alleged that the acting principal failed to arrange for adequate supervision in the school grounds. The plaintiff claimed that the Commonwealth was liable as a result of that failure. However, the Commonwealth was not the employer of the acting principal, or the other teachers. They were all employees of the New South Wales Department of Education which, at the relevant time, operated the Woden Valley High School on behalf of the Commonwealth pursuant to an inter-governmental arrangement. It was too late for the plaintiff to sue the State of New South Wales. The trial judge found no negligence. That finding was reversed on appeal. The factual issue is presently irrelevant. What was significant for future cases was the basis on which the Court attributed responsibility to the Commonwealth for the negligence of the teachers.

25 Mason J, with whom Gibbs CJ agreed, said that, although the case had been presented by the plaintiff, and dealt with at first instance and in the intermediate appellate court, as one of vicarious liability[20], the plaintiff was entitled to succeed on a different basis. He did not reject the possibility that the Commonwealth might have been vicariously liable for the negligence of the teachers[21]. However, he rested his decision on the ground that "[t]he duty … imposed on a school authority is akin to that owed by a hospital to its patient"[22]. In *Gold*, it had been held that the liability of a hospital arises out of an obligation

---

19 [1980] 2 NSWLR 542 at 561.

20 (1982) 150 CLR 258 at 264.

21 (1982) 150 CLR 258 at 271.

22 (1982) 150 CLR 258 at 270.

to use reasonable care in treatment, the performance of which cannot be delegated to someone else. This is a "personal" duty. It is more stringent than a duty to take reasonable care; it is a duty to ensure that reasonable care is taken. The reason for its imposition in the case of schools is the immaturity and inexperience of pupils, and their need for protection. This gives rise to a special responsibility akin to that of a hospital for its patients[23].

26 Having regard to the existing authorities on personal or non-delegable duties, and in the light of what he said in later cases, it is clear that Mason J intended to make no distinction between a duty to ensure that reasonable care is taken and a duty to see that reasonable care is taken. It also seems clear that the increased stringency to which he was referring lay, not in the extent of the responsibility undertaken (reasonable care for the safety of the pupils), but in the inability to discharge that responsibility by delegating the task of providing care to a third party or third parties.

27 Murphy J found against the Commonwealth both on the basis of non-delegable duty and on the basis of vicarious liability. He said that, because the Commonwealth assumed the role of conducting a school[24]:

> "In terms of the prevailing concepts of duty, the Commonwealth became fixed with certain non-delegable duties:
>
> 1. To take all reasonable care to provide suitable and safe premises. The standard of care must take into account the well-known mischievous propensities of children, especially in relation to attractions and lures with obvious or latent hazards.
>
> 2. To take all reasonable care to provide an adequate system to ensure that no child is exposed to any unnecessary risk of injury; and to take all reasonable care to see that the system is carried out.
>
> The Commonwealth also became vicariously liable to pupils and parents for the acts and omissions of the teaching and other staff (whether or not these were supplied by another entity or agency)."

28 Brennan J held that the Commonwealth, as a school authority, was under a duty to provide adequate supervision of the pupils, and, as no such supervision was provided, there was a breach of duty[25].

---

23 (1982) 150 CLR 258 at 270-271.

24 (1982) 150 CLR 258 at 274-275.

25 (1982) 150 CLR 258 at 280.

29 The other member of the Court, Aickin J, died before judgment was delivered.

30 What was decided in *Introvigne* was that, even though it may have been doubtful that the Commonwealth was vicariously liable for the negligent failure of the teachers to provide adequate supervision, (the doubt arising from the inter-governmental arrangement), nevertheless the Commonwealth was under a duty to provide reasonable supervision; it could not discharge that duty by arranging for the State of New South Wales to conduct the school; it had a responsibility to see that adequate supervision was provided; and the absence of adequate supervision meant that it had not fulfilled its responsibility and was in breach of its duty of care. That produced the same practical result as would have followed if the Commonwealth had employed the teachers; an outcome that would have been unremarkable but for the quirk of federalism encountered by the plaintiff when he belatedly amended his Statement of Claim.

31 The failure to take care of the plaintiff which resulted in the Commonwealth's liability in *Introvigne* was a negligent omission on the part of the teachers at the school, acting in the course of their ordinary duties. The hospital cases, which were treated by Mason J as analogous, similarly involved negligence. A responsibility to take reasonable care for the safety of another, or a responsibility to see that reasonable care is taken for the safety of another, is substantially different from an obligation to prevent any kind of harm. Furthermore, although deliberately and criminally inflicting injury on another person involves a failure to take care of that person, it involves more. If a member of a hospital's staff with homicidal propensities were to attack and injure a patient, in circumstances where there was no fault on the part of the hospital authorities, or any other person for whose acts or omissions the hospital was vicariously responsible, the common law should not determine the question of the hospital's liability to the patient on the footing that the staff member had neglected to take reasonable care of the patient. It should face up to the fact that the staff member had criminally assaulted the patient, and address the problem of the circumstances in which an employer may be vicariously liable for the criminal acts of an employee. Intentional wrongdoing, especially intentional criminality, introduces a factor of legal relevance beyond a mere failure to take care. Homicide, rape, and theft are all acts that are inconsistent with care of person or property, but to characterise them as failure to take care, for the purpose of assigning tortious responsibility to a third party, would be to evade an issue[26].

---

26 See *Lister v Hesley Hall Ltd* [2002] 1 AC 215 at 250 per Lord Millett.

32 As will appear, courts of the highest authority in England and Canada, and courts in other common law jurisdictions, have analysed the problem of the liability of a school authority for sexual abuse of pupils by teachers in terms of vicarious liability. If the argument based on non-delegable duty, said to be supported by *Introvigne*, is correct, their efforts have been misdirected, and the conclusions they have reached have unduly restricted liability. If the proposition accepted in the Court of Appeal of New South Wales is correct, and represents the law in Australia, then the liability of school authorities in this country extends beyond that which has been accepted in other common law jurisdictions. Moreover, in this country, where a relationship of employer and employee exists, if the duty of care owed to a victim by the employer can be characterised as personal, or non-delegable, then the potential responsibility of an employer for the intentional and criminal conduct of an employee extends beyond that which flows from the principles governing vicarious liability. It is unconstrained by considerations about whether the employee was acting in the course of his or her employment. It is enough that the victim has been injured by an employee on an occasion when the employer's duty of care covered the victim. The employer's duty to take care, or to see that reasonable care is taken, has been transformed into an absolute duty to prevent harm by the employee. It is similar to the duty owed by the owners of animals known to have vicious propensities.

33 In *Burnie Port Authority v General Jones Pty Ltd*[27], a case concerning non-delegable duties of care, in which *Introvigne* was considered and applied, Brennan J identified the fallacy involved in an argument of the kind accepted by the majority in the New South Wales Court of Appeal. He referred to a case where an employer, who is subject to a personal (non-delegable) duty, entrusts performance to an independent contractor. In that connection, he quoted a passage from the judgment of Cockburn CJ in *Bower v Peate*[28], and said[29]:

> "There is a difficulty with this passage if it is applied in a case where negligence is in issue. The difficulty lies in the words 'is bound to see to the doing of that which is necessary to prevent the mischief', for those words suggest that the duty is an absolute duty 'to prevent the mischief', a duty higher than a duty to exercise reasonable care. There are some cases, notably the rule in *Rylands v Fletcher* and the law of nuisance, where the act authorized to be done does impose on the employer of an independent contractor a duty higher than a duty to exercise reasonable care. Therefore, where the authorized act is or creates

---

27 (1994) 179 CLR 520 at 575-576.

28 (1876) 1 QBD 321 at 326-327.

29 (1994) 179 CLR 520 at 576-577.

> a non-natural use of land, or in the absence of preventive measures will create a nuisance, the duty of the employer is, in the one case, to prevent escape of the mischievous thing or, in the other, to prevent the occurrence of the nuisance. But the duty in negligence is not so demanding."

34 The proposition that, because a school authority's duty of care to a pupil is non-delegable, the authority is liable for any injury, accidental or intentional, inflicted at school upon a pupil by a teacher, is too broad, and the responsibility with which it fixes school authorities is too demanding.

35 In *Kondis v State Transport Authority*[30], a case concerning an employer's duty to provide a safe system of work, Mason J developed what he had earlier said in *Introvigne*. He said that, when we look at the classes of case in which the existence of a non-delegable duty has been recognized, it appears that there is some element in the relationship between the parties that makes it appropriate to impose a duty to ensure that reasonable care and skill is taken for the safety of another's person or property. He went on[31]:

> "The element in the relationship between the parties which generates a special responsibility or duty to see that care is taken may be found in one or more of several circumstances. The hospital undertakes the care, supervision and control of patients who are in special need of care. The school authority undertakes like special responsibilities in relation to the children whom it accepts into its care. If the invitor be subject to a special duty, it is because he assumes a particular responsibility in relation to the safety of his premises and the safety of his invitee by inviting him to enter them. And in *Meyers v Easton*[32] the undertaking of the landlord to renew the roof of the house was seen as impliedly carrying with it an undertaking to exercise reasonable care to prevent damage to the tenant's property. In these situations the special duty arises because the person on whom it is imposed has undertaken the care, supervision or control of the person or property of another or is so placed in relation to that person or his property as to assume a particular responsibility for his or its safety, in circumstances where the person affected might reasonably expect that due care will be exercised."

36 In cases where the care of children, or other vulnerable people, is involved, it is difficult to see what kind of relationship would not give rise to a non-delegable duty of care. It is clearly not limited to the relationship between

---

30 (1984) 154 CLR 672 at 684-687.

31 (1984) 154 CLR 672 at 687.

32 (1878) 4 VLR 283.

school authority and pupil. A day-care centre for children whose parents work outside the home would be another obvious example. The members or directors of the club, which provided recreational facilities for children, considered by the Supreme Court of Canada in *Jacobi v Griffiths*[33], presumably owed a non-delegable duty of care to the children who were sexually assaulted by the club's employee. It would be wrong to assume that the persons or entities potentially subject to this form of tortious liability have "deep pockets", or could obtain, at reasonable rates, insurance cover to indemnify them in respect of the consequences of criminal acts of their employees or independent contractors. Whether the organization providing care is public or private, commercial or charitable, large or small, religious or secular, well-funded or mendicant, its potential no-fault tortious liability will be extensive. Furthermore, if deterrence of criminal behaviour is regarded as a reason for imposing tortious liability upon innocent parties, three things need to be remembered. First, the problem only arises where there has been no fault, and therefore no failure to exercise reasonable care to prevent foreseeable criminal behaviour on the part of the employee. Secondly, it is primarily the function of the criminal law, and the criminal justice system, to deal with matters of crime and punishment. (Most Australian jurisdictions also have statutory schemes for compensating victims of crime.) Thirdly, by hypothesis, the sanctions provided by the criminal law have failed to deter the employee who has committed the crime.

37 There is a further difficulty with the proposition under consideration. If a pupil is injured by the criminal act of another pupil, or of a stranger, then the possible liability of the school authority is determined by asking whether some act or omission of the school authority, or of some person for whose conduct it is vicariously responsible, was a cause of the harm suffered by the pupil. Why is a different question asked when the injury results from the criminal act of a teacher?

38 There is no reason, either in principle or in authority, to treat the existence of a non-delegable duty of care as having the consequences held by the New South Wales Court of Appeal. In that respect, the reasoning of Heydon JA, and of the Queensland Court of Appeal, is to be preferred.

39 The orthodox method of analysing the problem is that adopted by the House of Lords and the Supreme Court of Canada. On the assumption that there has been no fault on the part of the school authority, the question to be addressed is whether the authority is vicariously liable for the wrongdoing of its employee.

---

33 [1999] 2 SCR 570.

Vicarious liability

40 An employer is vicariously liable for a tort committed by an employee in the course of his or her employment. The limiting or controlling concept, course of employment, is sometimes referred to as scope of employment. Its aspects are functional, as well as geographical and temporal. Not everything that an employee does at work, or during working hours, is sufficiently connected with the duties and responsibilities of the employee to be regarded as within the scope of the employment. And the fact that wrongdoing occurs away from the workplace, or outside normal working hours, is not conclusive against liability.

41 The antithesis of conduct in the course of employment is sometimes expressed by saying that the employee was "on a frolic of his own". The origin of that expression was explained by Diplock LJ in *Morris v C W Martin & Sons Ltd*[34]:

> "A coachman had a tendency, well-recognised in the nineteenth century, to drive off with his master's vehicle upon a 'frolic of his own' and sometimes to injure a passer-by while indulging in this foible. The only connection between the injury to the passer-by and the master's act in employing the coachman was that but for such employment the coachman would probably not have had the opportunity of driving off with the vehicle at all. At a period when judges themselves commonly employed coachmen, this connection was regarded as too tenuous to render the master vicariously liable to the passer-by for the injury caused by the coachman, at any rate if the master had exercised reasonable care in selecting him for employment. The immunity of the master from vicarious liability for tortious acts of a servant while engaged upon a frolic can be rationalised in a variety of ways. The master's employment of the servant was only a causa sine qua non of the injury: it was not the causa causans. It was not 'foreseeable' by the master that his employment of the servant would cause injury to the person who sustained it. The master gave no authority to the servant to create an Atkinian proximity relationship between the master and the person injured by the servant's acts. One or other of these rationalisations underlies the common phrase in which the test of the master's liability is expressed: 'Was the servant's act within the scope or course of his employment?'"

42 To point to a vivid example of conduct by an employee that is not in the course of employment is a useful method of elucidating the concept, but it may be of limited assistance in resolving difficult borderline cases. It is clear that if the wrongful act of an employee has been authorised by the employer, the

---

34 [1966] 1 QB 716 at 733-734.

employer will be liable. The difficulty relates to unauthorised acts. The best known formulation of the test to be applied is that in Salmond, *Law of Torts* in the first edition in 1907[35], and in later editions[36]: an employer is liable even for unauthorised acts if they are so connected with authorised acts that they may be regarded as modes – although improper modes – of doing them, but the employer is not responsible if the unauthorised and wrongful act is not so connected with the authorised act as to be a mode of doing it, but is an independent act.

43 As Lord Wilberforce explained in *Kooragang Investments Pty Ltd v Richardson & Wrench Ltd*[37], to hold an employer liable for negligent acts of an employee is usually uncontroversial; negligence involves performing an allotted task carelessly rather than carefully. Intentional and criminal wrongdoing, engaged in solely for the benefit of the employee, presents a more difficult problem. Even so, employers may be vicariously liable for such wrongdoing, even in cases where the wrongdoing constitutes a flagrant breach of the employment obligations.

44 A major development in the law occurred with the decision of the House of Lords in 1912 in *Lloyd v Grace, Smith & Co*[38]. Until then, vicarious liability of an employer for the unauthorised fraud of an employee had been confined to conduct that was engaged in for the benefit of the employer. In that case, the managing clerk of a firm of solicitors defrauded a client of the firm. His employer was held liable to the client. The claim was based both on contract and tort[39]. It was dealt with in that manner. Earl Loreburn said[40]:

> "It was a breach by the defendant's agent of a contract made by him as defendant's agent to apply diligence and honesty in carrying through a business within his delegated powers and entrusted to him in that capacity. It was also a tortious act committed by the clerk in conducting business which he had a right to conduct honestly, and was instructed to conduct, on behalf of his principal."

---

35 At 83.

36 eg *Salmond on Torts*, 9th ed (1936) at 94-95.

37 [1982] AC 462 at 472.

38 [1912] AC 716.

39 [1912] AC 716 at 721.

40 [1912] AC 716 at 724-725.

45 The Earl of Halsbury[41] explained the rationale of vicarious responsibility in such a case by quoting Holt CJ who had said: "for seeing somebody must be a loser by … deceit, it is more reason that he that employs and puts a trust and confidence in the deceiver should be a loser than a stranger". Lord Macnaghten said that the employer, having put the employee in the place of the employer to do a certain class of acts, must be answerable for the manner in which that agent has conducted himself in doing the business of the employer[42].

46 If the solicitors' clerk had assaulted the client, or stolen money from her purse, a different result would have followed[43]. In neither of those cases would the clerk have been undertaking duties imposed on him by the nature of his employer's business and the nature of his employment. His act would have been an "independent" act, of which no more could be said than that the employment created the opportunity for the wrongdoing. In *Deatons Pty Ltd v Flew*[44], Dixon J explained the decision as concerning "one of those wrongful acts done for the servant's own benefit for which the master is liable when they are acts to which the ostensible performance of his master's work gives occasion or which are committed under cover of the authority the servant is held out as possessing or of the position in which he is placed as a representative of his master". It is the nature of that which the employee is employed to do on behalf of the employer that determines whether the wrongdoing is within the scope of the employment.

47 An act of negligence may be easy to characterise as an unauthorised mode of performing an authorised act. An act of intentional, criminal wrongdoing, solely for the benefit of the employee, may be easy to characterise as an independent act; but it is not necessarily so, and there are many examples of cases where such conduct has been found to be in the course of employment.

48 *Morris v C W Martin & Sons Ltd*[45] was a case of bailment. The plaintiff sent a mink stole to a furrier for cleaning. The furrier, with the plaintiff's consent, sent it on to some cleaners. The employee who was given the task of cleaning the fur stole it. His employers were held liable. Applying *Lloyd v Grace, Smith & Co*, Diplock LJ and Salmon LJ held that, although what the employee did was dishonest, he was dealing with the fur in the scope or course of

---

41 [1912] AC 716 at 727.

42 [1912] AC 716 at 733.

43 *Lister v Hesley Hall Ltd* [2002] 1 AC 215 at 246.

44 (1949) 79 CLR 370 at 381.

45 [1966] 1 QB 716.

his employment. Salmon LJ pointed out[46] that the result would have been different if some other employee of the cleaner, who had no responsibility connected with the fur, had stolen it. It is useful to consider why this is so. All employees of the cleaner would have been under an obligation not to damage or steal the fur, and would have been personally liable if they had damaged or stolen it. But the employer was vicariously liable only for the conduct of the employee whose employment duties involved physical possession of, and dealing with, the fur.

49 The leading Australian authority on the subject of vicarious responsibility for an assault by an employee is *Deatons Pty Ltd v Flew*[47]. That was the case that Judge Downs was told he need not be concerned about. The plaintiff sued a hotel barmaid and her employer in trespass. The barmaid had thrown the contents of a glass of beer, and then the glass itself, into his face. He lost an eye. There was conflicting evidence as to what led up to the incident. The plaintiff's version was that he simply asked to speak to the publican, and the next thing he remembered was that he woke up in the eye hospital. There was other evidence that he was drunk and aggressive, and that he had quarrelled with the barmaid, striking her and calling her names. The jury found against both defendants. The employer appealed. The Full Court of the Supreme Court of New South Wales ordered a new trial[48]. Jordan CJ, with whom Street and Maxwell JJ agreed, considered that there had been a misdirection by the trial judge in telling the jury that, if they accepted the plaintiff's version of events, the plaintiff was entitled to succeed. The only doubt he had was as to whether there should be a new trial or a verdict by direction for the employer. He said[49]:

> "If the evidence given on behalf of the plaintiff could be, and was, regarded as justifying the inference that the barmaid, without any reason connected with her employment, flung a glass in the plaintiff's face, being actuated by a mere irresponsible personal urge to injure him, it would follow that the employer incurred no liability. If a reasonable inference was that the barmaid's action was an instinctive act of self-defence against an assault made upon her whilst she was doing, and because she was doing, what she was employed to do, I think that it would be open to the jury to find that the employer was liable. A master who employs a servant in a capacity which exposes her to the risk of brutal violence may fairly be regarded as impliedly authorising her to defend herself against such

---

46 [1966] 1 QB 716 at 741.

47 (1949) 79 CLR 370.

48 *Flew v Deatons Pty Ltd* (1949) 49 SR (NSW) 219.

49 (1949) 49 SR (NSW) 219 at 222-223.

> violence. If, however, the reasonable inference is that, the plaintiff's assault upon the barmaid being over and done with, she threw a glass at him, not by way of self-defence or in order to induce him to depart, but as an independent act of personal retribution by way of vengeance for his misbehaviour towards her, the employer would not be liable …
>
> The fact that throwing the glass would be an excessive way of doing something that might otherwise be regarded as coming within the scope of her employment would not, I think, necessarily put it outside the scope, although a very gross excess might in a particular case go to suggest that the act complained of was purely personal and not within the scope of employment".

50 The employer then appealed to this Court, contending, successfully, that it was entitled, not merely to a new trial, but to a verdict by direction. The Court considered that, on either version of the facts, the employer was not vicariously liable for the trespass: on the plaintiff's version what the barmaid did was a gratuitous, unprovoked act; the only alternative view open was that it was an act of personal retribution. Either way, it was not incidental to the work she was employed to do[50]. It was emphasised that it was not the duty of the barmaid to keep order in the bar. There were other people to do that. Her job was merely to serve drinks[51]. Her conduct was not an excessive method of maintaining order. It was "a spontaneous act of retributive justice"[52].

51 Both in the Supreme Court of New South Wales, and in this Court, the outcome turned upon application of the Salmond test. The test serves well in many cases, but it has its limitations. As has frequently been observed, the answer to a question whether certain conduct is an improper mode of performing an authorised act may depend upon the level of generality at which the authorised act is identified. If, on the facts, it had been possible to treat maintaining order in the bar as one of the barmaid's responsibilities, and if, on the facts, it had been open to regard her conduct as an inappropriate response to disorder, then the jury could properly have held the employer liable in trespass. However, the barmaid's only responsibility was to serve drinks, and throwing a glass of beer at a customer could not be regarded as an improper method of doing that. The level of generality at which it is proper to describe the nature of an employee's duties ought not to be pitched so high as to pre-empt the issue. The fact that an employer owes a common law duty of care to an injured person does not mean

---

50 *Deatons Pty Ltd v Flew* (1949) 79 CLR 370 at 379 per Latham CJ.

51 (1949) 79 CLR 370 at 381 per Dixon J, 386 per Williams J.

52 (1949) 79 CLR 370 at 382 per Dixon J.

that it is appropriate to describe the employment duties of all the employees as including taking care of the person.

52 When the specific responsibilities of an employer relate in some way to the protection of person or property, and an intentional wrongful act causes harm to person or property, then the specific responsibilities of a particular employee may require close examination. The defendants in *Morris v C W Martin & Sons Ltd* were sub-bailees for reward of the article stolen by their employee, and had a duty to protect it from theft. The employee was the person in charge of the article. The defendants in *Lloyd v Grace, Smith & Co* were fiduciaries. The clerk was the person who was managing the relevant transaction. Although the hotel proprietor in *Deatons Pty Ltd v Flew* owed a duty of care to customers at its premises, the barmaid's responsibilities were not protective. Stealing a fur stole is not an improper method of cleaning it, but as the employer was a bailee, with custodial responsibility, and it put the goods in charge of a particular employee, then it was proper to regard that responsibility as devolving upon the employee. The theft was so connected with the custodial responsibilities of the employee as to be regarded as in the course of employment; not because it was in furtherance of the employee's responsibilities, but because the nature of his responsibilities extended to custody of the fur as well as cleaning it.

53 It is the element of protection involved in the relationship between school authority and pupil that has given rise to difficulty in defining the circumstances in which an assault by a teacher upon a pupil will result in vicarious liability on the part of a school authority. The problem is complicated by the variety of circumstances in which pupil and teacher may have contact, the differing responsibilities of teachers, and the differing relationships that may exist between a teacher and a pupil. Some teachers may be employed simply to teach; and their level of responsibility for anything other than the educational needs of pupils may be relatively low. Others may be charged with responsibilities that involve them in intimate contact with children, and require concern for personal welfare and development. The ages of school children range from infancy to early adulthood. Although attendance at school is compulsory for children between certain ages, many secondary school students remain at school for several years after it has ceased to be obligatory.

54 Where acts of physical violence are concerned, the nature and seriousness of the criminal act may be relevant to a judgment as to whether it is to be regarded as a personal, independent act of the perpetrator, or whether it is within the scope of employment. A security guard at business premises who removes a person with unnecessary force may be acting in the course of employment. On the other hand, as Jordan CJ pointed out in *Deatons Pty Ltd v Flew*, extreme and unnecessary violence, perhaps combined with other factors, such as personal animosity towards the victim, might lead to a conclusion that what is involved is an act of purely personal vindictiveness. Sexual abuse, which is so obviously inconsistent with the responsibilities of anyone involved with the instruction and

care of children, in former times would readily have been regarded as conduct of a personal and independent nature, unlikely ever to be treated as within the course of employment. Yet such conduct might take different forms. An opportunistic act of serious and random violence might be different, in terms of its connection with employment, from improper touching by a person whose duties involve intimate contact with another. In recent years, in most common law jurisdictions, courts have had to deal with a variety of situations involving sexual abuse by employees.

55 In 1999, the Supreme Court of Canada dealt consecutively with two such cases. The judgments were handed down on the same day. The first case was *Bazley v Curry*[53]. A non-profit organization, which operated residential care facilities for the treatment of emotionally troubled children, required its employees to perform parental duties, ranging from general supervision to intimate functions like bathing and tucking in at bedtime. It employed a man who was a paedophile. He sexually abused a child. The question was whether the organization was vicariously liable for his wrongdoing. That question was answered in the affirmative.

56 McLachlin J, who delivered the judgment of the Court, examined the considerations of policy underlying the concept of vicarious liability, and said[54]:

> "Underlying the cases holding employers vicariously liable for the unauthorized acts of employees is the idea that employers may justly be held liable where the act falls within the ambit of the risk that the employer's enterprise creates or exacerbates. Similarly, the policy purposes underlying the imposition of vicarious liability on employers are served only where the wrong is so connected with the employment that it can be said that the employer has introduced the risk of the wrong (and is thereby fairly and usefully charged with its management and minimization). The question in each case is whether there is a connection or nexus between the employment enterprise and that wrong that justifies imposition of vicarious liability on the employer for the wrong, in terms of fair allocation of the consequences of the risk and/or deterrence."

57 Later, McLachlin J elaborated her views on the concept of sufficiency of connection, saying[55]:

---

53 [1999] 2 SCR 534.

54 [1999] 2 SCR 534 at 557.

55 [1999] 2 SCR 534 at 559.

> "The fundamental question is whether the wrongful act is *sufficiently related* to conduct authorized by the employer to justify the imposition of vicarious liability. Vicarious liability is generally appropriate where there is a significant connection between the *creation or enhancement of a risk* and the wrong that accrues therefrom, even if unrelated to the employer's desires." (emphasis in original)

58 Factors to be taken into account, relevant to sexual abuse, were said to include the opportunity for abuse afforded to the employee, relationships of power and intimacy, and the vulnerability of potential victims. The focus of the test for vicarious liability for an employee's sexual abuse was said to be "whether the employer's enterprise and empowerment of the employee materially increased the risk of the sexual assault and hence the harm"[56].

59 *Jacobi v Griffiths*[57], which was decided on the same day as *Bazley*, concerned the vicarious liability of a non-profit organization, which operated a recreational club for children, for sexual assaults upon two children by one of the club's employees. The employee was a program director, whose job was to organize after-school recreational activities. He cultivated an intimate association with the two victims, and assaulted them at his home. It was held that the club was not liable.

60 Speaking for the majority, Binnie J began with an examination of a series of North American cases in which courts had dealt with attempts to make employers liable for sexual assaults by employees. He said[58]:

> "It is fair to say that these cases demonstrate a strong reluctance to impose no-fault liability for such deeply personal and abhorrent behaviour on the part of an employee."

61 Dealing with the consideration that a sexual assault is almost never conduct that could advance the purposes of the employer's enterprise, Binnie J observed that, whilst that was not conclusive, it could not be dismissed as insignificant[59]. It was a factor relevant to the sufficiency of the connection between the criminal acts and the employment. He then examined cases concerning the nature of an employer's enterprise, and inherent and foreseeable

---

56 [1999] 2 SCR 534 at 563.

57 [1999] 2 SCR 570.

58 [1999] 2 SCR 570 at 597.

59 [1999] 2 SCR 570 at 602-605.

risks[60], pointing out that a combination of power and intimacy can create a strong connection between the enterprise and sexual assault. He cited the decision of the Supreme Court of California in *John R v Oakland Unified School District*[61].

62 Turning to considerations of policy, Binnie J said that *Bazley* proceeded upon the theory of "enterprise risk" as the rationale of vicarious liability, the employer being responsible because "it introduced the seeds of the potential problem into the community, or aggravated the risks that were already there, but only if its enterprise *materially* increased the risk of the harm that happened"[62] (emphasis in original). *Bazley* was distinguished as a case where the sexual abuse occurred in a special environment that involved intimate private control, and quasi-parental relationship and power[63]. In *Jacobi*, on the other hand, the club offered group recreational activities in the presence of volunteers and other members. Those activities were not of such a kind as to create a relationship of power and intimacy; they merely provided the offender with an opportunity to meet children. The children were free to come and go as they pleased; and they returned to their mother at night. There was no close connection between the employee's duties and his wrongful acts[64].

63 *John R v Oakland Unified School District*[65], cited in *Jacobi*, concerned a student who was allegedly sexually molested by his mathematics teacher while he was at the teacher's apartment, participating in an officially sanctioned study program. The Supreme Court of California held that the teacher's employer, the school district, was not vicariously liable. Arguelles J, for the majority, after discussing the rationale of vicarious liability, said that deterrence and compensation would not be advanced by holding the school authority liable and, as to risk allocation, said[66]:

> "But the connection between the authority conferred on teachers to carry out their instructional duties and the abuse of that authority to indulge in personal, sexual misconduct is simply too attenuated to deem a sexual

---

60 [1999] 2 SCR 570 at 606-610.

61 769 P 2d 948 (Cal 1989).

62 [1999] 2 SCR 570 at 610-617.

63 [1999] 2 SCR 570 at 595-596.

64 [1999] 2 SCR 570 at 618-621.

65 769 P 2d 948 (Cal 1989).

66 769 P 2d 948 at 956 (Cal 1989).

assault as falling within the range of risks allocable to a teacher's employer."

64 The concept of enterprise risk was identified as significant by the United States Supreme Court, which discussed vicarious liability in tort for sexual misconduct by employees, in the context of considering work-related sexual discrimination contrary to the *Civil Rights Act* of 1964, in *Faragher v City of Boca Raton*[67]. Souter J, for the majority, quoted with approval a statement that the employer should be liable for "faults that may be fairly regarded as risks of his business", and noted a long list of cases in which appellate courts in the United States had either held, or assumed, that sexual misconduct falls outside the scope of ordinary employment[68].

65 The concept of enterprise risk, and material increase of risk, has been influential in the North American cases. As a test for determining whether conduct is in the course of employment, as distinct from an explanation of the willingness of the law to impose vicarious liability, it has not been taken up in Australia, or, it appears, the United Kingdom. However, in Australia, and in the United Kingdom, as in Canada and the United States, the sufficiency of the connection between employment and wrongdoing to warrant vicarious responsibility is examined by reference to the course or scope of employment. In practice, in most cases, the considerations that would justify a conclusion as to whether an enterprise materially increases the risk of an employee's offending would also bear upon an examination of the nature of the employee's responsibilities, which are regarded as central in Australia. In *Deatons Pty Ltd v Flew*, for example, the fact that it was no part of the barmaid's responsibilities to keep order in the bar was important. If that had been part of her duties, then presumably there would have been an increased risk that any violent propensities on her part could result in harm to customers. In argument in the present cases, the Solicitor-General for Queensland pointed out that providing schools for children, and making attendance compulsory, does not increase the risk that they will be sexually abused; it probably reduces it. Much would depend on what they might otherwise be doing. That, however, is not the comparison that the Supreme Court of Canada was making. Attention was directed to the nature of the services being provided to the victims, and to whether those services were of a kind that increased the danger of abuse from an employee with criminal propensities.

66 It is regrettable that the more intensive the care provided by an educational or recreational organization, the more extensive will be its risk of no-fault

---

67 524 US 775 (1998).

68 524 US 775 at 793-797 (1998).

liability for the conduct of its employees. Educational institutions may have a degree of choice in the level of care they set out to provide, and there is little practical wisdom in discouraging them from providing anything more than academic instruction. Even so, a decision as to course of employment necessitates an examination of the responsibilities of an employee, and certain kinds of responsibility, unfortunately, carry certain kinds of risk.

67 It cannot be said that the risk of sexual abuse ought to be regarded as an incident of the conduct of most schools, or that the ordinary responsibilities of teachers are such that sexual assaults on pupils would normally be regarded as conduct (albeit serious misconduct) within the scope of employment. However, there are some circumstances in which teachers, or persons associated with school children, have responsibilities of a kind that involve an undertaking of personal protection, and a relationship of such power and intimacy, that sexual abuse may properly be regarded as sufficiently connected with their duties to give rise to vicarious liability in their employers.

68 A recent decision of the House of Lords, *Lister v Hesley Hall Ltd*[69] concerned a school, operated as a commercial enterprise, mainly for children with emotional and behavioural difficulties. Boarding facilities were provided for some of the pupils. A warden was in charge of the boarding annex. He and his wife, for most of the time, were in sole charge. The annex was intended to be a home, not a mere extension of the school environment, and the warden had many of the responsibilities of a parent. He sexually abused some of the pupils. The question was whether his employer was vicariously liable for his assaults. The House of Lords answered that question in the affirmative.

69 Lord Steyn[70], with whom Lord Hutton agreed[71], asked "whether the warden's torts were so closely connected with his employment that it would be fair and just to hold the employers vicariously liable", and answered in the affirmative. Lord Clyde[72] also said that the issue to be considered was the closeness of the connection between the act in question and the employment.

70 Lord Hobhouse of Woodborough said[73]:

---

69 [2002] 1 AC 215.

70 [2002] 1 AC 215 at 230.

71 [2002] 1 AC 215 at 238.

72 [2002] 1 AC 215 at 232.

73 [2002] 1 AC 215 at 241.

> "Whether or not some act comes within the scope of the servant's employment depends upon an identification of what duty the servant was employed by his employer to perform … If the act of the servant which gives rise to the servant's liability to the plaintiff amounted to a failure by the servant to perform that duty, the act comes within 'the scope of his employment' and the employer is vicariously liable. If, on the other hand, the servant's employment merely gave the servant the opportunity to do what he did without more, there will be no vicarious liability, hence the use by Salmond and in the Scottish and some other authorities of the word 'connection' to indicate something which is not a casual coincidence but has the requisite relationship to the employment of the tortfeasor (servant) by his employer".

71 Lord Millett said[74]:

> "In the present case the warden's duties provided him with the opportunity to commit indecent assaults on the boys for his own sexual gratification, but that in itself is not enough to make the school liable ... But there was far more to it than that. The school was responsible for the care and welfare of the boys. It entrusted that responsibility to the warden. He was employed to discharge the school's responsibility to the boys. For this purpose the school entrusted them to his care. He did not merely take advantage of the opportunity which employment at a residential school gave him. He abused the special position in which the school had placed him to enable it to discharge its own responsibilities, with the result that the assaults were committed by the very employee to whom the school had entrusted the care of the boys."

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

73 One reason for the dismissiveness with which the possibility of vicarious liability in a case of sexual abuse is often treated is that sexual contact between a teacher and a pupil is usually so foreign to what a teacher is employed to do, so peculiarly for the gratification of the teacher, and so obviously a form of misconduct, that it is almost intuitively classified as a personal and independent act rather than an act in the course of employment. Yet it has long been accepted

---

74 [2002] 1 AC 215 at 250.

that some forms of intentional criminal wrongdoing may be within the scope of legitimate employment. Larceny, fraud and physical violence, even where they are plainly in breach of the express or implied terms of employment, and inimical to the purpose of that employment, may amount to conduct in the course of employment.

74 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 responsibilities, 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 that, as in *John R*, 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 the 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.

75 It is necessary now to turn to the cases before the Court.

The case of Lepore

76 The majority in the New South Wales Court of Appeal, applying a principle based on non-delegable duty, according to which the State is obliged to ensure that pupils on school premises and during school hours are not injured physically at the hands of an employed teacher (whether acting negligently or intentionally), concluded that the State's liability was established incontrovertibly, and that there should be a new trial limited to damages. Heydon JA rejected that principle. However, he considered (correctly) that the fact-finding process at the first trial had miscarried, and that there ought to be a new trial on liability and damages.

77 Although the plaintiff's case against the State at the first hearing before Judge Downs, in so far as it was based on strict liability rather than fault, was put in terms of breach of non-delegable duty rather than vicarious liability, and although vicarious liability was not argued in the Court of Appeal, nevertheless there is no reason in justice why, at a new trial, the plaintiff should not be

permitted to amend his Statement of Claim and to seek to make out a case of vicarious liability.

78 The fact-finding at the first hearing was so deficient that it is not possible to form a clear view as to the strength of such a case. However, the maintenance of discipline is clearly within the employment responsibilities of the teacher, and much, perhaps all, of the alleged misconduct appears to have taken place in the context of administering punishment for supposed misbehaviour. It may be possible that some or all of it could properly be regarded as excessive chastisement, for which a school authority would be vicariously liable. The relatively minor criminal charges laid against the teacher, and the modest penalties imposed, may be consistent with this view of the matter. Whether excessive or inappropriate chastisement results from the sadistic tendency of a teacher, or a desire for sexual gratification, or both, it is conduct in the course of employment, for which a school authority is vicariously liable. If, on the other hand, some or all of the conduct of the teacher was found to be so different from anything that could be regarded as punishment that it could not properly be seen as other than merely sexually predatory behaviour, then, in relation to such conduct, the plaintiff would have no case based on vicarious liability. There appears to have been nothing about the duties or responsibilities of the teacher that involved him in a relationship with his pupils of such a kind as would justify a conclusion that such activity was in the course of his employment.

79 The proceedings at first instance comprehensively miscarried. There should be a new trial on all issues although, as will appear from the above, the argument based on non-delegable duty should no longer be treated as open, and the only potential basis for a case of vicarious liability depends upon finding that the relevant conduct amounted to excessive or inappropriate chastisement.

80 Special leave to appeal was granted on condition that the appellant would bear the costs of the appeal in any event and would not seek to disturb the costs orders made in the Court of Appeal.

81 The appeal should be allowed in part. Order 2 of the orders made by the Court of Appeal of New South Wales should be set aside. In place of that order it should be ordered that the orders made by Judge Downs on 16 April 1999 should be set aside and there should be a new trial. The appellant should pay the costs of the appeal to this Court.

The cases of Samin and Rich

82 The Court of Appeal of Queensland was correct to reject the only case advanced in argument before it, which was a case of strict and absolute liability based on non-delegable duty.

83 However, the plaintiffs now seek also to make out a case of vicarious liability. Unless such a case is unarguable, then they should have an opportunity to do so. The Court of Appeal gave them unqualified leave to deliver a further Statement of Claim.

84 All that this Court knows about the alleged facts is what appears in the proposed Amended Statement of Claim, which has been summarised earlier. One thing we do not have, that would be of importance to a claim of vicarious liability, is evidence as to the nature of the functions and responsibilities of the teacher at a one-teacher school in rural Queensland in 1965. Nor does the pleading provide a clear picture of the facts and circumstances of the alleged assaults. This is consistent with the approach that has so far been taken by the plaintiffs' lawyers, which has been that it is only necessary to show that the plaintiffs were sexually assaulted, at school, by a teacher. That is not sufficient to make the State vicariously liable. How much more is necessary?

85 For the reasons given earlier, in order to make the State of Queensland vicariously liable for the teacher's sexual assaults, it would be necessary for the plaintiffs to show that his responsibilities to female pupils of the age of the plaintiffs at the time, placed him in a position of such power and intimacy that his conduct towards them could fairly be regarded as so closely connected with his responsibilities as to be in the course of his employment. That would involve making findings both as to his powers and responsibilities, and as to the nature of his conduct. It would not be enough that his position provided him with the opportunity to gratify his sexual desires, and that he took advantage of that opportunity.

86 The appeals should be dismissed. Having regard to the manner in which the case has been conducted to date, there is no reason why the usual order as to costs should not follow. The appellants should pay the respondents' costs of the appeals.

87 GAUDRON J. These appeals, which raise questions as to the liability of education authorities for sexual misconduct by teachers towards their pupils, were heard together.

Facts and history of proceedings
State of New South Wales v Lepore & Anor

88 In this matter, the first respondent claims that he was sexually assaulted on a number of occasions in 1978 by his teacher who was employed by the Department of Education ("the Department") of the State of New South Wales. At the time, the first respondent was seven or eight years old and in second class at Heckenberg Primary School. On his account, the sexual assaults occurred after he was sent to a storeroom attached to the classroom on account of his misconduct in class.

89 Following a trial limited to the question of liability, Downs DCJ found that the teacher assaulted the first respondent at least once by striking him on his bare bottom but refrained from making further findings as to the sexual assaults alleged. His Honour held that "[t]he assaults alleged were deliberate and isolated acts of abuse ... which were inimical or totally foreign to the [teacher's] duties". As there was no evidence that the Department knew of the assaults or the teacher's predisposition in that regard and no evidence that a system of work or supervision could reasonably have been implemented to avoid the assaults, his Honour held that there was no evidence that the Department had breached the duty of care it owed to the first respondent. A verdict was entered for the State.

90 An appeal to the New South Wales Court of Appeal was, by majority (Mason P and Davies AJA, Heydon JA dissenting), allowed. The sole issue in the Court of Appeal was whether the State of New South Wales was liable for the teacher's assaults on the basis of its breach of a non-delegable duty of care. It was not put that the State, itself, had been negligent in, for example, failing to ensure proper supervision. Further, vicarious liability for the tortious conduct of the teacher was expressly disavowed.

91 The majority in the Court of Appeal proceeded on the basis that the teacher had sexually assaulted the pupil. Mason P, with whose views Davies AJA expressed agreement, held that the State of New South Wales, as education authority, owed a non-delegable duty of care "to school pupils on school premises and during school hours ... to ensur[e] that they are not injured physically at the hands of an employed teacher (whether acting negligently or intentionally)." His Honour added that the duty is not absolute but limited to a duty to ensure that reasonable care and skill is exercised and that, in the case of intentional conduct, a school authority is not liable unless "the teacher's conduct is tortious as well as harmful", as, in his Honour's view, it was in the present case. In his separate concurring judgment, Davies AJA said that the State of New South Wales was liable because the actions of the teacher "resulted in [its]

failure ... to take care for the safety and well-being of the students to whom it had a non-delegable duty of care."

92 On the other hand, Heydon JA took the view that the fact finding process had miscarried at first instance and, thus, it was not appropriate to decide whether pupils are "owed strict duties by education authorities to prevent the type of harm here allegedly suffered". In this last regard, his Honour did not think the answer was automatically supplied by this Court's decision in *The Commonwealth v Introvigne*[75] in which it was held that an education authority owes a non-delegable duty of care to students attending its schools.

93 One other matter relevant to the fact finding process should be mentioned. In the Court of Appeal, Mason P held that the assault or assaults in question could not be characterised as "excessive chastisement". However, Davies AJA was of the view the assaults occurred in the course of the teacher "carrying out one of the duties he was employed to do", namely, to discipline pupils for misbehaviour.

Samin v State of Queensland & Ors; Rich v State of Queensland & Ors

94 The appellants in these cases were pupils at a one teacher school in Queensland between 1963 and 1965. It is not now in issue that, during those years, they were the victims of gross sexual misconduct on the part of a teacher employed either by the Minister for Education of Queensland ("the Minister") or the State of Queensland, itself. Nor is it in issue that the misconduct occurred on school premises and during school hours.

95 Each of the appellants brought proceedings against the teacher concerned, the Minister and the State of Queensland in the District Court of Queensland alleging, as against the Minister and the State, that the teacher's assaults constituted breaches of the non-delegable duty of care owed to them. In each case, the Minister and the State of Queensland applied to have the Statement of Claim struck out as disclosing no cause of action against them. It was held by Botting J that the duty owed to the pupils was non-delegable and that, if the assaults were proved, breach of that duty would be established. In consequence, the strike-out applications were dismissed.

96 The Minister and the State of Queensland successfully appealed from the decision and orders of Botting J to the Court of Appeal of the Supreme Court of Queensland. That Court held that breach of the non-delegable duty of care owed by education authorities to their pupils was not established simply by proof of

---

75 (1982) 150 CLR 258.

injury. In the result, the Statements of Claim were struck out with leave granted to replead.

Issues in this Court

97 It was not contended in this Court that either the State of New South Wales or the State of Queensland or its Minister for Education could be held liable for the assaults in issue by reason of any acts or omissions on their part. Rather, the primary argument was that, by virtue of the non-delegable duty of care identified in *Introvigne*[76], they were liable in negligence upon proof that the alleged assaults had occurred and that the pupils had thereby suffered damage.

98 It was also contended in the first matter that the pupil was entitled to succeed on the basis that the State of New South Wales is vicariously liable for the actions of the teacher. The argument in this regard was made principally by reference to the recent decision of the Supreme Court of Canada in *Bazley v Curry*[77] and that of the House of Lords in *Lister v Hesley Hall Ltd*[78]. And in the second and third matters, it was indicated that, pursuant to leave to replead, the pupils intend to put their cases against the Minister and the State of Queensland on the basis that they, too, are vicariously liable for the actions of the teacher.

Non-delegable duties of education authorities

99 It is not and, at no stage of these proceedings, has it been in issue that the duties owed by education authorities to their pupils are non-delegable. As already indicated, so much was established by the decision of this Court in *Introvigne*[79]. What is in issue is the nature of a duty of that kind.

100 Within the law of negligence, certain relationships have been identified as giving rise to duties which have been described as "non-delegable"[80] or

---

76 (1982) 150 CLR 258.

77 [1999] 2 SCR 534.

78 [2002] 1 AC 215.

79 (1982) 150 CLR 258.

80 See, for example, *Hughes v Percival* (1883) 8 App Cas 443 at 446 per Lord Blackburn; *Lloyd v Grace, Smith & Co* [1912] AC 716; *Morris v C W Martin & Sons Ltd* [1966] 1 QB 716; *Kondis v State Transport Authority* (1984) 154 CLR 672; *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520; *Northern Sandblasting Pty Ltd v Harris* (1997) 188 CLR 313; *Scott v Davis* (2000) 204 CLR 333.

"personal"[81], including master and servant (in relation to the provision of a safe system of work), adjoining owners of land (in relation to work threatening support or common walls), hospital and patient and, relevantly for these appeals, education authority and pupil[82]. The relationships which give rise to a non-delegable or personal duty of care have been described as involving a person being so placed in relation to another as "to assume a particular responsibility for [that other person's] safety" because of the latter's "special dependence or vulnerability"[83].

101 It has been said that a non-delegable or personal duty of care is "a duty ... of a special and 'more stringent' kind"[84] and that it is a "duty to ensure that reasonable care is taken."[85] In *Scott v Davis*, Gummow J said that a non-delegable duty "involves, in effect, the imposition of strict liability upon the defendant who owes that duty."[86] To say that, where there is a non-delegable duty of care, there is, in effect, a strict liability is not to say that liability is established simply by proof of injury. As Gummow J pointed out in *Scott*, there must first be a duty of care on the part of the person against whom liability is asserted. And, obviously, there must also have been a breach of that duty and resulting injury.

102 The law of negligence is concerned with a duty to take reasonable care to avoid a foreseeable risk of injury to another. As the law of negligence has developed, however, it has become possible, in the case of some relationships, to identify more precise duties of care. Thus, for example, it is not unusual to speak of an employer's duty to take reasonable care to provide a safe system of work. And in *Introvigne*, Murphy J identified the duties of an education authority as

---

81 See, for example, *Hughes v Percival* (1883) 8 App Cas 443 at 446 per Lord Blackburn; *Lloyd v Grace, Smith & Co* [1912] AC 716; *Wilsons and Clyde Coal Co v English* [1938] AC 57; *Morris v C W Martin & Sons Ltd* [1966] 1 QB 716; *Kondis v State Transport Authority* (1984) 154 CLR 672.

82 See *Kondis v State Transport Authority* (1984) 154 CLR 672 at 685-686 per Mason J.

83 *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520 at 551 per Mason CJ, Deane, Dawson, Toohey and Gaudron JJ.

84 *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520 at 550 per Mason CJ, Deane, Dawson, Toohey and Gaudron JJ referring to *Kondis v State Transport Authority* (1984) 154 CLR 672 at 686 per Mason J.

85 *Kondis v State Transport Authority* (1984) 154 CLR 672 at 686 per Mason J.

86 (2000) 204 CLR 333 at 417 [248].

duties "[t]o take all reasonable care to provide suitable and safe premises ... to provide an adequate system to ensure that no child is exposed to any unnecessary risk of injury; and ... to see that the system is carried out."[87]

103 There is a tendency to speak, in the case of an employer, of a duty to provide a safe system of work or, in the case of an education authority, a duty to provide a safe school environment, without acknowledging either that, in that context, "safe" means "free of a foreseeable risk of harm" or that the duty is a duty to take reasonable care. If the duty of an education authority to provide a safe school environment were not confined by considerations of foreseeability and reasonable care, it would result in strict liability in the sense that the authority would be liable upon proof of injury being sustained on school premises during school hours. But that would follow not because the duty of an education authority is non-delegable but because of the absolute nature of its non-delegable duty.

104 There is another feature of the duty arising out of the particular relationships that have been identified as giving rise to a non-delegable duty of care which should be stressed. It is that the relevant duty can be expressed positively and not merely in terms of a duty to refrain from doing something that involves a foreseeable risk of injury. Thus, the relevant duty of adjoining owners can be expressed as a duty to take reasonable care to provide support; that of an employer, to take reasonable care to provide a safe system of work; that of a hospital, to take reasonable care to provide proper nursing and medical care; that of a school authority, to take reasonable care to provide a safe school environment. Once the relevant duty is stated in those terms it is readily understandable that the duty should be described as non-delegable.

105 If a pupil is injured on school premises during school hours because reasonable care has not been taken to provide a safe school environment, the school authority is thereby shown to be in breach of its personal or non-delegable duty to provide a safe environment. And that is so no matter whose act or omission was the immediate cause of the pupil's injury or whose immediate task it was to do that which would have eliminated the risk of injury or to refrain from doing that which created that risk. The position was explained, albeit in somewhat different terms and in relation to an adjoining owner's duty of care, by Lord Blackburn in *Hughes v Percival*:

> "the duty went as far as to require him to see that reasonable skill and care were exercised in those operations which involved a use of the party-wall

---

87 (1982) 150 CLR 258 at 274-275.

> ... If such a duty was cast upon the defendant he could not get rid of responsibility by delegating the performance of it to a third person."[88]

Thus, to describe the duty of a school authority as non-delegable is not to identify a duty that extends beyond taking reasonable care to avoid a foreseeable risk of injury. It is simply to say that, if reasonable care is not taken to avoid a foreseeable risk of injury, the school authority is liable notwithstanding that it engaged a "qualified and ostensibly competent"[89] person to carry out some or all of its functions and duties.

Vicarious liability generally

106 The absence of a satisfactory and comprehensive jurisprudential basis for the imposition of liability on a person for the harmful acts or omissions of others – vicarious liability, as it is called – is a matter which has provoked much comment[90]. It may be that the lack of a satisfactory jurisprudential basis is referable, at least in significant part, to the fact that certain cases have been decided by reference to policy considerations without real acknowledgement of that fact. It may also be that, in some cases, employers have been held vicariously liable on the assumption that they would not otherwise have been liable for the injury or damage suffered. Further, it may be that the failure to identify a jurisprudential basis for the imposition of vicarious liability has resulted in decisions which are not easily reconciled with fundamental legal principle.

107 Until vicarious liability was imposed on employers for the deliberate criminal acts of employees, the critical consideration was whether the act in respect of which vicarious liability was asserted occurred "in the course of employment"[91]. And an act was said to have been done in the course of employment if it was authorised by the employer or was an unauthorised way of doing an act so authorised[92].

---

88 (1883) 8 App Cas 443 at 446.

89 *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520 at 550 per Mason CJ, Deane, Dawson, Toohey and Gaudron JJ.

90 See, for example, *Bazley v Curry* [1999] 2 SCR 534 at 545 per McLachlin J; *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21 at 54-56 [86]-[88] per McHugh J.

91 See *Lloyd v Grace, Smith & Co* [1912] AC 716; Salmond, *Law of Torts*, (1907) at 83; *Salmond & Heuston on the Law of Torts*, 21st ed (1996) at 443.

92 See *Lloyd v Grace, Smith & Co* [1912] AC 716; Salmond, *Law of Torts*, (1907) at 83; *Salmond & Heuston on the Law of Torts*, 21st ed (1996) at 443.

108 To the extent that vicarious liability is imposed on employers by reason that an employee has either done something that the employer has authorised or has done something in the course of his or her employment, it is referable to the general law of principal and agent[93]. To the extent that vicarious liability is imposed for acts which constitute the doing of an authorised act in an unauthorised way, it will generally be the case that it can be justified on the basis of ostensible authority[94], a species of estoppel by which a principal is precluded from denying his or her agent's authority. That the doctrine of ostensible authority is a species of estoppel is clear from the dissenting judgment of Vaughan Williams LJ in the Court of Appeal in *Lloyd v Grace, Smith & Co*[95], one of three cases which are frequently cited as authority for the proposition that employers may be held vicariously liable for the deliberate criminal acts of their employees.

109 In *Lloyd v Grace, Smith & Co*[96], it was ultimately held in the House of Lords that solicitors were liable to their client to make good the defalcations of their managing clerk. At first instance, certain factual issues were determined by the jury, including that, in receiving certain title deeds from the client and in calling in a mortgage debt owed to her, he was acting in the course of his services as managing clerk[97]. A question arose in the Court of Appeal as to whether there was evidence to support those findings. Vaughan Williams LJ said this:

> "I think that there is evidence that there was such a holding out as would estop [the solicitors] from proving that [the clerk] had no authority to receive the deeds and take the instructions which were given him, even

---

93 See *Lloyd v Grace, Smith & Co* [1912] AC 716; *Bazley v Curry* [1999] 2 SCR 534; *Jacobi v Griffiths* [1999] 2 SCR 570; *Scott v Davis* (2000) 204 CLR 333; *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21; *Lister v Hesley Hall Ltd* [2002] 1 AC 215; Salmond, *Law of Torts*, (1907) at 83; *Salmond & Heuston on the Law of Torts*, 21st ed (1996) at 443.

94 See *Lloyd v Grace, Smith & Co* [1912] AC 716; *Bazley v Curry* [1999] 2 SCR 534; *Jacobi v Griffiths* [1999] 2 SCR 570; *Scott v Davis* (2000) 204 CLR 333; *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21; *Lister v Hesley Hall Ltd* [2002] 1 AC 215; Salmond, *Law of Torts*, (1907) at 83; *Salmond & Heuston on the Law of Torts*, 21st ed (1996) at 443.

95 [1911] 2 KB 489.

96 [1912] AC 716.

97 [1912] AC 716 at 720.

> though at the time he took the instructions and received the deeds [the clerk] was minded to commit a fraud."[98]

110 Whether the facts of *Lloyd v Grace, Smith & Co* be analysed on the basis that the managing clerk was acting as agent for the solicitors in receiving the deeds and calling in the mortgage debt or that, by reason of his ostensible authority in that regard, the solicitors were estopped from contending otherwise, the question of the solicitors' liability to the client fell to be determined on the basis that, through their agent, they, the solicitors, received the title deeds and money in question. And upon their receipt, the solicitors clearly came under a personal obligation not to dispose of the deeds or money other than in accordance with their client's instructions.

111 Although the decision in *Lloyd v Grace, Smith & Co* is explicable on the basis of the solicitors' personal obligation and, in consequence, their direct liability for the loss suffered, the language used in various speeches, including those of Earl Loreburn[99], Lord Macnaghten[100] and Lord Shaw of Dunfermline[101], is the language of liability or legal responsibility on the part of a principal for the fraud of an agent acting in the course of his or her employment or with ostensible authority.

112 The second of the three cases relevant to the vicarious liability of an employer for the criminal acts of an employee is *Morris v C W Martin & Sons Ltd*[102]. That case, which concerned the theft of a fur coat by an employee of a dry cleaning company that was the sub-bailee of the coat, can also be explained on the basis of a personal or non-delegable duty resulting in direct rather than vicarious liability. Indeed, Lord Denning MR would have decided it on that basis, saying that:

> "in the ultimate analysis [the decided cases] depend on the nature of the duty owed by the master towards the person whose goods have been lost or damaged. If the master is under a duty to use due care to keep goods safely and protect them from theft and depredation, he cannot get rid of his responsibility by delegating his duty to another. If he entrusts that duty to his servant, he is answerable for the way in which the servant

---

98 [1911] 2 KB 489 at 506.

99 [1912] AC 716 at 725.

100 [1912] AC 716 at 738.

101 [1912] AC 716 at 741.

102 [1966] 1 QB 716.

> conducts himself therein. No matter whether the servant be negligent, fraudulent, or dishonest, the master is liable. But not when he is under no such duty."[103]

A somewhat similar view was taken by Salmon LJ who stated that:

> "[a] bailee for reward is not answerable for a theft by any of his servants but only for a theft by such of them as are deputed by him to discharge some part of his duty of taking reasonable care."[104]

113 In contrast to the view taken by Lord Denning MR in *Morris*, Diplock LJ rested his decision on the basis that "[w]hat [the employee] was doing, albeit dishonestly, he was doing in the scope or course of his employment in the technical sense of that infelicitous but time-honoured phrase [and the employers] as his masters are responsible for his tortious act."[105] Precisely how it could be said that the employee was acting in the scope or course of his employment in stealing the coat was not explained. Nor is it easy to postulate on what basis it might be so said, unless, as was said by Salmon LJ, the employee had been "deputed ... to discharge some part of [the employer's] duty"[106], or, the employer was estopped from contending otherwise.

114 The third case which has been treated as authority that an employer may be held vicariously liable for the deliberate criminal acts of an employee is *Photo Production Ltd v Securicor Transport Ltd*[107], which was concerned with the liability of a company that had contracted to provide security services to the plaintiff in that case. The question of the security company's liability for loss suffered when one of its employees started a fire in the plaintiff's factory was ultimately decided by reference to the terms of an exclusion clause. In the view of Lord Diplock, the security company had a primary obligation which, if breached, would have resulted in direct rather than vicarious liability[108] but that primary obligation had been qualified by the exclusion clause with the consequence that no breach had occurred[109].

---

103 [1966] 1 QB 716 at 725.

104 [1966] 1 QB 716 at 740-741.

105 [1966] 1 QB 716 at 737.

106 [1966] 1 QB 716 at 741.

107 [1980] AC 827.

108 [1980] AC 827 at 851.

109 [1980] AC 827 at 851.

115 However, it was said in *Securicor*[110] by Lord Wilberforce, with whom Lord Keith of Kinkel and Lord Scarman agreed, that, but for the exclusion clause, the security company would have been liable either for breach of its duty "to operate the service with due and proper regard to the safety and security of the premises" or on the basis of "vicarious responsibility for the wrongful act of [its employee]"[111]. Similarly, Lord Salmon expressed the view that the company "would have been liable for the damage ... caused by [its employee] whilst indubitably acting in the course of his employment"[112].

116 The observation of Lord Salmon in *Securicor* that the employee in question was "indubitably acting in the course of his employment" has to be understood in the context of the trial judge's inability to make a finding as to whether the employee "intended to light only a small fire ... or whether he intended to cause much more serious damage"[113]. That inability on the part of the trial judge led Lord Wilberforce to observe that the trial judge's findings "[fell] short of a finding that [the employee] deliberately burnt or intended to burn the [plaintiff's] factory."[114]

117 Notwithstanding that Lord Hobhouse of Woodborough later said in *Lister* that *Securicor* was "a case of arson"[115], the latter case cannot, in my view, be accepted as authority for the proposition that an employee may be vicariously liable for the deliberate criminal acts of an employee. More fundamentally, as a general rule it is a misuse of language to speak of deliberate criminal acts as acts committed in the course of employment, unless that phrase imports only a temporal connection between the criminal act and the employment in question. Given that fundamental difficulty, a different approach to the question of vicarious liability for deliberate criminal acts was taken in the recent decision of the Supreme Court of Canada in *Bazley* and, to a lesser extent, in that of the House of Lords in *Lister*.

---

110 [1980] AC 827 at 853.

111 [1980] AC 827 at 846.

112 [1980] AC 827 at 852.

113 [1980] AC 827 at 840.

114 [1980] AC 827 at 840.

115 [2002] 1 AC 215 at 241.

Canadian and United Kingdom approaches

118 As already indicated, the argument that an education authority may be held vicariously liable to a pupil for sexual assault by a teacher was made principally by reference to the decisions in *Bazley*[116] and *Lister*[117]. Both cases concerned sexual assaults on children who were in residential care because of their emotional or behavioural difficulties. In each case, the assaults were perpetrated by an employee of the organisation providing that care[118]. Neither case, it should be noted, was concerned with the provision of education in an ordinary day school setting.

119 In *Bazley*, McLachlin J, who delivered the judgment of the Supreme Court of Canada, noted the difficulties of reconciling the decisions concerning vicarious liability[119] and the policy considerations underlying the doctrine and, then, observed:

> " Underlying the cases holding employers vicariously liable for the unauthorized acts of employees is the idea that employers may justly be held liable where the act falls within the ambit of the risk that the employer's enterprise creates or exacerbates. Similarly, the policy purposes underlying the imposition of vicarious liability on employers are served only where the wrong is so connected with the employment that it can be said that the employer has introduced the risk of the wrong ... The question in each case is whether there is a connection or nexus between the employment enterprise and that wrong that justifies imposition of vicarious liability on the employer for the wrong, in terms of fair allocation of the consequences of the risk and/or deterrence."[120]

Her Ladyship concluded that "the test for vicarious liability for an employee's sexual abuse of a client should focus on whether the employer's enterprise and empowerment of the employee materially increased the risk of the sexual assault and hence the harm."[121] In the result, the employer in that case was held liable on that basis.

---

116 [1999] 2 SCR 534.

117 [2002] 1 AC 215.

118 See *Bazley v Curry* [1999] 2 SCR 534 at 539-540; *Lister v Hesley Hall Ltd* [2002] 1 AC 215 at 220.

119 [1999] 2 SCR 534 at 544.

120 [1999] 2 SCR 534 at 557.

121 [1999] 2 SCR 534 at 563.

120 Before turning to the decision in *Lister*, it is convenient to note that in *Jacobi v Griffiths*[122] (a decision handed down by the Supreme Court of Canada on the same day as *Bazley*), an employer was held, by majority, not to be vicariously liable for the sexual assaults perpetrated by a person employed as a program director for a youth club. The employee had sexually molested a brother and sister who participated in club activities and attended club outings. However, except for one incident involving the sister and associated with club activities, the assaults occurred in the director's own home and outside working hours.

121 In *Jacobi*, it was said by Binnie J, on behalf of the majority, that, although the employee took advantage of the opportunity which his employment afforded him, the power which he "used to accomplish his criminal purpose ... was neither conferred by [his employer] nor was it characteristic of the type of enterprise which [the employer] put into the community."[123] On the other hand, McLachlin J, speaking for the minority, considered that the employee "worked at a job where he was put in a special position of trust and power over particularly vulnerable people and used that position to carry out an abuse of the power with which he was conferred to carry out his duties" and that that "stronger connection" justified the imposition of vicarious liability[124].

122 In *Lister*, the House of Lords not only held an employer liable for the sexual assaults committed by its employee, the warden of a residential establishment, but expressly overruled the earlier decision of the Court of Appeal in *Trotman v North Yorkshire County Council*[125]. In that latter case, a child was sexually assaulted while sharing a bedroom with the deputy headmaster on a school holiday in Spain[126]. The House of Lords did not endorse the "material increase in risk" approach taken by the Supreme Court of Canada in *Bazley*. Rather, it based its decision on the "relative closeness of the connection between the nature of the employment and the particular tort"[127], the "sufficien[cy of] connection between the acts of abuse ... and the work which [the employee] had

---

122 [1999] 2 SCR 570.

123 [1999] 2 SCR 570 at 621.

124 [1999] 2 SCR 570 at 586.

125 [1999] LGR 584.

126 [1999] LGR 584 at 592.

127 [2002] 1 AC 215 at 229 per Lord Steyn, with whom Lord Hutton agreed at 238.

been employed to do"[128] or on such connection of the unlawful acts with the duties of the employee that they fall within the scope of his or her duties[129].

Material increase in risk

123 Ordinarily, if there is a material increase in a risk associated with an enterprise involving the care of children that is a foreseeable risk and, thus, it is the personal or non-delegable duty of those who run that enterprise to take reasonable care to prevent that risk eventuating. And so far as concerns enterprises engaged in the provision of residential care, it must now be acknowledged, as it was by Lord Millett in *Lister*, 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."[130]

124 In most, if not all, of the situations of which Lord Millett spoke in *Lister*, it ought now be recognised that there is a personal or non-delegable duty on the authority concerned to take reasonable steps to minimise, if not eliminate, the opportunity for abuse by those to whom the employer has delegated its duties and functions. And if abuse occurs in circumstances in which an employee has seized an opportunity which could have been obviated by the use of reasonable care, the employer should be held directly liable.

125 A residential institution or authority 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. Further, it seems almost certain that, on that basis, there would be no different result in factually similar cases from those arrived at in *Bazley* and *Lister*. So, too, on that basis, it would be a breach of a personal or non-delegable duty of care resulting in direct liability to allow an employee to share a bedroom with a child entrusted to his care, as was the case in *Trotman*.

---

128 [2002] 1 AC 215 at 237 per Lord Clyde.

129 [2002] 1 AC 215 at 242 per Lord Hobhouse of Woodborough and at 245 per Lord Millett.

130 [2002] 1 AC 215 at 250.

126 The fact that a person has materially increased the risk of criminal conduct on the part of an employee is directly relevant to the content of his or her duty of care. However, in my view, it has no bearing on whether that person should be held liable in the absence of fault on his or her part. Moreover, as the different opinions in *Jacobi* indicate, it does not provide a clear basis for determining whether a person should be held vicariously liable for the deliberate criminal acts of an employee.

Vicarious liability: considerations of policy and principle

127 As a matter of legal policy, there is no advantage and considerable disadvantage in holding a person vicariously liable in circumstances in which he or she is directly liable because of a breach of his or her personal or non-delegable duty, as was the case in *Lloyd v Grace, Smith & Co*[131] and, also, in *Morris v C W Martin & Sons Ltd*[132]. That course is likely to lead the persons concerned to think, erroneously, that they have been held liable without fault on their part. Further, it seems at least arguable, in the case of those who are young or especially vulnerable, that they are better protected by identification of the content of the duty of care that is owed to them by those authorities and institutions that have assumed responsibility for their welfare than by the imposition of vicarious liability for the deliberate criminal acts of their employees.

128 Further, if vicarious liability is to be imposed so that a person is to be held liable in damages for injury suffered without fault on his or her part, it ought to be imposed only in circumstances where it can be justified by reference to legal principle. To do otherwise is to invite disrespect for the law. As already indicated, to hold an employer liable for the authorised acts of an employee or acts done in the course of his or her employment, is simply to apply the ordinary law of agency. And as also indicated, where the issues concern the doing of an authorised act in an unauthorised way, it will ordinarily be the case that vicarious liability results from the ostensible authority of the person whose acts caused injury to the plaintiff.

129 The difficulties that have arisen in relation to vicarious liability concern the absence of any real test for determining whether an act occurred in the course of or within the scope of employment. That difficulty is exacerbated in the case of deliberate criminal acts which, save, perhaps, for some temporal connection, cannot ordinarily be described as acts done in the course of or within the scope of employment.

---

131 [1912] AC 716.

132 [1966] 1 QB 716.

130 The only principled basis upon which vicarious liability can be imposed for the deliberate criminal acts of another, in my view, is that the person against whom liability is asserted is estopped from asserting that the person whose acts are in question was not acting as his or her servant, agent or representative when the acts occurred. And on that basis, vicarious liability is not necessarily limited to the acts of an employee, but might properly extend to those of an independent contractor or other person who, although as a strict matter of law, is acting as principal, might reasonably be thought to be acting as the servant, agent or representative of the person against whom liability is asserted[133].

131 Ordinarily, a person will not be estopped from denying that a person was acting as his or her servant, agent or representative unless there is a close connection between what was done and what that person was engaged to do. That was the focus of the attention of the House of Lords in *Lister*. However, that is not, of itself, the test of estoppel. Ultimately, the test is whether the person in question has acted in such a way that a person in the position of the person seeking the benefit of the estoppel would reasonably assume the existence of a particular state of affairs[134]. In the case of vicarious liability, the relevant state of affairs is simply that the person whose acts or omissions are in question was acting as the servant agent or representative of the person against whom liability is asserted.

Conclusion and orders
State of New South Wales v Lepore & Anor

132 In this case it seems there may have been a close connection between the acts of the teacher and that which he was authorised to do, namely, chastise the plaintiff for his misbehaviour. Moreover and more to the point, it may be that by acquiescing in the teacher's use of the storeroom for the purposes of chastisement or, even, in having a secluded room which might be so used the State of New South Wales is estopped from contending that the teacher was not acting as its servant, agent or representative in doing what he did in that room. However, as

---

133 See *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21 at 58 [94] per McHugh J. See also *Scott v Davis* (2000) 204 CLR 333 at 346 [34] per McHugh J.

134 See *Grundt v Great Boulder Pty Gold Mines Ltd* (1937) 59 CLR 641 at 675 per Dixon J; *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387; *The Commonwealth v Verwayen* (1990) 170 CLR 394 at 428-429 per Brennan J; *Australian Securities Commission v Marlborough Gold Mines Ltd* (1993) 177 CLR 485 at 506 per Mason CJ, Brennan, Dawson, Toohey and Gaudron JJ; *Giumelli v Giumelli* (1999) 196 CLR 101 at 113 [9] per Gleeson CJ, McHugh, Gummow and Callinan JJ.

Heydon JA held in the Court of Appeal, the fact finding process undertaken at first instance does not permit resolution of the question of vicarious liability. Accordingly, there must be a new trial.

133 The appeal should be allowed in part, par 2 of the order of the Court of Appeal should be set aside and, in lieu, it should be ordered that the judgment and order of the District Court of 16 April 1999 be set aside and a new trial ordered. The costs of the first trial should abide the outcome of the new trial. In accordance with the conditions upon which special leave was granted, the State should pay the first respondent's costs in this Court.

Samin v State of Queensland & Ors; *Rich v State of Queensland & Ors*

134 In each of these matters, the appeal should be dismissed. As special leave was granted to enable the question of the liability of education authorities to be fully explored, there should be no order as to the costs of the appeals to this Court.

135 McHUGH J. The question in these appeals is whether a teacher's assault or sexual assault of a pupil constitutes a breach of a State education authority's duty to take reasonable care of the pupil or is a tort for which the authority is vicariously liable.

136 In my opinion a State education authority owes a duty to a pupil to take reasonable care to prevent harm to the pupil. The duty cannot be delegated. If, as is invariably the case, the State delegates the *performance* of the duty to a teacher, the State is liable if the teacher fails to take reasonable care to prevent harm to the pupil. The State is liable even if the teacher intentionally harms the pupil. The State cannot avoid liability by establishing that the teacher intentionally caused the harm even if the conduct of the teacher constitutes a criminal offence. It is the State's duty to protect the pupil, and the conduct of the teacher constitutes a breach of the State's own duty. It is unnecessary to decide whether the State is also vicariously liable for the tort of the teacher who assaults or sexually assaults a pupil. Vicarious liability arises for the purposes of tort law when the law makes a person – usually an employer – liable for another person's breach of duty. In a non-delegable duty case, however, the liability is direct – not vicarious. The wrongful act is a breach of the duty owed by the person who cannot delegate the duty.

State of New South Wales v Lepore

137 The plaintiff, Angelo Lepore, sued the State of New South Wales and Trevor Michell, his former teacher, in the District Court for damages claiming that the teacher had assaulted him while he was a pupil at a school conducted by the State. Against the teacher, he claimed damages for assault; against the State, he claimed damages for breach of the duty of care owed by an education authority to a pupil under its control. The action was tried by Downs DCJ on a preliminary question concerning the liability of the defendants. After stating that it was undisputed that the teacher had struck the plaintiff and other children "upon their bare bottoms at least once over an unspecified period in or about September 1978", the learned judge said that he was satisfied that the teacher had assaulted the plaintiff. However, Downs DCJ held that there was no evidence that the State had "breached the duty that it owed to the plaintiff". His Honour's judgment indicates that he thought that the liability of the State depended on proof that it either knew or ought to have known that the teacher was likely to commit the assault or that it had failed to implement a system that would have avoided the assault. Nothing in his judgment indicates that he thought that the State owed the plaintiff a duty *to ensure* that reasonable care was taken of him while he was at school or that the duty was non-delegable.

138 The plaintiff appealed against the order dismissing his action against the State of New South Wales. By majority, the Court of Appeal held that the State had breached the duty of care that it owed to the plaintiff. President Mason said:

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

His Honour also held that the duty of the State was non-delegable. Davies AJA agreed. Heydon JA dissented on the content of the duty. But his Honour thought that the trial was so unsatisfactory that he ordered a new trial of all issues.

The duty of a school authority

139 A school authority "owes to its pupils a duty to ensure that reasonable care is taken of them whilst they are on the school premises during hours when the school is open for attendance"[135]. In *Ramsay v Larsen*[136], Kitto J said "whether the authority be a Government or a corporation or an individual, ... the school authority undertakes not only to employ proper staff but to give the child reasonable care". The duty of the school authority does not depend on an implied delegation of authority from the parents of the pupil. In the case of a State authority, the duty arises from exercising governmental power and setting up a system of compulsory education[137]. In the case of a private school authority, it arises from the contractual arrangement between the school and the pupil's parents or guardian. In each case, the duty arises because the school authority has control of the pupil whose immaturity is likely to lead to harm to the pupil unless the authority exercises reasonable care in supervising him or her and because the authority has assumed responsibility for the child's protection. In *Richards v Victoria*[138], Winneke CJ, giving the judgment of the Full Court of the Supreme Court of Victoria, said:

> "The reason underlying the imposition of the duty would appear to be the need of a child of immature age for protection against the conduct of others, or indeed of himself, which may cause him injury coupled with the fact that, during school hours the child is beyond the control and protection of his parent and is placed under the control of the schoolmaster who is in a position to exercise authority over him and afford him, in the exercise of reasonable care, protection from injury".

---

135 *The Commonwealth v Introvigne* (1982) 150 CLR 258 at 269 per Mason J.

136 (1964) 111 CLR 16 at 28.

137 *Ramsay v Larsen* (1964) 111 CLR 16 at 25-26, 37.

138 [1969] VR 136 at 138-139.

140 In *Geyer v Downs*[139], Stephen J accepted that this reasoning of Winneke CJ correctly explained the rationale for imposing the duty of care in the case of the education authority-pupil relationship. Mason and Jacobs JJ agreed with the judgment of Stephen J.

141 In *Richards*, the Full Court also rejected the argument[140] that reasonable foreseeability was relevant in determining the existence of the duty. The Full Court held that the relationship of school authority and pupil gave rise to a duty of care "prior to and independently of the particular conduct alleged to constitute a breach of that duty"[141]. This Court accepted that principle in *Victoria v Bryar*[142] where the Court unanimously held that the relationship of school authority and pupil belongs to the class of cases in which a duty of care springs from the relationship itself.

142 The duty arises on the enrolment of the child. It is not confined to school hours or to the commencement of the teachers' hours of employment at the school. If the authority permits a pupil to be in the school grounds before the hours during which teachers are on duty, the authority will be liable if the pupil is injured through lack of reasonable supervision. In *Geyer v Downs*[143], this Court held that the education authority was liable for injuries suffered by a pupil playing in the school grounds at about 8.45am although teachers at the school were not required to be on duty at that time. Stephen J said[144]:

> "It is for schoolmasters and for those who employ them, whether government or private institutions, to provide facilities whereby the schoolmasterly duty can adequately be discharged during the period for which it is assumed. A schoolmaster's ability or inability to discharge it will determine neither the existence of the duty nor its temporal ambit but only whether or not the duty has been adequately performed. The temporal ambit of the duty will, therefore, depend not at all upon the schoolmaster's ability, however derived, effectively to perform the duty but, rather, upon whether the particular circumstances of the occasion in question reveal that the relationship of schoolmaster and pupil was or was

---

139 (1977) 138 CLR 91 at 93.

140 [1969] VR 136 at 139-140.

141 [1969] VR 136 at 140.

142 (1970) 44 ALJR 174.

143 (1977) 138 CLR 91.

144 (1977) 138 CLR 91 at 94.

> not then in existence. If it was, the duty will apply. It will be for the schoolmaster and those standing behind him to cut their coats according to the cloth, not assuming the relationship when unable to perform the duty which goes with it."

143 The duty extends to protecting the pupil from the conduct of other pupils or strangers and from the pupil's own conduct[145]. The measure of the duty is not that which could be expected of a careful parent. The statement of Lord Reid to that effect in *Carmarthenshire County Council v Lewis*[146] is no longer law. Murphy and Aickin JJ rejected the parent analogy in *Geyer v Downs*[147] saying that it was unreal to apply that standard to "a schoolmaster who has the charge of a school with some 400 children, or of a master who takes a class of thirty or more children".

144 Importantly for the purposes of this case, the duty imposed on the education authority is non-delegable[148]. When a duty is non-delegable, the person owing it must ensure that the duty is carried out. If the duty is to take reasonable care of some person or property, the person must ensure that reasonable care is taken. Brennan CJ explained the nature of the defendant's liability in a non-delegable duty case in *Northern Sandblasting Pty Ltd v Harris*[149] where his Honour said:

> "However, if the defendant is under a personal duty of care owed to the plaintiff and engages an independent contractor to discharge it, a negligent failure by the independent contractor to discharge the duty leaves the defendant liable for its breach. The defendant's liability is not a vicarious liability for the independent contractor's negligence but liability for the defendant's failure to discharge his own duty[150]. The duty in such a case is often called a 'non-delegable duty'."

145 Although the task of performing the duty may be delegated, the person owing the duty is responsible for the conduct of those employed to perform the

---

145 *Richards v Victoria* [1969] VR 136 at 138-139.

146 [1955] AC 549 at 566.

147 (1977) 138 CLR 91 at 102.

148 *The Commonwealth v Introvigne* (1982) 150 CLR 258 at 264; *Kondis v State Transport Authority* (1984) 154 CLR 672 at 686.

149 (1997) 188 CLR 313 at 330.

150 cf *Voli v Inglewood Shire Council* (1963) 110 CLR 74 at 95.

duty[151]. In *McDermid v Nash Dredging & Reclamation Co Ltd*, Lord Hailsham of St Marylebone said[152] that a non-delegable duty does not mean the duty "is incapable of being the subject of delegation, but only that the employer cannot escape liability if the duty has been delegated and then not properly performed". In the same case, Lord Brandon of Oakbrook pointed out[153] that, if a non-delegable duty is not performed, it is no defence that the employer "delegated its performance to a person, whether his servant or not his servant, whom he reasonably believed to be competent to perform it". If the duty is non-delegable and its performance has been entrusted to an employee, it is irrelevant that in failing to perform the duty with reasonable care the employee was acting outside the scope of his or her employment[154].

146 The defendant who is under a non-delegable duty is liable for the conduct of employees and independent contractors because the defendant has expressly or impliedly undertaken to have the duty performed. This is so even though, in the case of a defendant that is a company, it can only discharge its duty by employing natural persons. In *Photo Production Ltd v Securicor Transport Ltd*[155], a case of contract, Lord Diplock said:

> "Where what is promised will be done involves the doing of a physical act, performance of the promise necessitates procuring a natural person to do it; but the legal relationship between the promisor and the natural person by whom the act is done, whether it is that of master and servant, or principal and agent, or of parties to an independent sub-contract, is generally irrelevant. If that person fails to do it in the manner in which the promisor has promised to procure it to be done, as, for instance, with reasonable skill and care, the promisor has failed to fulfil his own primary obligation. This is to be distinguished from 'vicarious liability' – a legal concept which does depend upon the existence of a particular legal relationship between the natural person by whom a tortious act was done and the person sought to be made vicariously liable for it."

---

151 *Kondis v State Transport Authority* (1984) 154 CLR 672 at 685; *McDermid v Nash Dredging & Reclamation Co Ltd* [1987] AC 906 at 910, 919, 920.

152 [1987] AC 906 at 910.

153 [1987] AC 906 at 919.

154 See Atiyah, *Vicarious Liability* (1967) at 271.

155 [1980] AC 827 at 848.

147 Accordingly, where a company was under a duty to clean and return a fur coat, it was liable for the theft by an employee whose job it was to clean the fur[156]. Diplock and Salmon LJJ decided the case on the basis that the theft occurred within the employee's course of employment. On their analysis, it was a conventional case of vicarious liability. But Lord Denning MR decided the case on the ground that the bailee of the fur owed a non-delegable duty to take reasonable care of the fur. On this analysis, it was irrelevant whether or not the employee was acting within the course of his employment. His Lordship said[157]:

> "[W]hen a principal has in his charge the goods or belongings of another in such circumstances that he is under a duty to take all reasonable precautions to protect them from theft or depredation, then if he entrusts that duty to a servant or agent, he is answerable for the manner in which that servant or agent carries out his duty. If the servant or agent is careless so that they are stolen by a stranger, the master is liable. So also if the servant or agent himself steals them or makes away with them."

148 The principle that Lord Denning MR applied is not limited to cases of bailment. Nor, although *Photo Production*[158] was a contract case, are Lord Diplock's remarks limited to contract cases. They apply to a duty imposed by tort. If a contract expresses or implies a duty to take reasonable care, the general law will impose the same duty for the purposes of the law of torts. There cannot be one rule for the contract duty and a different rule for the general law duty. Their Lordships' statements, therefore, apply to any relationship where a defendant has a non-delegable duty to take reasonable care to protect the person or property of another.

149 As Mason J pointed out in *Kondis v State Transport Authority*[159], the source of the concept of a non-delegable common law duty of care is *Pickard v Smith*[160] where the defendant was the occupier of a coal cellar underneath a railway platform. The Common Pleas held the defendant liable for injury to the plaintiff occurring when he fell through a trapdoor left open by a coal-merchant when delivering coal to the defendant. Williams J, giving the judgment of the Court, said[161]:

---

156 *Morris v C W Martin & Sons Ltd* [1966] 1 QB 716.

157 [1966] 1 QB 716 at 728.

158 [1980] AC 827 at 848.

159 (1984) 154 CLR 672 at 684.

160 (1861) 10 CB (NS) 470 [142 ER 535].

161 (1861) 10 CB (NS) 470 at 480 [142 ER 535 at 539].

> "The act of opening it was the act of the employer, though done through the agency of the coal-merchant; and the defendant, having thereby caused danger, was bound to take reasonable means to prevent mischief. The performance of this duty he omitted; and the fact of his having intrusted it to a person who also neglected it, furnishes no excuse, either in good sense or law."

150 The decision seems contrary to the principle that an employer is not liable for the acts or omissions of independent contractors. However, the Common Pleas seemed to think that it was a clear case and by no means a novel one. The principle for which *Pickard v Smith* stands was soon after applied in *Bower v Peate*[162] and by the House of Lords in *Dalton v Angus*[163]. In each case, the plaintiff had a right of support for buildings on the plaintiff's land from the defendant who was an adjoining owner. In each case, the defendant had caused work to be done on his land that caused a loss of support for the plaintiff's land. Despite the excavation work being carried out by independent contractors, the defendants were held liable for the loss of support. The principle of *Pickard v Smith* was also applied in *Tarry v Ashton*[164] where the defendant was held liable for injury to a person on a highway that resulted from the disrepair of premises overhanging the highway.

151 Subsequently, the principle has been applied in numerous cases. Thus, a hospital has a duty to exercise reasonable care in the treatment of a patient and cannot delegate the duty to other persons such as doctors or nurses[165]. Similarly, an employer cannot delegate the duty of care that it owes to an employee[166]. Again the occupier of a public hall is liable to entrants on the premises for the negligence of an architect in designing a safe platform for the hall[167]. And the

---

162 (1876) 1 QBD 321.

163 (1881) 6 App Cas 740.

164 (1876) 1 QBD 314.

165 *Collins v Hertfordshire County Council* [1947] KB 598; *Cassidy v Ministry of Health* [1951] 2 KB 343; *Roe v Minister of Health* [1954] 2 QB 66; *Albrighton v Royal Prince Alfred Hospital* [1980] 2 NSWLR 542; *Ellis v Wallsend District Hospital* (1989) 17 NSWLR 553.

166 *Wilsons and Clyde Coal Co v English* [1938] AC 57; *Kondis v State Transport Authority* (1984) 154 CLR 672; *McDermid v Nash Dredging & Reclamation Co Ltd* [1987] AC 906.

167 *Voli v Inglewood Shire Council* (1963) 110 CLR 74.

owner of land who allows a dangerous substance to be brought onto the land or who allows a dangerous activity to be performed on the land has a duty to ensure that reasonable care is taken to guard persons from the danger. The owner cannot delegate the discharge of that duty to others[168].

152 This Court has said that the law will identify a duty as non-delegable whenever a person has undertaken the supervision or control of, or has assumed a particular responsibility for, the person or property of another in circumstances where the person affected might reasonably expect that due care would be exercised[169]. However, the concept of non-delegable duties of care has been strongly criticised. Professor Fleming described a non-delegable duty as a disguised form of vicarious liability[170]. Professor Glanville Williams has gone further. He has said that it is a "fictitious formula"[171]. Perhaps a more accurate statement is that of Giles JA in *Elliott v Bickerstaff*[172] where his Honour said "the so-called duty of care in truth is not a duty to take care but a mechanism for responsibility for someone else's failure to take care". However, as I later point out, this statement does not mean that the person owing the duty is liable only when someone else is liable.

153 As Gummow J pointed out in *Scott v Davis*[173], a difficulty with this Court's explanation of the rationale of non-delegable duties is that it suggests that many other duties whose performance is accepted as delegable should be classified as non-delegable. In *Scott*[174], his Honour said that "[s]ome caution is required because the characterisation of a duty as non-delegable involves, in effect, the imposition of strict liability upon the defendant who owes that duty".

154 However, the problem of determining whether a duty is non-delegable does not arise in this case. In *The Commonwealth v Introvigne*[175], this Court held

---

168 *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520.

169 *Kondis v State Transport Authority* (1984) 154 CLR 672 at 687; *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520 at 550-552.

170 Fleming, *The Law of Torts*, 9th ed (1998) at 434.

171 Glanville Williams, "Liability for Independent Contractors", (1956) *Cambridge Law Journal* 180 at 183.

172 (1999) 48 NSWLR 214 at 238.

173 (2000) 204 CLR 333 at 416-417 [246]-[248].

174 (2000) 204 CLR 333 at 417 [248].

175 (1982) 150 CLR 258 at 264.

that the duty owed by an education authority to a pupil is non-delegable. And that proposition has been endorsed subsequently in this Court[176]. In *Introvigne*, the Commonwealth was held liable even though the school that it had established in the Australian Capital Territory was run by the State of New South Wales which was reimbursed by the Commonwealth for the cost of running the school. Thus, there was no question of the Commonwealth being vicariously liable for the negligent conduct of the State's employees. The Commonwealth's liability was direct and personal and its duty was non-delegable.

155 In *Introvigne*, the plaintiff had been skylarking with friends in the school quadrangle before school commenced. The pupils had been hanging on the halyard of a flagpole. At a moment when the plaintiff was not swinging on the halyard, the truck of the flagpole, weighing about 7 kilograms, became detached and struck the plaintiff on the head. This Court held that the Commonwealth was liable notwithstanding that the State of New South Wales administered the public system of education in the Australian Capital Territory. Mason J said[177]:

> "By establishing a school which was 'maintained' on its behalf at which parents could enrol their children for instruction pursuant to the obligation imposed on them by the Ordinance, the Commonwealth, in my opinion, came under a duty of care to children attending the school. The nature and scope of that duty of care was co-extensive with the duty of care owed by any authority or body conducting a school to pupils attending the school. It was a duty to ensure that reasonable care was taken for the safety of the pupil which was breached in the circumstances of this case, in the two respects already mentioned. It was, as I see it, a duty directly owed by the Commonwealth for breach of which it is liable. It was not a case of vicarious liability for the omissions of the acting principal and the members of his staff, though had it been necessary to do so, the Commonwealth might have been found liable on this score.
>
> ...
>
> The fact that the Commonwealth delegated the teaching function to the State, including the selection and control of teachers, does not affect its liability for breach of duty. Neither the duty, nor its performance, is capable of delegation."

156 Later, his Honour said[178]:

---

176 *Kondis v State Transport Authority* (1984) 154 CLR 672 at 685.

177 (1982) 150 CLR 258 at 271-272.

178 (1982) 150 CLR 258 at 273.

> "The Commonwealth had undertaken a governmental function for the conduct of which it was responsible, whether it employed its own teachers or arranged for teachers to be made available to it by a State."

157 All parties to the present appeals accepted that the duty owed to the respective plaintiffs was non-delegable.

158 The vital issue in all cases of non-delegable duties is to determine with precision what the duty is. As I have pointed out, in *Introvigne*, Mason J said that the duty was "a duty to ensure that reasonable care is taken of pupils attending the school"[179]. Further, the duty to take reasonable care requires the education authority to ensure that the supervision of the children is carried out with reasonable care. In *Richards v Victoria*[180], the Full Court upheld a finding that the State of Victoria was liable where a schoolboy received serious injuries in a fight with another schoolboy during class in the presence of a teacher. Because the teacher, who was the person charged with performing the State's duty of reasonable care, should have foreseen the likelihood of injury to the plaintiff, the State was liable because reasonable care in the supervision of the plaintiff had not taken place. Similarly, in *Victoria v Bryar*[181], this Court upheld a jury's verdict that the State was responsible for an injury suffered by a teenage pupil at a Victorian State school that resulted from another pupil using an elastic band to fire a paper pellet. In *Bryar*, the teacher performing the State's duty of supervision had seen the majority of his pupils engaged "in a concentrated exchange of paper pellets fired by means of elastic bands and that, he so far condoned this indiscipline as to do nothing about it"[182].

159 However, the duty to supervise – wide and constant as it is – is not as wide as Mason P appears to have formulated it in the present case. His Honour said that the duty "extends to ensuring that they are not injured physically at the hands of an employed teacher (whether acting negligently or intentionally)". The duty of the education authority is to take reasonable care to ensure that the pupil is so supervised that he or she does not suffer harm. It may be that is all that the learned President meant. But his formulation appears to suggest that there is an absolute duty to prevent harm to the pupil. If that is what his Honour meant, the formulation cannot be accepted as correct.

---

179 (1982) 150 CLR 258 at 271.

180 [1969] VR 136.

181 (1970) 44 ALJR 174.

182 (1970) 44 ALJR 174 at 175.

160 If the education authority has delegated the performance of some aspect of its duty to a teacher, the authority will be liable if the teacher failed to take reasonable care for the safety of the pupil. However, the pupil does not have to point to any particular teacher as being responsible for the failure to take reasonable care for his or her safety. All that 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. That is a necessary consequence of the duty owed to a pupil being personal and non-delegable. Thus in *Carmarthenshire County Council v Lewis*[183], the House of Lords upheld a finding that an education authority was liable for the death of a driver killed when avoiding a child who had wandered onto the road. It did so even though the teacher who was supervising the children at the relevant time was not guilty of negligence. The child had obviously gone through an open gate, and the plaintiff succeeded even though she could not point to the person responsible for the opening of the gate. In *Geyer v Downs*[184], this Court held that the education authority was liable for injuries suffered by a pupil playing in the school grounds although teachers at the school were not required to be on duty at the time and none were present. Similarly in *Watson v Haines*[185], the Supreme Court of New South Wales held the education authority liable for failing to devise an effective system to prevent injury to the plaintiff even though the plaintiff could not identify any particular officer of the authority who was liable.

161 In the present case, the State of New South Wales by reason of its compulsory education system had a duty to ensure that reasonable care was taken in supervising the activities of the plaintiff and protecting him from harm while he was on the school premises during the times that students were known to be on school grounds. The State purported to perform this duty in a number of ways, one of which was to employ the second respondent, Michell, to teach and supervise the plaintiff during particular school periods. If Michell had failed to take reasonable steps to prevent injury to the plaintiff by another pupil or a stranger, the State would have been liable on the principles laid down by this Court in *The Commonwealth v Introvigne*. Likewise, the State would have been liable if by some negligent conduct on the part of Michell himself, the plaintiff had been injured. It makes no difference that the injury in this case was sustained by an assault even if the assault had sexual overtones. Just as the bailee in *Morris v C W Martin & Sons Ltd*[186] could not escape liability, in Lord Denning's view, for theft by its employee, so the State of New South Wales

---

183 [1955] AC 549.

184 (1977) 138 CLR 91.

185 (1987) Aust Torts Reports ¶80-094.

186 [1966] 1 QB 716.

cannot escape liability for Michell's criminal assault. The duty of the State was to take reasonable care for the safety of the plaintiff, and the assault by his teacher breached the duty to take reasonable care of him.

162 The plaintiff elected to sue the teacher for trespass to the person. But if it matters – and I do not think it does – the plaintiff could have sued the teacher in negligence. An action for negligent infliction of harm is not barred by reason of the intentional act of the person causing the harm. Historically, as long as a plaintiff did not make the intention of the defendant part of the cause of action, the plaintiff could sue in trespass to the person or by an action on the case for the direct infliction of force. At all events, that was the position before the enactment of the *Common Law Procedure Act* 1852 (UK) and its analogues in Australia[187]. Since the abolition of the forms of action, a plaintiff may, if he or she chooses, sue in negligence for the intentional infliction of harm[188].

163 By assaulting the plaintiff, Michell not only breached the duty of care that he owed to the plaintiff, but his assault constituted a breach of the employer's non-delegable duty to take reasonable care for the safety of the plaintiff.

164 The various States involved or intervening in the appeals complained that to hold an education authority liable in cases such as the present would result in a massive increase in the legal liability of education authorities. They also asserted that it would make them liable for the criminal conduct of teachers acting outside the scope of their employment. The latter proposition may be correct. But it has been the law in this country at least since this Court's decision in *Introvigne*[189] that an education authority is legally liable for the wrongs and neglects of those that it employs to carry out its duty to take reasonable care of its pupils. The doctrine of non-delegable duty no doubt makes the position of education authorities difficult. But they are not totally helpless to prevent teachers from assaulting or sexually assaulting pupils. 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;

---

187 *Williams v Milotin* (1957) 97 CLR 465 at 470-471.

188 *Gray v Motor Accident Commission* (1998) 196 CLR 1.

189 (1982) 150 CLR 258. The judgment of Kitto J in *Ramsay v Larsen* (1964) 111 CLR 16 suggests that this Court recognised the non-delegable nature of the duty as early as 1964. For his Honour said (at 28) that the duty was "not only to employ proper staff but to *give* the child reasonable care" (my emphasis).

- 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.

165 No doubt there are other methods open to education authorities to combat the problem of teachers who, for their own gratification, use their power and position to exploit children. Given the nature of the offences, no system is likely to eliminate the abuse or sexual abuse of school children. In the case of schools in isolated areas with only one teacher, the difficulties of eliminating or reducing abuse may be very great. But whether or not there are any reasonably practicable methods by which education authorities can eliminate or reduce the incidence of abuse, long established legal principle and this Court's decisions require that they carry the legal responsibility for any abuse that occurs. Given the potential – often permanent – consequences of the sexual abuse of children, this result does not seem unjust.

166 It is unnecessary to determine whether or not Michell was acting in the course of his employment when he assaulted the plaintiff, so that the State would be vicariously liable for Michell's conduct. The decisions of the highest courts in England and Canada suggest that, in most cases where a teacher has abused a pupil, the wrong will be taken to have occurred within the scope of the teacher's employment[190]. The education authority will therefore be vicariously liable for the wrong. The Australian common law, however, has adopted a simpler and stricter test of liability.

167 The appeal of the State of New South Wales should be dismissed.

Rich v State of Queensland

168 The plaintiff pleaded that between January 1963 and July 1965 she was a pupil at a school operated by the State of Queensland and/or the Minister for Education of Queensland at Yalleroi. Her Statement of Claim alleged that they employed the third defendant, William Theodore D'Arcy, as a teacher at the school. Paragraphs 3 and 4 of her Statement of Claim provide:

> "3. In the premises pleaded above, the First Defendant and/or the Second Defendant and/or the Third Defendant each owed to the

---

190 See in the Canadian context, *Bazley v Curry* [1999] 2 SCR 534. In England, see *Lister v Hesley Hall Ltd* [2002] 1 AC 215.

Plaintiff a duty to ensure that reasonable care was taken of her whilst she was at the school.

4. In breach of each of the Defendants' duties between 28 January 1963 and 1 July 1965 the Third Defendant assaulted the Plaintiff."

The particulars of assaults declare that they took place in the classroom or the store-room at Yalleroi State School.

169 Paragraph 3 of the Statement of Claim formulates the defendants' duty in identical terms to that formulated by Mason J in *The Commonwealth v Introvigne*[191]. Accordingly, the Statement of Claim disclosed a good cause of action. The Court of Appeal of the Supreme Court of Queensland erred in striking it out.

170 The appeal should be allowed.

Samin v State of Queensland

171 The plaintiff's Statement of Claim alleges that between October 1963 and July 1965 she was a pupil at the Yalleroi State School, a school operated by the State of Queensland and/or the Minister for Education. Her Statement of Claim also alleges that the defendants employed the third defendant, William Theodore D'Arcy, as a teacher at the school.

172 Paragraph 3 of the Statement of Claim is pleaded in identical terms to that in *Rich v State of Queensland*, as is Paragraph 4 except that the date 20 October 1963 is substituted for the date 28 January 1963. The particulars of assaults are different but they show that the assaults occurred in rooms at the school during school hours or during the lunchtime break.

173 In my opinion the Statement of Claim in this case also showed a good cause of action. The Court of Appeal erred in striking out the Statement of Claim.

174 The appeal should be allowed.

---

191 (1982) 150 CLR 258 at 271.

GUMMOW AND HAYNE JJ.

STATE OF NEW SOUTH WALES v ANGELO LEPORE & ANOR

175 This matter was heard at the same time as *Rich v State of Queensland & Ors* and *Samin v State of Queensland & Ors*. It was said to raise the same issues of principle as are considered in those matters. In this case, however, those issues are obscured by the unusual course that was taken in the proceedings at first instance. In particular, the primary judge did not make the findings of fact that were necessary to resolve the factual issues joined between the parties. It is this which must determine the outcome of the appeal to this Court, rather than the issues of principle.

The claim

176 Angelo Lepore, the first respondent to this appeal, commenced an action in the District Court of New South Wales claiming damages for personal injury allegedly suffered by him as a result of assaults committed by the second respondent while the second respondent was a teacher at a State primary school. (It is convenient to continue to refer to the first respondent as the plaintiff, and to the second respondent as the "former teacher".) By his amended statement of claim, the plaintiff alleged that "[d]uring 1978, on repeated occasions, the [former teacher] assaulted and sexually and indecently assaulted" him. He further alleged that the injuries he sustained "were occasioned by the negligence of the [State], its servant and/or agents". Thus, he alleged causes of action in trespass to the person against the former teacher, and negligence, or vicarious liability for negligence, against the State. His statement of claim did not, in terms, allege that the State owed him a non-delegable duty of care. On one view, the statement of claim may also have alleged that the State was vicariously liable for the trespasses committed by the former teacher, but it seems that such a claim was not pursued at first instance.

The trial

177 Before the action came on for trial in the District Court an order was made, it seems by consent, that the issue of liability would be tried separately. The primary judge (Downs DCJ) said this was a matter of agreement; Mason P, in the Court of Appeal, said it was the result of an order made on the plaintiff's application[192]. Nothing turns on identifying more precisely the origin of the course that was followed. It is enough that issues of liability and damage were

---

192 *Lepore v State of New South Wales* (2001) 52 NSWLR 420 at 422 [7].

severed. How the issue of liability could be severed effectively or conveniently from the issues of damage, when the plaintiff's claim against the State was pleaded in negligence, appears not to have been examined or considered at first instance.

178 The issue of liability coming on for trial, it was treated by the primary judge as a trial of two questions: first, whether the State owed the plaintiff a duty of care which it had breached and, secondly, whether the former teacher had assaulted the plaintiff. The primary judge identified the plaintiff's contention about the State's breach of duty as being that the State had failed to take reasonable care to protect the plaintiff by failing to adopt a sufficient system for supervising the former teacher, and had failed to supervise him adequately when he was carrying out his teaching duties. Certainly these allegations were given as particulars of negligence in the amended statement of claim. But other, wider allegations of negligence were also made in that amended statement of claim. The particulars of negligence included an allegation that the State had failed "to protect the children in the care and control of teachers" at the school, and an allegation that the State had failed "in its duty to the [p]laintiff in loco parentis". No reference was made to these allegations in the primary judge's reasons and if, or how they were used in argument at first instance is not readily apparent.

179 The plaintiff gave oral evidence in the District Court that he had been assaulted by the former teacher by being struck on the buttocks with a ruler. He also swore that the former teacher had required the plaintiff (and others) to undress before being beaten and that "then sometimes he used to just touch us and play with us or make the kids – each others play with each others …". A statement the plaintiff had given to police at a time much closer to the events of which he was speaking was tendered in evidence. In that statement he described not only beatings of the kind he described in his oral evidence but also some sexual assaults.

Findings of the primary judge

180 The primary judge made no express finding about the sexual allegations of the plaintiff. He noted that the plaintiff's oral evidence was not wholly consistent with the statement which he had earlier given to police and that there were some contradictions between the accounts which the plaintiff and other students at the school had given in statements to police or in oral evidence at the trial. The primary judge did not say which of these contradictory versions of events he preferred. The only finding he made was that the former teacher had "assaulted the plaintiff". He made no finding about what acts constituted that assault or whether more than one assault had taken place. He said:

> "Bearing in mind the tender ages of the children at the time and the lapse of more than 20 years, it is difficult to place much reliance upon any

> details of what the children alleged took place. Nevertheless it is undisputed that the [former teacher] struck each of the children upon their bare bottoms at least once over an unspecified period in or about September 1978. After all later in 1978 he pleaded guilty to having assaulted each of them once and he chose to absent himself from court before me.
>
> Consequently I am satisfied that the [former teacher] assaulted the plaintiff but it should be observed that I have not considered or made any findings on the issue of injury to the plaintiff thereby. That deals with the first [sic, second] question I was asked to consider."

181 The finding that the former teacher had assaulted the plaintiff "at least once" in no sense constituted a finding about the former teacher's liability to the plaintiff for trespass to the person. It did not decide the issues of liability which had been tendered for decision. The plaintiff had alleged more than one assault and had alleged different forms of assault – some constituted by striking and others constituted by fondling. In his grounds of defence the former teacher had denied all these allegations. The finding made by the primary judge did not resolve the issues of liability that thus were joined in the action.

182 As we have said, the primary judge treated the central allegation against the State as being an allegation that it had failed either to have a sufficient system of supervision of the former teacher or it had failed to supervise him properly. The primary judge concluded that there was "not any evidence" that the State breached the duty it owed to the plaintiff. The duty the primary judge identified, the existence of which he said was not disputed by the parties, was "the duty to the plaintiff that a teacher owes to a pupil". Yet in the course of final addresses to the primary judge, reference was made to *The Commonwealth v Introvigne*[193] which deals with a very different duty from the duty alleged in the amended statement of claim.

183 The plaintiff's pleading did not, or at the very least did not clearly, allege that the assaults by the former teacher constituted a breach by the State of a non-delegable duty of care which it owed the plaintiff. The closest the pleading came to such an allegation was to allege, as particulars of negligence, a failure to protect children at the school and a failure in the State's "duty to the [p]laintiff in loco parentis". Even so, it seems clear that the plaintiff wanted to rely on *Introvigne*. It also appears that there was no contention that the course of interlocutory proceedings, or the course of trial, prevented the plaintiff from

---

193 (1982) 150 CLR 258.

putting his case in this way. Certainly, in the Court of Appeal, the plaintiff alleged that he had been entitled to succeed against the State in this way.

184 The primary judge said that there was "not any evidence" about the period over which the alleged assaults took place and that "[t]he assaults alleged were deliberate and isolated acts of abuse". However, the primary judge made no finding about how many assaults were established by the evidence led, or any finding about the exact conduct constituting the assault or the assaults. It was, therefore, not open to the primary judge to go on to make the finding which he did, that there had been no want of adequate supervision by the State. That finding depended upon characterising the assaults as *isolated* acts of abuse.

185 Had it been found as a fact that there had been only very few incidents of the kind alleged, it may have been open to the judge to describe them as "isolated" acts. But the primary judge appears to have confined his finding to the conclusion that the former teacher had struck the plaintiff (and some other children) "upon their bare bottoms *at least once* over an unspecified period in or about September 1978" (emphasis added). This made neither a positive finding that this happened only very occasionally, nor a negative finding that the evidence did not permit a more precise finding than that it happened once, and may have happened on other occasions. That being so, the primary judge's conclusion that there was no evidence that the State had breached the duty that it owed the plaintiff (because the assaults were *isolated* acts of abuse) is a conclusion that cannot be sustained.

186 The liability to the plaintiff, both of the State and of the former teacher, depends critically upon resolution of the factual controversy revealed in the proceedings at first instance. On the pleadings, issue was joined about how many assaults occurred and what form they took. It is by no means clear that the parties conducted the case at first instance on the basis that each party was to be confined, in the case of the plaintiff to his statement of claim and in the case of the defendants to their grounds of defence, but the factual issues which were joined at trial included issues about how many assaults occurred and what form they took. Resolving those issues depended upon the assessment to be made by the judge of the evidence that was given. His reasons reveal that he had reservations about some of the evidence that was adduced. That being so, an appellate court cannot now resolve the factual issues that emerged from the pleadings and were in issue at trial. It follows that the orders made by the primary judge cannot stand.

187 At the root of all of the difficulties presented by this case lies the decision to attempt to sever trial of issues of liability from trial of issues about damages[194]. Adopting that course in this case has led to procedural confusion. The trial at first instance miscarried. There must be a new trial with all its attendant cost and inconvenience to all those concerned.

188 Because there was no challenge in the Court of Appeal to the order for separate trial, it was not open to that Court to set it aside and, therefore, neither can this Court. Nonetheless, the matter must go back for retrial and, the order for separate trials being an interlocutory order, there appears to be no reason preventing the District Court making a further order for trial of the whole proceeding in the ordinary way.

189 In the Court of Appeal, Heydon JA concluded[195] that the plaintiff should be at liberty to seek to amend his statement of claim to allege the duty which, on appeal, he contended arose from *Introvigne*, and that he should be at liberty to maintain some, but not all, of the allegations that he made in his amended statement of claim. No such liberty should now be granted and no such restriction should be imposed. The proceedings at first instance having miscarried as they have, it would be wrong to treat the plaintiff as if he were estopped by anything done in, or apparently decided at, that hearing. Whether he should now have leave to amend his pleading in any respect will depend upon the form of the proposed amendment and will, no doubt, be affected by what is decided in *Rich v State of Queensland & Ors* and *Samin v State of Queensland & Ors*.

190 The appeal to this Court should be allowed in part, paragraph 2 of the order of the Court of Appeal made on 23 April 2001 set aside and, in its place, there be an order that the judgment entered in the District Court on 16 April 1999 be wholly set aside and there be an order for a new trial, the costs of that trial to abide its outcome. Consistent with the conditions upon which the State was granted special leave to appeal to this Court, the costs orders made by the Court of Appeal are undisturbed and the State should pay the respondents' costs of the appeal in this Court.

---

194 *Tepko Pty Ltd v Water Board* (2001) 206 CLR 1 at 18 [52] per Gaudron J, 55 [168]-[170] per Kirby and Callinan JJ.

195 *Lepore v State of New South Wales* (2001) 52 NSWLR 420 at 448 [126].

SHEREE ANNE RICH v STATE OF QUEENSLAND & ORS
VIVIAN CHRISTINE SAMIN v STATE OF QUEENSLAND & ORS

191 These two appeals were heard at the same time as *State of New South Wales v Lepore & Anor*. All three matters were said to raise, as their central issue, whether a State is liable to a person who, while a pupil at a State school, was sexually assaulted by a teacher during school hours and on the school premises. The present appeals, in which the State of Queensland is respondent, arise from an application made by the State, as defendant to proceedings brought in the District Court of Queensland, to strike out the plaintiffs' statements of claim as disclosing no arguable cause of action. In each case that application failed at first instance but succeeded on appeal to the Court of Appeal of Queensland[196].

192 The plaintiffs' statements of claim are sufficiently set out in the reasons of other members of the Court. The central allegation, in each case, was that the State, the Minister for Education of Queensland, and the teacher who it was alleged had sexually assaulted the plaintiff, "each owed to the [p]laintiff a duty to ensure that reasonable care was taken of her whilst she was at the school". No allegation was made that the State or the Minister had acted without reasonable care, whether in selecting and supervising teachers or otherwise. The only person who was alleged to have acted improperly was the teacher – not by acting without reasonable care, but by deliberately committing sexual assaults on the plaintiffs. We were told that if the matters were to go to trial the State would not dispute that the several sexual assaults alleged by each plaintiff had occurred. Other facts and circumstances relating to the matter are sufficiently described in the reasons of other members of the Court and we need not repeat them.

193 No distinction was drawn in argument between the State and the Minister. For present purposes, it is not necessary to consider whether there is any distinction that could be drawn or whether the Minister is properly joined having regard to the relevant provisions of the *Crown Proceedings Act* 1980 (Q). It is enough to refer only to the position of the State.

194 Each statement of claim alleged that the State had breached a duty which it owed the plaintiff. In the Court of Appeal, counsel for the plaintiffs expressly disclaimed any alternative claim founded on vicarious liability of the State. In this Court, however, counsel accepted that such a claim would be made in each case if the statements of claim were found not to disclose an arguable cause of action. By leave, each plaintiff submitted a form of the statement of claim which

---

196 *Rich v State of Queensland; Samin v State of Queensland* (2001) Aust Torts Reports ¶81-626.

she would seek to file if the present pleadings were to be held to be insupportable. It was accepted that it would be wrong to give leave to replead if claims founded on vicarious liability were bound to fail.

195 Although the plaintiffs placed the chief weight of their argument on contentions founded on the present form of their pleadings, it is better to begin these reasons by considering the foreshadowed claim based on vicarious liability. First, the questions that must be considered in connection with vicarious liability bear upon the questions that arise in considering the duty which the plaintiffs alleged that the State owed them. Secondly, recent decisions in the United Kingdom[197] and Canada[198] holding employers liable for sexual assaults on children by employees have been founded on vicarious liability.

Vicarious liability

196 As was pointed out in *Hollis v Vabu Pty Ltd*[199], any consideration of vicarious liability must begin by accepting, first[200], that "[a] fully satisfactory rationale for the imposition of vicarious liability in the employment relationship has been slow to appear in the case law" and, secondly[201], that "the modern doctrine respecting the liability of an employer for the torts of an employee was adopted not by way of an exercise in analytical jurisprudence but as a matter of policy". The content of rules governing the imposition of vicarious liability has changed and developed over time, although the verbal formulae applied to describe those rules have remained largely unchanged. Perhaps the largest of the changes that have occurred has been in the content given to "control" as the factor which distinguishes a relationship of employer and employee from a relationship of principal and independent contractor[202].

197 Despite all those caveats, there are several influences which can be identified as bearing upon questions of vicarious liability. First, there is "the

---

197 *Lister v Hesley Hall Ltd* [2002] 1 AC 215.

198 *Bazley v Curry* [1999] 2 SCR 534 and *Jacobi v Griffiths* [1999] 2 SCR 570.

199 (2001) 207 CLR 21.

200 (2001) 207 CLR 21 at 37 [35].

201 (2001) 207 CLR 21 at 37 [34]; *Darling Island Stevedoring and Lighterage Co Ltd v Long* (1957) 97 CLR 36 at 56-57 per Fullagar J.

202 *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16; *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21 at 40-41 [43]-[44].

cynical conclusion of the late Dr Baty … that the real reason [for finding vicarious liability] is that the damages are taken from a deep pocket"[203]. That is a consideration that finds other, less pejorative, expression as a "principle of loss-distribution"[204] or as the need to provide a "just and practical remedy" for harm suffered as a result of wrongs committed in the course of the conduct of the defendant's enterprise[205]. Secondly, there is the sense that it is right and just to attribute responsibility to those who not only placed in the community an enterprise from which risk and damage has emerged, but also stood to gain in some way from its pursuit. In *Hollis*, it was said that[206]:

> "under contemporary Australian conditions, the conduct by the defendant of an enterprise in which persons are identified as representing that enterprise should carry an obligation to third persons to bear the cost of injury or damage to them which may fairly be said to be characteristic of the conduct of that enterprise".

Or, as McLachlin J put it in *Bazley v Curry*[207], "where the employee's conduct is closely tied to a risk that the employer's enterprise has placed in the community, the employer may justly be held vicariously liable for the employee's wrong".

198 Thirdly, there are the several considerations identified by Pollock in his *Essays in Jurisprudence and Ethics*, published in 1882. The rule making an employer liable for acts and omissions of servants was, he said[208], "supposed to make employers more careful in their choice of servants, and in looking to the state of the plant and instruments of their business". That aim was "thought worth securing at the cost of some individual hardship" whereas "the use of care in choosing a contractor who is likely to be careful is too remote a benefit to the community to be enforced by indiscriminate penalties"[209]. Thus the distinction drawn between vicarious liability for the negligence of a servant and the absence of liability for the negligence of an independent contractor was said to find its

---

203 *Soblusky v Egan* (1960) 103 CLR 215 at 229 per Dixon CJ, Kitto and Windeyer JJ.

204 Atiyah, *Vicarious Liability in the Law of Torts*, (1967) at 22.

205 *Bazley* [1999] 2 SCR 534 at 553-554 [30]-[31].

206 (2001) 207 CLR 21 at 40 [42].

207 [1999] 2 SCR 534 at 548-549 [22].

208 Pollock, *Essays in Jurisprudence and Ethics*, (1882) ("*Pollock's Essays*") at 130.

209 *Pollock's Essays* at 130.

reason, in part, in the deterrent effect of holding an employer responsible for the negligence of employees.

199 Pollock also recognised, however, that deterrence was not a complete explanation for the law's imposition of vicarious liability for the negligence of another. Because vicarious liability is imposed regardless of the fault of the party who is held vicariously responsible, it is imposed regardless of the capacity of that party to avoid the harm that occurs. In many cases, then, the deterrent effect of holding the party responsible is at best indirect, and it may be remote and speculative.

200 Pollock pointed to the fact that there are circumstances in which a duty is cast upon a person independent of that person's own acts. He drew particular attention[210] to duties in respect of the ownership of property, or the voluntary use of property in a particular way. Some of the examples he gave were of strict liability under the former rule in *Rylands v Fletcher*[211], but they also included cases of cattle trespass, and the liability of an occupier of land to an invitee.

201 To these he added[212] a case which can be seen as one of vicarious responsibility or, as we suggest may be the better view, as a case only about what is sufficient proof of personal responsibility – *Byrne v Boadle*[213]. There, an employer, who occupied first floor premises where barrels of flour were stored, was held liable for injury done to the plaintiff when a barrel fell from the first floor to the street below, despite there being no evidence of how the accident happened. The employer was held responsible on the basis that such events do not occur without fault. There being no evidence suggesting that the employees had acted carefully, the employer was held liable.

202 The common element which Pollock identified[214], in the several different kinds of case he mentioned, was "that a man has for his own convenience brought about or maintained some state of things which in the ordinary course of nature may work mischief to his neighbours". Accordingly, where an employer conducted a business, and for that purpose employed staff, the employer brought about a state of things in which, if care was not taken, mischief would be done.

---

210 *Pollock's Essays* at 130.

211 (1868) LR 3 HL 330.

212 *Pollock's Essays* at 121.

213 (1863) 2 H & C 722 [159 ER 299].

214 *Pollock's Essays* at 122.

It was, he concluded, right to hold the employer responsible for loss sustained as a result of acts done in the course of that venture. But the liability to be imposed on the employer was liability for the way in which the business was conducted. Accordingly, the employer should be held responsible only for negligence which occurred *in the course of* the servant's employment[215]. Conduct of the business (and the employee's actions in the course of employment in that business) were the only state of things which the employer created and for which the employer should be held responsible. "Course of employment" was, in Pollock's view[216], not some limitation to an otherwise more general liability of an employer; it was a necessary element of the definition of the extent of the liability.

203 Before dealing further with the concept of course of employment it is useful to consider the three cases, two from Canada and one from the United Kingdom, which we mentioned earlier and which have examined vicarious liability for sexual assaults on children – *Bazley*, *Jacobi v Griffiths*[217] and *Lister v Hesley Hall Ltd*[218]. It will also be necessary to refer to the more recent decision of the House of Lords in *Dubai Aluminium Co Ltd v Salaam*[219].

204 Before the decisions of the Supreme Court of Canada in *Bazley* (and *Jacobi*, decided on the same day as *Bazley*) and of the House of Lords in *Lister*, there would have been little argument that a teacher who sexually assaulted a pupil, whether at school or out of school, was not acting in the course of employment. Such an assault is the antithesis of the central task confided to a teacher which is to care for and teach the child. It could in no way be said to be a part of what a teacher is held out as being employed to do. Yet in both *Bazley* and in *Lister* an employer was held vicariously liable for sexual assaults on a pupil by a teacher.

Lister v Hesley Hall Ltd

205 *Lister* was decided after *Bazley* and *Jacobi*. It is, however, convenient to consider *Lister* before the two Canadian cases. Although the members of the House of Lords who decided *Lister* referred to *Bazley*, there was little analysis of the policy considerations examined by the Supreme Court of Canada in *Bazley*.

---

215 *Pollock's Essays* at 126.

216 *Pollock's Essays* at 126.

217 [1999] 2 SCR 570.

218 [2002] 1 AC 215.

219 [2002] 3 WLR 1913; [2003] 1 All ER 97.

206 Lord Steyn, with whom Lord Hutton agreed, described[220] the determinative question as being whether the employee's torts "were so closely connected with his employment that it would be fair and just to hold the employers vicariously liable". Because the sexual abuse was "inextricably interwoven" with the employee's carrying out of his duties, his Lordship gave an affirmative answer to the question he had posed. Lord Clyde saw the decisions in *Bazley* and *Jacobi* as consistent with the traditional approach recognised in England[221] and as turning on the strength of the connection between employment and wrong.

207 Lord Hobhouse of Woodborough considered[222] it inappropriate to follow the reasoning in *Bazley* because, in his Lordship's view, that reasoning expressed the policy reasons for the rule arrived at in *Bazley* rather than identifying the criteria for the application of the rule. Both Lord Hobhouse[223] and the fifth member of the House, Lord Millett[224], placed chief emphasis on the employer's duty to the child being to care for and protect the child. The employer delegated performance of that duty to the employee who, in breach of his contractual duties to his employer, assaulted the child entrusted to his care.

208 It is apparent, then, that no single principle can be identified as underpinning the decision in *Lister*. The analyses of Lord Hobhouse and Lord Millett have strong echoes of non-delegable duties. By contrast, the majority of the House located the result in what were said to be orthodox principles of vicarious liability.

Dubai Aluminium Co Ltd v Salaam

209 In *Dubai Aluminium*, the House of Lords again examined the principles of vicarious liability. The two leading speeches were given by Lord Nicholls of Birkenhead and Lord Millett. In each, further consideration was given to what connection is necessary, between a wrongful act or omission causing injury and

---

220 [2002] 1 AC 215 at 230 [28].

221 [2002] 1 AC 215 at 237 [48].

222 [2002] 1 AC 215 at 242 [60].

223 [2002] 1 AC 215 at 240 [56].

224 [2002] 1 AC 215 at 250 [82].

the employment relationship, to warrant holding the employer vicariously responsible for the employee's tort. Lord Nicholls said that[225]:

> "Perhaps the best general answer is that the wrongful conduct must be so closely connected with acts the partner or employee was authorised to do that, for the purpose of the liability of the firm or the employer to third parties, the wrongful conduct *may fairly and properly be regarded* as done by the partner while acting in the ordinary course of the firm's business or the employee's employment." (original emphasis)

Lord Millett adopted a similar test[226]:

> "All depends on the closeness of the connection between the duties which, in broad terms, the employee was engaged to perform and his wrongdoing."

But as Lord Nicholls recognised[227], a test of closeness of connection:

> "affords no guidance on the type or degree of connection which will normally be regarded as sufficiently close to prompt the legal conclusion that the risk of the wrongful act occurring, and any loss flowing from the wrongful act, should fall on the firm or employer rather than the third party who was wronged".

Bazley v Curry and *Jacobi v Griffiths*

210 In *Bazley*, McLachlin J, writing for the Court, identified[228] three general considerations which should guide the decision whether to hold an employer vicariously liable for the defaults of an employee:

(a) to confront the question whether liability *should* be against the employer rather than obscure the decision beneath semantic discussions of scope of employment and mode of conduct;

---

225 [2002] 3 WLR 1913 at 1920 [23]; [2003] 1 All ER 97 at 105-106.

226 [2002] 3 WLR 1913 at 1943 [129]; [2003] 1 All ER 97 at 128.

227 [2002] 3 WLR 1913 at 1920 [25]; [2003] 1 All ER 97 at 106.

228 [1999] 2 SCR 534 at 559-560 [41].

(b) to identify the fundamental question as being whether the wrongful act was sufficiently related to conduct authorised by the employer to justify the imposition of vicarious liability; and

(c) to consider the sufficiency of the connection between the employer's creation or enhancement of a risk and the wrong done, by reference, in cases of intentional torts, to (i) the opportunity the enterprise gave the employee to abuse power; (ii) the extent to which the wrongful act furthered the employer's aims; (iii) the extent to which the wrongful act was related to friction, confrontation or intimacy inherent in the employer's enterprise; (iv) the extent of power given to the employee over the victim; and (v) the vulnerability of potential victims to wrongful exercise of power.

McLachlin J went on to say of sexual abuse by employees that[229]:

> "It must be possible to say that the employer *significantly* increased the risk of the harm by putting the employee in his or her position and requiring him to perform the assigned tasks. The policy considerations that justify imposition of vicarious liability for an employee's sexual misconduct are unlikely to be satisfied by incidental considerations of time and place. … Nor is foreseeability of harm used in negligence law the test. What is required is a material increase in the risk as a consequence of the employer's enterprise and the duties he entrusted to the employee, mindful of the policies behind vicarious liability." (original emphasis)

211 In *Bazley*, the Supreme Court held that the operator of a residential care facility for treatment of emotionally troubled children was vicariously liable for sexual assaults committed by an employee engaged (with others) "to do everything a parent would do, from general supervision to intimate duties like bathing and tucking in at bedtime"[230]. By contrast, in *Jacobi*, the Court held (by majority) that a children's club, which operated a recreational facility for children, was not vicariously liable for sexual assaults committed by an employee engaged to supervise volunteer staff, and to organise after-school recreational activities and the occasional outing. In *Jacobi*, McLachlin J dissented, and would have held the club vicariously liable for the conduct of its employee, because the employee "worked at a job where he was put in a special position of trust and power over particularly vulnerable people and used that

---

229 [1999] 2 SCR 534 at 560-561 [42].

230 [1999] 2 SCR 534 at 540 [2].

position to carry out an abuse of the power with which he was conferred to carry out his duties"[231].

212 As the differing outcomes in *Bazley* and *Jacobi* reveal, the considerations described by McLachlin J in *Bazley* give no bright line test for deciding whether vicarious liability is to be found. The question was approached in the Supreme Court of Canada as one of policy – *should* vicarious liability be found? And no doubt it was the same kind of question which Lord Steyn answered in *Lister* by saying that it was "fair and just" to hold the employer liable.

213 We would accept that an important element in considering the underlying policy questions in cases such as the present is the nature and extent (the "sufficiency") of the relationship between the employee's authorised conduct and the wrongful act or, as was said in *Dubai Aluminium*, "the closeness of the connection" between the employment relationship and the wrongful act[232]. But adopting either of these tests simply restates, in other words, the problem presented by the concept of "course of employment".

Analysis by reference to risk

214 Creation and enhancement of risk, and the various subsidiary considerations to which McLachlin J referred in *Bazley*, may distract attention from what meaning should be given to course of employment – especially when the case is one concerning intentional wrongdoing rather than negligence. Consideration of risk, and associated questions, may distract attention from the underlying task of identifying what the employee was engaged to do. They are questions that require an abstract and generalised assessment of the risk that individual employees in an enterprise will choose to act unlawfully, and in direct breach of the terms of their employment. Thus the approach adopted in *Bazley* requires a court to ask whether a school authority creates a risk of sexual assault (or enhances that risk) by operating a school. That inquiry shifts attention from the risks which conducting the enterprise brings with it (through employees doing the tasks they are *employed* to do) to the risk that individuals will break the law and their employment contract while they are at work. The inquiry about risk becomes an inquiry about opportunity for wrongdoing.

215 Conducting a school may certainly provide the occasion or the opportunity for a teacher to assault a pupil. But in what other sense can it be said that the

---

231 [1999] 2 SCR 570 at 586 [21].

232 [2002] 3 WLR 1913 at 1920 [23], 1943 [129]; [2003] 1 All ER 97 at 105-106, 128.

school authority creates (let alone enhances) the risk that a pupil will be sexually assaulted?

216 The teacher is given authority over the pupil; the pupil is, inevitably, vulnerable to abuse of that power. According to the nature of the duties to be undertaken by the teacher there may be greater or lesser opportunity for assault. If the duties are intimate there may be greater opportunity than if they are not, but experience dictates that sexual assaults on young people are not confined to assaults by those who are required to perform intimate tasks for, or with a child. Such assaults are usually associated with the wrongful exercise of power over a child which is power derived from the holding of some place of authority (as parent, carer, religious or other leader) and is often preceded by a period of cultivation or grooming of the child. The opportunity for such conduct by a teacher is obviously provided by the role that is central to the teacher's task – of guiding and leading the child, both by example and otherwise, through the journey of learning.

217 It is particularly instructive to consider the analysis which McLachlin J made of risk in *Bazley*. Two key points in that analysis were: first[233], that "[a]s the opportunity for abuse becomes greater, so the risk of harm increases" and, secondly[234], "the more an enterprise requires the exercise of power or authority for its successful operation, the more materially likely it is that an abuse of that power relationship can be fairly ascribed to the employer". If those are the key points to be considered in examining relevant risks, it would seem that a test which is cast in terms of creating or enhancing the risk of sexual assault leads inexorably to a conclusion that a school authority will always be vicariously liable for sexual assault by a teacher if the assault occurs on school premises or during school hours. That is a large conclusion. But in every school, teachers exercise power or authority, and in every school, no matter what may be the duties of the teachers, there is the opportunity for abuse, no matter whether the duties which the teacher is required to perform will inevitably require intimate contact with the child.

218 Analysis by reference to risk in this way gives no significance to three facts. First, the conduct of which complaint is made is intentional conduct by the employee. Secondly, the conduct directly contravenes the contract of employment and is contrary to the very core of the task for which a teacher is employed. Thirdly, the teacher is not deterred from engaging in it by the sanctions of the criminal law.

---

233 [1999] 2 SCR 534 at 561 [43].

234 [1999] 2 SCR 534 at 562 [44].

219 If the criminal law will not deter the wrongdoer there seems little deterrent value in holding the employer of the offender liable in damages for the assault committed. It might be said that it may encourage more careful selection of teachers, or better systems of work, in which the opportunities for misconduct are reduced in some way, but at best these must be seen as speculative and remote results. After all, the hypothesis for the debate is that the particular school authority has not itself been negligent, whether in selection or supervision of its staff. But, consistent with the fundamental nature of vicarious liability as a liability imposed where there is no fault by the employer, it may well be said that these considerations do not weigh heavily in the debate. For the purposes of argument it may, therefore, have to be assumed that to impose vicarious liability might possibly advance, in some indirect way, some deterrent or prophylactic purpose. If such an assumption must be made, it is one to which little significance can be given.

220 That is not the case with the other matters we have mentioned – that there has been an intentional act by the employee in breach of the contract of employment and wholly contrary to the core of the task for which the teacher is employed. Here Pollock's insight into the place to be given in vicarious liability to the notion of course of employment becomes critically important. If a basis for imposing vicarious liability on an employer is that the employer should be liable as the person who creates the enterprise or the circumstances out of which the risk and damage emerges, it is an essential step in establishing vicarious liability to show that the risk and damage occurred in the course of employment. As we have said, that requirement is not an artificial limitation imposed for reasons extraneous to the principle which supports the finding of liability; it is an integral part of the definition of the liability.

221 Conducting any enterprise carries with it a variety of risks. The paradigm kind of risk of which Pollock spoke was the risk that an employee, setting out on the employer's business, carried out a task carelessly and injured a third party. By contrast, if the employee, in the course of an activity wholly divorced from the conduct of the employer's business, happened to cause injury to another, the employer was not to be held liable even if the injury happened during work hours or in the workplace. The risk, for the occurrence of which the employer was to be held liable, was, therefore, the risk of injury caused by an employee in pursuing the *employer's* venture.

222 The analysis made in *Bazley* is founded in the general proposition that those who conduct a business or other venture, and employ staff for that purpose, receive the benefits of the enterprise and should therefore also bear its burdens. Where the analysis made in *Bazley* departs from the proposition identified by Pollock is that the risks to be considered are not confined to those risks which

attend the *furtherance* of the venture but include the risks of conduct that is directly antithetical to those aims.

223 An approach not fundamentally different from *Bazley* has been adopted in some American jurisdictions where employers have been held vicariously liable for sexual assaults occurring as a result of authority or power given to the employee by the employment[235]. However, reference to the risk of wrongdoing carries with it a danger in this context that must be recognised. A wrongful act is alleged to have occurred. The risk has come to pass. It follows that an inquiry about the risk of a venture may, in the end, become an inquiry into whether, but for the attributes of the employment (control, authority, trust, access to persons or premises), the wrongful act could have occurred. If the act could not have occurred but for the employment, it will be said that the employer should be held to be vicariously liable because the employer should bear the burden of the risk of wrongdoing[236]. The inquiry would be about *how* the wrongdoer carried out the wrong, regardless of what he or she was employed to do. To adopt this approach would represent a radical departure from what hitherto has been accepted as an essential aspect of the rules about vicarious liability: the requirement that the wrongdoing be legally characterised as having been done in the course of employment.

Duty of care owed by the school authority?

224 Analysis by reference to risk may also obscure the importance of considering questions of that kind when deciding whether the school authority, or other employer, has itself breached a duty of care owed to the injured person. If the school authority should reasonably have taken steps to prevent the abuse of a pupil, because "the magnitude of the risk [of abuse] and the degree of the probability of its occurrence, along with the expense, difficulty and inconvenience of taking alleviating action and any other conflicting responsibilities which the defendant may have"[237] were such as reasonably to require response, orthodox principles of negligence would be engaged. No doubt

---

235 See, for example, *Mary M v City of Los Angeles* 814 P 2d 1341 (1991); *Applewhite v City of Baton Rouge* 380 So 2d 119 (1979); cf *White v County of Orange* 212 Cal Rptr 493 (1985) all of which are cases of sexual assault by police officers. See also *John R v Oakland Unified School District* 769 P 2d 948 (1989); *Jeffrey E v Central Baptist Church* 243 Cal Rptr 128 (1988).

236 Ingram, "Liability of a Principal for Fraud or Abuse of Position by an Agent", (1995) 17 *Whittier Law Review* 85 at 104.

237 *Wyong Shire Council v Shirt* (1980) 146 CLR 40 at 47-48 per Mason J.

it would be necessary to take account of what, at the time of an alleged assault, was reasonably known to a school authority about such matters. To transfer considerations of risk in the sense just identified to the field of vicarious liability does not assist the proper development of that field.

The "course of employment" and intentional torts

225 The difficulties to which the concept of course of employment has given rise in connection with vicarious liability are well known. As with other legal elements of vicarious liability[238], the expression does not necessarily display its legal content by its semantic meaning. Contrary to what the phrase "course of employment" might be thought to mean, it may include within its reach some acts done by an employee in direct contravention of explicit and binding directions given to that employee by the employer. It may also include within its reach some acts that are contrary to law. Thus no one doubts that the employer who instructs an employee driver to drive within the road rules will be vicariously responsible if, contrary to that instruction, the employee speeds and causes injury to a third party. Why is that employee's conduct within the course of employment?

226 Analysis of the concept of course of employment has often stopped with a bare recitation of Salmond's propositions[239] – that an act is done in the course of employment if it is a wrongful act authorised by the employer, or a wrongful and unauthorised mode of doing an authorised act[240]. The notion of an unauthorised mode of doing an authorised act has evident difficulties in application. Especially is that so when the conduct of which complaint is made is, as in these cases, the commission of a criminal offence.

227 It may be thought that the search for underlying principles which would give more precise content to the idea of "course of employment" in its application to intentional torts is not greatly assisted by identifying negative propositions. Even so, it is necessary to begin by noticing three of those negative propositions.

228 First, *Deatons Pty Ltd v Flew*[241] establishes that the fact that an intentional tort is committed by an employee while at work and during ordinary working

---

238 *Hollis* (2001) 207 CLR 21 at 38 [36].

239 Salmond, *Law of Torts*, 1st ed (1907) at 83.

240 See, for example, *Canadian Pacific Railway Co v Lockhart* [1942] AC 591 at 599.

241 (1949) 79 CLR 370.

hours will not always suffice to establish vicarious liability. Secondly, the fact that the conduct of which complaint is made constitutes a breach of the law may not suffice to deny vicarious liability. *Lloyd v Grace, Smith & Co*[242] and *Morris v C W Martin & Sons Ltd*[243] are often cited in this regard[244]. *Lloyd* also supports a third proposition. This is that the circumstance that the employee who practises a fraud upon a third party does so for the benefit of the employee not the employer, is no answer to the liability of the employer if the employer, whilst not authorising "the particular act", has placed the employee in a position "to do that class of acts"; the employer then "must be answerable for the manner in which that [employee] has conducted himself"[245].

229 It is important to recognise the tension between these propositions. The reference to "class of acts" posits a necessarily imprecise criterion of liability but what is involved is indicated by the statement of Gavan Duffy CJ and Starke J in *Colonial Mutual Life Assurance Society Ltd v Producers and Citizens Co-operative Assurance Co of Australia Ltd*[246]:

> "The class of acts which [the employee] was employed to do necessarily involved the use of arguments and statements for the purpose of persuading the public to effect policies of insurance with the defendant, and in pursuing that purpose he was authorized to speak, and in fact spoke, with the voice of the defendant. Consequently the defendant is liable for defamatory statements made by [the employee] in the course of his canvass, though contrary to its direction."

230 The barmaid in *Deatons*, who threw a glass at a patron, committed an assault for which the employer was held not to be vicariously liable. The assault was held not to have been committed in the course of her employment. By contrast, in *Lloyd*, the employer of a solicitor's clerk was held vicariously liable

---

242 [1912] AC 716.

243 [1966] 1 QB 716. See also *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827.

244 See, for example, *Lister* [2002] 1 AC 215 at 224 [17] and 225-226 [19] per Lord Steyn.

245 *Lloyd v Grace, Smith & Co* [1912] AC 716 at 733 per Lord Macnaghten, adopting the statement of Willes J in *Barwick v English Joint Stock Bank* (1867) LR 2 Ex 259 at 266.

246 (1931) 46 CLR 41 at 47. See also *Bonette v Woolworths Ltd* (1937) 37 SR (NSW) 142 at 149-151 per Jordan CJ.

when the clerk fraudulently conveyed real property to himself rather than in accordance with the client's instructions. The fraud was found to have been committed in the course of the clerk's employment. What is it that distinguishes the conduct of the fraudulent clerk in *Lloyd* from the conduct of the barmaid in *Deatons*?

231 The answer given by Dixon J, in *Deatons*[247], was that the barmaid's action was not

> "a negligent or improper act, due to error or ill judgment, but done in the supposed furtherance of the master's interests. Nor [was] it one of those wrongful acts done for the servant's own benefit for which the master is liable when they are acts to which the ostensible performance of his master's work gives occasion or which are committed under cover of the authority the servant is held out as possessing or of the position in which he is placed as a representative of his master (see *Lloyd v Grace, Smith & Co*[248]; *Uxbridge Permanent Benefit Building Society v Pickard*[249])."

It may be doubted that what Dixon J said was intended to describe exhaustively all the circumstances which would attract vicarious liability. The statement was made in connection with a claim that an employer was vicariously liable for an *intentional* tort. Nonetheless, there are two elements revealed by what his Honour said that are important for present purposes. First, vicarious liability may exist if the wrongful act is done in *intended pursuit* of the employer's interests or in *intended performance* of the contract of employment. Secondly, vicarious liability may be imposed where the wrongful act is done in *ostensible pursuit* of the employer's business or in the *apparent execution of authority* which the employer holds out the employee as having.

232 What unites those elements is the identification of what the employee is actually employed to do or is held out by the employer as being employed to do. It is the identification of what the employee was actually employed to do and held out as being employed to do that is central to any inquiry about course of employment. Sometimes light may be shed on that central question by looking at a subsidiary question of who stood to benefit from the employee's conduct[250]. But that inquiry must not be permitted to divert attention from the more basic

---

247 (1949) 79 CLR 370 at 381.

248 [1912] AC 716.

249 [1939] 2 KB 248.

250 *Barwick v English Joint Stock Bank* (1867) LR 2 Ex 259 at 265 per Willes J.

question we have identified. That is why, in *Lloyd*, Lord Macnaghten rejected[251] the proposition that actual or intended benefit to the employer was a necessary condition of vicarious liability. Rather, in *Lloyd*, the determinative finding was, as we have noted earlier, that the fraudulent clerk was authorised by his employer to act for the firm in a class of matters including the conveyancing transactions which Emily Lloyd instructed him to effect. At trial Scrutton J had found that it was within the scope of the clerk's employment to advise clients like Mrs Lloyd who came to the firm to sell property "as to the best legal way to do it, and the necessary documents to execute"[252]. The fraud was held to have been committed in the course of that employment[253].

233 By contrast, in *Deatons*, the barmaid who threw the glass did so in retaliation for a blow and an insult, not in self-defence and not in any way in the supposed furtherance of the employer's interests (whether in keeping order in the bar or otherwise)[254]. Nor, unlike *Lloyd*, was it a case where the act done was one to which the ostensible performance of the employer's work gave occasion, or which was committed under cover of the authority the employee was held out as possessing, or of the position in which the employee was placed as representative of the employer[255].

234 Many cases in which it is sought to hold an employer vicariously liable for the intentional tort of an employee can be determined by reference to the first of these elements. The act of which complaint is made can be seen to have been done in the intended performance of the task which the employee was employed to perform. Cases of excessive punishment by a teacher may fall within this category. So too will many cases where a store detective wrongfully arrests and detains a person or in that process assaults them. No doubt the examples could be multiplied.

235 That kind of analysis is not available in cases of fraud. The commission of a fraud can seldom be said to have been in the intended performance of the employee's duties. In those cases, however, it will often be the case that what was done by the employee was done in the apparent execution of authority actually, or ostensibly, given to the employee by the employer. *Dubai*

---

251 [1912] AC 716 at 732.

252 *Lloyd v Grace, Smith & Co* [1911] 2 KB 489 at 494.

253 [1912] AC 716 at 730.

254 (1949) 79 CLR 370 at 381 per Dixon J.

255 *Deatons Pty Ltd v Flew* (1949) CLR 370 at 381 per Dixon J.

Aluminium[256] may be understood as being a case of this kind. Very often, however, such cases will yield to simpler analysis. The employer may be in direct breach of an obligation owed to the person who has been defrauded. That obligation may arise from a contract between the employer and the person who has been defrauded: a contract which can be seen as having been made by the fraudster on behalf of the employer. Or the obligation may be proprietary in nature as will often be the case where money or other property is to be held in trust for the person defrauded.

236 Other direct obligations may be relevant. In *Morris*, there had been a bailment of goods. It was for the employer to demonstrate that its inability to return them in good order was not due to fault on its part. It may be doubted that it could have done so.

237 In his note in the *Law Quarterly Review* about *Lloyd*[257] Pollock pointed out that the solicitor was bound to attend to his client's work personally or if he delegated it, to supervise that work. That being so, the solicitor was in breach of his contract of retainer by not supervising the work of the fraudulent clerk[258]. Emily Lloyd could, therefore, have recovered on that basis. Moreover, having held out the clerk as authorised to act on his behalf, it may be that the solicitor was estopped from denying that what was done was authorised[259]. That was the preferred basis upon which, in *Lloyd*, Vaughan Williams LJ had placed his dissenting judgment in the Court of Appeal[260].

238 It may be, therefore, that extending vicarious liability to cases where the intentional conduct of which complaint is made was done in ostensible pursuit of the employer's business, or in the apparent execution of authority which the employer held out the employee as having, was an unnecessary extension of the concept of course of employment. It may also be that the content of concepts of ostensible pursuit and apparent execution of ostensible authority depends upon, or at least runs parallel with, whether a simpler basis of liability can be identified

---

256 [2002] 3 WLR 1913; [2003] 1 All ER 97.

257 (1913) 29 *Law Quarterly Review* 10.

258 Stoljar, "The Servant's Course of Employment", (1949) 12 *Modern Law Review* 44 at 58.

259 Stoljar, "The Servant's Course of Employment", (1949) 12 *Modern Law Review* 44 at 58.

260 *Lloyd v Grace, Smith & Co* [1911] 2 KB 489 at 506.

in the fashion of the examples given. Those are questions which may require further consideration in cases which raise the issue.

239 For present purposes, it is enough to conclude that when an employer is alleged to be vicariously liable for the intentional tort of an employee, recovery against the employer on that basis should not be extended beyond the two kinds of case identified by Dixon J in *Deatons*: first, where the conduct of which complaint is made was done in the intended pursuit of the employer's interests or in the intended performance of the contract of employment or, secondly, where the conduct of which complaint is made was done in the ostensible pursuit of the employer's business or the apparent execution of the authority which the employer held out the employee as having.

The present cases

240 To hold a school authority, be it government or private, vicariously liable for sexual assault on a pupil by a teacher would ordinarily give the victim of that assault a far better prospect of obtaining payment of the damages awarded for the assault than the victim would have against the teacher. But the party to pay those damages, the school authority, would itself have committed no wrong. And in no sense could it be said that the commission of the assault was an act done in furtherance of the aims of the school authority or as a result of its pursuing those aims by establishing the school concerned and employing its staff.

241 The deliberate sexual assault on a pupil is not some unintended by-product of performance of the teacher's task, no matter whether that task requires some intimate contact with the child or not. It is a predatory abuse of the teacher's authority in deliberate breach of a core element of the contract of employment. Unlike the dishonest clerk in *Lloyd*, or the dishonest employee in *Morris*, the teacher has no actual or apparent authority to do any of the things that constitute the wrong. In *Lloyd*, the clerk had, and was held out as having, authority to act in conveying the property which Emily Lloyd had and which he took to his own use; in *Morris*, the employee had authority to receive the garment that he stole. When a teacher sexually assaults a pupil, the teacher has not the slightest semblance of proper authority to touch the pupil in that way.

242 The rules governing vicarious liability exhibit the difficulty they do because they have been extended and applied as a matter of policy rather than principle. In the present cases the chief reason for holding the State responsible would be to give the appellants a deep-pocket defendant to sue. That is not reason enough in a case where the conduct of which they complain was contrary to a core element of the teacher's contract of employment. So to hold would strip any content from the concept of course of employment and replace it with a simple requirement that the wrongful act be committed by an employee.

243 The wrongful acts of the teacher in these cases were not done in the intended pursuit of the interests of the State in conducting the particular school or the education system more generally. They were not done in intended performance of the contract of employment. Nor were they done in the ostensible pursuit of the interests of the State in conducting the school or the education system. Though the acts were, no doubt, done in abuse of the teacher's authority over the appellants, they were not done in the *apparent* execution of any authority he had. He had no authority to assault the appellants. What was done was not in the guise of any conduct in which a teacher might be thought to be authorised to engage.

244 If the present pleadings reveal no arguable cause of action, leave to replead to allege vicarious liability of the State should have been refused. Should the present pleadings be struck out? Are the plaintiffs' claims, as they are now framed, arguable?

The duty alleged

245 In each case, the plaintiff alleged that the State owed her what is usually referred to as a non-delegable duty. The form in which it was expressed in the pleading, that the State owed the plaintiff a duty to ensure that reasonable care was taken of her when at the school, was evidently based on what was said by Mason J in *The Commonwealth v Introvigne*[261]. It is a formulation of the duty that may be understood in two radically different ways. Is the focus of the last phrase "reasonable care was taken of her" upon the *reasonableness of the conduct* of the person who is caring for the pupil or is it upon *the condition of the child* continuing to be in a state consistent with reasonable care? That is, the duty might be understood as a duty to ensure that those who have the care of the child act without negligence. Alternatively, it might be understood as a duty to ensure that the child is kept reasonably carefully and is, therefore, not harmed by *any* act or omission of those who actually have charge of the child. The distinction between the two ways in which the duty is understood is fundamental, but at times in the course of argument there appeared to be an elision of the two.

246 As the reasons of other members of the Court demonstrate, identifying the ratio decidendi of *Introvigne* may be difficult[262]. Further, as Mason J pointed out in his reasons in *Introvigne*[263], "[t]he concept of personal duty, performance of

---

261 (1982) 150 CLR 258 at 269-270.

262 See also *Lepore v State of New South Wales* (2001) 52 NSWLR 420 at 439-440 [99] per Heydon JA.

263 (1982) 150 CLR 258 at 270.

which is incapable of delegation, has been strongly criticised". Explanations have been given in this Court of cases decided on the basis of non-delegable duties, notably by Mason J in *Kondis v State Transport Authority*[264], and this explanation was accepted in the joint judgment in *Burnie Port Authority v General Jones Pty Ltd*[265]. No party suggested we should reconsider these cases. However, the doctrinal strength of the explanations of the cases has been questioned[266]. 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[267]:

> "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."

247 The foregoing suggests the need for considerable caution in developing any new species of this genus of liability. In the present appeals it is as well to begin by considering how the concept of a non-delegable duty emerged.

The origins of non-delegable duties

248 Non-delegable duty is a concept which traces its roots to Lord Blackburn's statement in *Dalton v Angus*[268] that "a person causing something to be done, the doing of which casts on him a duty, cannot escape from the responsibility attaching on him of seeing that duty performed by delegating it to a contractor". The statement was made in the context of a claim by a land owner for damages caused by removal of support from adjoining land. Lord Blackburn acknowledged that, since *Quarman v Burnett*[269], it was settled law that a person was vicariously liable for the negligence of a servant, but not for the negligence of an independent contractor. But where, as is the case with the obligation of one

---

264 (1984) 154 CLR 672 at 687.

265 (1994) 179 CLR 520 at 550-552.

266 *Scott v Davis* (2000) 204 CLR 333 at 416-417 [248].

267 *Prosser and Keeton on Torts*, 5th ed (1984) at 512.

268 (1881) 6 App Cas 740 at 829; see also *Tarry v Ashton* (1876) 1 QBD 314 at 319; *Hughes v Percival* (1883) 8 App Cas 443 at 446.

269 (1840) 6 M & W 499 [151 ER 509].

land owner not to withdraw lateral support from adjoining land, the duty is to ensure a result, it was held to be no excuse to say that the person who removed the support was not a servant of the owner but an independent contractor. That is a conclusion that turns on the nature of the duty in question rather than upon any distinction between responsibility for servants and responsibility for independent contractors.

249 Further, it is a conclusion that reflects the particular context in which it was expressed. As was said in the earlier decision of *Bower v Peate*[270] (referred to in *Dalton v Angus*), the answer to the contention that the land owner was not liable because he had delegated the task of excavation to an independent contractor could be placed on a broader ground, namely:

> "that a man who orders a work to be executed, from which, in the natural course of things, injurious consequences to his neighbour must be expected to arise, unless means are adopted by which such consequences may be prevented, is bound to see to the doing of that which is necessary to prevent the mischief, and cannot relieve himself of his responsibility by employing some one else … to do what is necessary to prevent the act he has ordered to be done from becoming wrongful."

The subsequent application of Lord Blackburn's dictum to cases where the duty was to act with reasonable care, and where injury was not obvious and inevitable if care was not taken was, therefore, to apply it to a very different class of case. The taking of that step (unlike the injurious consequences mentioned in *Bower v Peate*) was by no means inevitable. Applying Lord Blackburn's dictum in this different context transformed a duty to act carefully into a duty to achieve a particular result.

250 The step was taken to avoid the doctrine of common employment, a doctrine long since abolished in Australia. But for this, or some other device, an employee's claim seeking to hold the employer vicariously liable for the negligence of a fellow employee would have been defeated by that doctrine.

251 In *Wilsons and Clyde Coal Co v English*[271], it was held that the obligation of an employer to provide a safe place, staff, and system of work "is fulfilled by the exercise of due care and skill. But it is not fulfilled by entrusting its fulfilment *to employees*, even though selected with due care and skill" (emphasis added). Accordingly, an employer was held liable to an employee injured as a

---

270 (1876) 1 QBD 321 at 326.

271 [1938] AC 57 at 78 per Lord Wright.

result of the negligence of a fellow employee. Due care and skill had not been exercised by the employee, and it was held that the employer's duty to exercise due care and skill was not fulfilled by choosing employees carefully. But for the doctrine of common employment, the same result could have followed from the application of orthodox principles of vicarious liability.

252 Then, in *Paine v Colne Valley Electricity Supply Co Ltd*[272], the liability of the employer was further extended: from being liable where an employee's negligence caused injury to another employee, to being liable for the negligence of an independent contractor. The doctrine of common employment did not intrude in any way in this case. The device which had been adopted to avoid the doctrine of common employment was extended to a case where its application was not necessary to avoid what was seen as the unjust consequences of that doctrine. The liability that was imposed was described as "personal" as distinct from vicarious. Yet the employer was not shown to have failed in any way and was being held liable because another person, for whom the employer would not ordinarily be vicariously responsible, had been negligent. As Professor Glanville Williams was later to say[273], a desired result was reached "by devious reasoning and the fictitious use of language".

253 The language of non-delegable duty was then taken up in relation to hospitals. The difficulties in identifying those for whose negligence a hospital should be vicariously responsible, revealed as early as *Hillyer v Governors of St Bartholomew's Hospital*[274], were avoided by describing the duty owed by a hospital to its patient as non-delegable[275]. It was sought to anchor this development, too, in Lord Blackburn's proposition[276] that a person fixed with a duty cannot escape responsibility by delegating its performance[277].

---

272 [1938] 4 All ER 803.

273 Glanville Williams, "Liability for Independent Contractors", (1956) *Cambridge Law Journal* 180 at 190.

274 [1909] 2 KB 820.

275 *Cassidy v Ministry of Health* [1951] 2 KB 343 at 362-363 per Denning LJ.

276 *Dalton v Angus* (1881) 6 App Cas 740 at 829.

277 *Cassidy* [1951] 2 KB 343 at 363 per Denning LJ.

Non-delegable duties in this Court

254 In this Court, the concept of a non-delegable duty of care has been considered in detail in *Introvigne*, *Kondis*[278] and in the joint reasons of five members of the Court in *Burnie Port Authority*[279]. As was said[280] in *Burnie Port Authority*, "[i]t has long been recognized that there are certain categories of case in which a duty to take reasonable care to avoid a foreseeable risk of injury to another will not be discharged merely by the employment of a qualified and ostensibly competent independent contractor" or, we would add, a qualified and ostensibly competent employee. Their Honours went on to say that[281]:

> "In those categories of case, the nature of the relationship of proximity gives rise to a duty of care of a special and 'more stringent' kind, namely a 'duty to ensure that reasonable care is taken'[282]. Put differently, the requirement of reasonable care in those categories of case extends to seeing that care is taken."

255 Several categories of cases in which the duty to take reasonable care is non-delegable were identified by Mason J in *Kondis*[283] – adjoining owners of land in relation to work threatening support or common walls; master and servant in relation to a safe system of work; hospital and patient; school authority and pupil; and (arguably) occupier and invitee. Each is identified as a relationship in which the person owing the duty either has the care, supervision or control of the other person or has assumed a particular responsibility for the safety of that person or that person's property[284]. It is not suggested, however, that all relationships which display these characteristics necessarily import a non-delegable duty.

---

278 (1984) 154 CLR 672.

279 (1994) 179 CLR 520 at 550 per Mason CJ, Deane, Dawson, Toohey and Gaudron JJ.

280 (1994) 179 CLR 520 at 550.

281 (1994) 179 CLR 520 at 550.

282 See *Kondis v State Transport Authority* (1984) 154 CLR 672 at 686.

283 (1984) 154 CLR 672 at 679-687. See also *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16 at 44 per Wilson and Dawson JJ; *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520 at 550.

284 *Kondis* (1984) 154 CLR 672 at 687; *Burnie Port Authority* (1994) 179 CLR 520 at 550-551.

256 What can safely be said is that all of the cases in which non-delegable duties have been considered in this Court have been cases in which the plaintiff has been injured as a result of negligence. The question has been whether a person other than the person who was negligent was to be held liable to the injured plaintiff for the damage thus sustained. In *Kondis*, the employer was held responsible; in *Introvigne*, the Commonwealth was held liable as the school authority in the Australian Capital Territory at the time. In the present cases, however, the question is different. Neither plaintiff suffered injury as a result of any *negligent* conduct of the teacher. It is not suggested that the State, as school authority, failed to act with reasonable care in selecting or supervising the teacher concerned. Rather, it is said that the liability of the State (as school authority) under its non-delegable duty extends to injury caused by *deliberate* criminal conduct of a teacher constituting a trespass to the person of the plaintiff.

The ambit of a non-delegable duty to take reasonable care

257 A duty to ensure that reasonable care is taken is a strict liability. There is a breach of the duty if reasonable care is not taken, regardless of whether the party that owes the duty has itself acted carefully. Not only is the liability strict, it can be seen to be a species of vicarious responsibility. Employers, hospitals, school authorities, all of whom owe a non-delegable duty, will be held liable for the negligence of others who are engaged to perform the task of care for a third party – no matter whether the person engaged to provide the care is a servant or an independent contractor.

258 The early English cases, which first identified non-delegable duties to ensure that reasonable care was taken, offered no reason for departing from the generally accepted rule that a person was not liable for an accident that occurred without the fault either of that person or of a servant in the course of employment. Lord Blackburn's often quoted proposition, about not escaping responsibility by engagement of a contractor, if applied to cases of duties to act carefully as distinct from duties to achieve a particular result, proffers no basis for what appears to be the resulting conflation of two distinct propositions – one about personal responsibility to see that a duty is performed and the other about vicarious responsibility for the negligent performance of the task. At best, when applied in the context of duties to act carefully, the proposition appears to be the assertion of a conclusion about responsibility, rather than any demonstration of a reason for reaching that conclusion. That being so, its citation offers no certain basis for defining the breadth of the proposition that it is intended to state.

259 The duty of an employer to provide a safe place and system of work and a safe staff is said to be non-delegable because "the employee's safety is in the

hands of the employer" and because "[t]he employee can reasonably expect … that reasonable care and skill will be taken"[285]. In the case of a school authority, it is said[286] that it is "the immaturity and inexperience of the children and their propensity for mischief that lie at the basis of the special responsibility which the law imposes on a school authority to take care for their safety". In each of these cases (and in other cases where non-delegable duties have been imposed) there is the common thread, identified in *Burnie Port Authority*[287], of an undertaking of care, supervision or control of another.

260 Two considerations identified by Pollock in connection with vicarious liability are seen to apply to these kinds of case. First, the person upon whom the duty is cast has chosen to undertake the venture in the course of which the plaintiff suffers injury. Secondly, to impose a duty upon the person who undertakes the venture may, in at least some cases, induce more careful conduct of that or similar ventures. No less importantly, a third feature identified by Pollock, namely, the course of employment, or the course of the venture, is an essential foundation for the duty that is imposed on the person who undertakes the care, supervision or control of another. That person owes the non-delegable duty to ensure that reasonable care is taken because that person has undertaken the care, supervision or control of another. The injury that is sustained is suffered because the care, supervision or control is inadequate. It is, for that reason, an injury suffered in the course of the venture undertaken by the employer, the hospital, the school authority.

261 None of the considerations we have mentioned suggests that the person upon whom the duty is cast should be the insurer of those to whom the duty is owed. The duty that is identified is imposed on a person in relation to a particular kind of activity – employing others in some business or other venture, conducting a school or hospital. The duty concerns the *conduct* of that activity. It is not a duty to preserve against any and every harm that befalls someone while that activity is being conducted.

262 Two examples may suffice to make good that point. Is a school authority to be held liable if, without any negligence on the part of it or its employees or contractors, a child is injured on school premises, during school hours, when the child stumbles and falls in the perfectly maintained and supervised school yard?

---

285 *Kondis* (1984) 154 CLR 672 at 688.

286 *Kondis* (1984) 154 CLR 672 at 686; *The Commonwealth v Introvigne* (1982) 150 CLR 258 at 271.

287 (1994) 179 CLR 520 at 551.

Is the authority to be held liable if, without negligence on the part of it, or its employees or contractors, a child is struck and injured by a bottle thrown into the school yard by a passer-by?

263 In each case the answer "no" should be given. In neither case was there any want of care by the authority; the authority did not fail to see that any person whom it employed or engaged to care for the pupil acted with reasonable care towards that pupil. That is, in neither case was there *any* default by the authority or any person to whom it delegated its task of caring for the pupil. Yet, as was pointed out earlier in these reasons, it might be said that, the child having been hurt, the authority did not ensure the result that no harm befell the pupil.

Should the ambit of the non-delegable duty be extended?

264 What is the result which those who owe a non-delegable duty must bring about? Is it absence of any kind of default by those who have the care, control or supervision of another? Is it absence of negligence by those persons? Is it absence of harm to the person concerned?

265 Hitherto the duty has been understood to be that the party having the care, supervision or control of others will itself act with reasonable care and will ensure that all others to whom it delegates that task, whether as servant or as independent contractor, act with reasonable care. If the delegate acts without reasonable care, the party who owes the duty is held liable. It is said that the party has not performed its duty to take reasonable care of the person and to ensure that reasonable care is taken. That understanding of the duty should not be extended to include responsibility for intentional defaults by delegates.

266 First, to hold that a non-delegable duty of care requires the party concerned to ensure that there is no default of any kind committed by those to whom care of the plaintiff is entrusted would remove the duty altogether from any connection with the law of negligence. No longer would the duty of the employer, the hospital, the school authority, be in any sense a duty to take reasonable care for the safety of the employee, the patient, the pupil. It would be a duty to bring about a result that no person (employee or independent contractor) who was engaged to take steps connected with the care of the plaintiff did anything to harm the plaintiff. This would introduce a new and wider form of strict liability to prevent harm, a step sharply at odds with the trend of decisions in this Court rejecting the expansion of strict liabilities[288]. It would sever the duty from its roots in the law of negligence. It would make the employer (the hospital, the school authority) an insurer of the employee (the

---

288 *Scott v Davis* (2000) 204 CLR 333 at 417-418 [250] per Gummow J.

patient, the pupil) against any harm done by any person engaged by the former to care for the latter.

267 Secondly, it would remove any need to consider whether the party concerned could or should have done something to avoid the harm. In the present cases, there is no allegation that the State failed to act with reasonable care in selecting and supervising teachers. Yet much of the argument in support of extending a non-delegable duty or imposing vicarious liability failed to give due weight to this fact. The unstated premise for the argument appeared, at times, to be that the State should be held responsible because it could and should have averted the injuries that were done to these appellants. Yet it is not suggested that the State was itself negligent in its choice or supervision of teachers. That being so, any deterrent or prophylactic effect that might be said to follow from extending the non-delegable duty of care of a school authority to include liability for intentional trespasses committed by teachers would, at best, be indirect.

268 An allegation of negligence in choice or supervision of teachers, if made, would have required careful attention to matters like the extent to which, at the time of the assaults, school authorities could reasonably have known of the prevalence of such assaults. It would be wrong to ignore the fact that awareness of the risk of sexual assaults on young people by those having authority over them has grown over recent years. It is, however, not necessary to decide what steps it would have been reasonable for a school authority to take in the 1960s, when these assaults occurred, or the steps it would now be reasonable for such an authority to take.

269 Thirdly, and no less importantly, extending a non-delegable duty of care, in the way for which the appellants contend, would give no room for any operation of orthodox doctrines of vicarious liability. It would be irrelevant to consider whether the party under the duty could or should be held vicariously liable for the defaults of the persons whose conduct caused the injury of which the plaintiff complains. Despite the difficulties that attend the content and application of principles of vicarious liability, it would distort the proper development of that aspect of the law to extend non-delegable duties in this way. It would do this by shifting the focus of attention away from an explicit consideration of whether vicarious liability should be imposed for certain kinds of intentional wrongdoing, to a discussion of the applicability of unusual principles intended to be a particular extension of ordinary negligence principles in certain limited circumstances.

270 As *Williams v Milotin*[289] makes plain, negligently inflicted injury to the person can, in at least some circumstances, be pleaded as trespass to the person, but the intentional infliction of harm cannot be pleaded as negligence[290]. The appellants allege intentional trespasses to the person, not negligence. The appellants' claims founded on an allegation of a non-delegable duty to ensure that care was taken of them are, therefore, bound to fail.

271 Each appeal should be dismissed with costs.

---

289 (1957) 97 CLR 465 at 470.

290 See also *Cousins v Wilson* [1994] 1 NZLR 463 at 468.

272 KIRBY J. In *Lister v Hesley Hall Ltd*[291], the House of Lords held that, as a matter of legal principle, in the circumstances of the case, a school was liable for the acts of an employee who had sexually abused children at the school. It was responsible for the wrongs done to the children and for the damage that they had suffered. In reaching their unanimous opinion to this effect, their Lordships were influenced by the approach taken by the Supreme Court of Canada to a similar question[292]. In that Court, in *Bazley v Curry*[293], the liability of the employer of a childcare counsellor, working in a residential home for children with behavioural disorders, was unanimously confirmed in respect of the wrongs done to, and damage suffered by, a child who was sexually abused by the employee.

273 The English and Canadian decisions are recent ones. The Canadian decision of *Bazley* was recently noticed and approved by this Court in another context[294]. There are some differences between the reasoning adopted in England and in Canada[295]. But there are also common elements to the decisions – most especially, each court adopted the guiding principle that the employer of the abusing employee, although itself without fault, would be treated by the law as vicariously liable to an abused child if a sufficiently "close connection" were shown between the employer's enterprise and the tortious conduct of the employee[296].

274 In coming to the conclusions that they respectively did, the English and Canadian courts challenged a number of legal assumptions that underlay the

---

291 [2002] 1 AC 215.

292 Lord Steyn, in the leading speech (with which Lord Hutton agreed at 238 [52]), described the judgments of the Supreme Court of Canada in *Bazley v Curry* [1999] 2 SCR 534 and *Jacobi v Griffiths* [1999] 2 SCR 570 as the "starting point" for future consideration of these problems "in the common law world": see *Lister* [2002] 1 AC 215 at 230 [27], see also at 236-237 [48]-[49] per Lord Clyde, 245 [70] per Lord Millett; cf at 242 [60] per Lord Hobhouse of Woodborough.

293 [1999] 2 SCR 534.

294 In *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21 at 39-40 [41]-[42].

295 Giliker, "Rough Justice in an Unjust World", (2002) 65 *Modern Law Review* 269 at 276-278; Feldthusen, "Vicarious Liability for Sexual Abuse", (2001) 9 *Tort Law Review* 173 at 178.

296 See *Bazley v Curry* [1999] 2 SCR 534 at 548-549 [22], 556-559 [36]-[40]; cf *Lister* [2002] 1 AC 215 at 229-230 [25] per Lord Steyn (with whom Lord Hutton agreed at 238 [52]), 236-237 [48] per Lord Clyde, 243-244 [65] per Lord Millett; cf at 241-242 [59]-[60] per Lord Hobhouse of Woodborough.

opposite opinion. The House of Lords was obliged not only to reverse the English Court of Appeal in the decision before it but also to overrule an earlier decision of that Court in *Trotman v North Yorkshire County Council*[297]. So too the Canadian court reversed a line of authority in that country, such as *McDonald v Mombourquette*[298] and *Boudreau v Jacob*[299].

275 In taking the course that they did, the highest courts in the United Kingdom and Canada did not regard themselves as departing from the basic doctrines of the common law. Instead, they viewed their conclusions as a clarification, and application, of those doctrines in the context of a significant new problem which called forth a fresh examination of past decisional authority[300].

276 The new problem is the increase in the reported instances of physical and sexual assaults upon children by employees of organisations to whose care the parents and guardians of the children have entrusted them[301]. That problem is not confined to the United Kingdom and Canada. It exists also in Australia. Therefore, the central question presented by these appeals is whether the common law of Australia, re-examined in these proceedings, affords effective civil remedies to children who are damaged by an employee of an organisation in whose care they are placed. Or whether such claims fall outside the categories of liability recognised by the common law.

277 In my opinion, the common law of Australia on this subject marches in step with that pronounced by the final courts of the United Kingdom and Canada. A test similar to that adopted in those countries applies as the law of Australia. Each of the plaintiffs in the present proceedings has a reasonably arguable cause of action against the educational authority concerned. Each should be permitted to advance such a claim upon amended pleadings. The reasons that persuaded

---

297 [1999] LGR 584.

298 (1996) 152 NSR (2d) 109 at 116-117 [22]. See Feldthusen, "Vicarious Liability for Sexual Torts", in Mullany and Linden (eds), *Torts Tomorrow: A Tribute to John Fleming*, (1998) 221 at 236-237.

299 (1997) 192 NBR (2d) 256.

300 *Jacobi v Griffiths* [1999] 2 SCR 570 at 610 [65].

301 In England, the Home Office in 1999 estimated total child sex abuse cases in England and Wales at 76,000 a year. See Giliker, "Rough Justice in an Unjust World", (2002) 65 *Modern Law Review* 269 at 278. There is no reason to believe that, proportionately to the population, the numbers in Australia would be fewer than in England.

unanimous decisions of the House of Lords and the Supreme Court of Canada should persuade this Court to accept similar legal principles governing liability. In none of the cases before the Court can it be said that the claims are so clearly lacking in a cause of action that the proceedings should be peremptorily terminated[302].

Three appeals and two categories of civil liability

278 Three appeals are before this Court. One appeal is from a judgment entered by the New South Wales Court of Appeal[303]. That Court unanimously upheld an appeal by Mr Angelo Lepore from a judgment entered against him in the District Court of New South Wales. However, the Court of Appeal divided as to the course that should then be taken. A majority concluded that Mr Lepore had established legal liability against the State of New South Wales for assaults to which he alleged he was subjected by a teacher employed by the State at the primary school which he had attended. The majority favoured an order requiring a trial to be had for the determination of the damages payable to Mr Lepore by the State[304].

279 The minority judge in the Court of Appeal (Heydon JA) rejected the proposition that, within the findings of the trial judge, Mr Lepore had established that he was entitled to recover damages from the State. However, he agreed that the original trial had miscarried. He favoured a limited retrial at which Mr Lepore should be permitted to amend some of his pleadings[305]. Heydon JA was of the opinion that the severance of the issue of damages in the first trial; the conduct of that trial; the findings and conclusions of the trial judge; and the reasons provided to sustain his judgment were, in important respects, unsatisfactory[306]. Although he came to a different solution to cure these defects, Davies AJA substantially agreed with Heydon JA's analysis. Their Honours' reasons in this regard were compelling.

---

302 *General Steel Industries Inc v Commissioner for Railways (NSW)* (1964) 112 CLR 125 at 137-138.

303 *Lepore v State of New South Wales* (2001) 52 NSWLR 420.

304 *Lepore v State of New South Wales* (2001) 52 NSWLR 420 at 433 [64]-[65] per Mason P, 450 [139] per Davies AJA.

305 *Lepore v State of New South Wales* (2001) 52 NSWLR 420 at 447-448 [123]-[126] per Heydon JA.

306 cf *Lepore v State of New South Wales* (2001) 52 NSWLR 420 at 428-429 [41]-[42] per Mason P.

280 The other appeals before this Court come from a unanimous judgment of the Court of Appeal of Queensland[307]. Those appeals are brought by Ms Sheree Rich and Ms Vivian Samin. They allege that, more than 35 years ago, when they were young girls, each was subjected to sexual assaults (amounting in one instance to rape) by a teacher employed by the State of Queensland in a "one teacher" school at Yalleroi in that State[308]. In these cases, the State did not contest the allegations of sexual assault. Those allegations had been the subject of a criminal prosecution of the teacher who had been convicted and sentenced in respect of them[309].

281 In neither proceedings, whether in the Court of Appeal or before this Court, did the respective teachers take an active part, although in each case, the teacher was named as a respondent to the appeal. In the case concerning Mr Lepore, the Registrar of this Court received a letter stating that the teacher had no funds, or relevant skills, to defend himself at trial or on appeal. In the other cases, the teacher is in prison serving his sentence. The resistance to each of the claims was therefore left to the governmental authorities responsible for providing the systems of public education respectively in the States of New South Wales and Queensland. In relation to children of the age of each of Mr Lepore, Ms Samin and Ms Rich, at the time of the alleged acts, attendance at school was a fulfilment of legal obligations making such attendance compulsory (and, hence, the provision of schooling facilities by the State obligatory in each case).

282 Two foundations for the legal liability of the respective States were propounded. They were:

(1) a non-delegable and direct liability of the State to ensure that reasonable steps were taken for the safety of the children placed in the care of the school provided by the State; and

(2) a vicarious and derivative liability of the State for the torts committed by the relevant teacher.

283 The factual background of the cases is set out in the reasons of other members of this Court. The procedural history of each case and the way each

---

307 *Rich v State of Queensland; Samin v State of Queensland* (2001) Aust Torts Reports ¶81-626.

308 *Rich v State of Queensland; Samin v State of Queensland* (2001) Aust Torts Reports ¶81-626 at 67,388-67,389 [3].

309 *D'Arcy* (2001) 122 A Crim R 268.

was argued in the courts below and in this Court are also described there. As is explained, the pleading of the respective claims did not, in any instance, initially advance the claim in terms of the second category of liability, namely the vicarious principle. Presumably this was because the view was taken by those advising Mr Lepore, Ms Samin and Ms Rich that they would face large problems in bringing home liability to the States concerned under that principle, having regard to the test for vicarious liability expressed by this Court in *Deatons Pty Ltd v Flew*[310]. In Mr Lepore's case, by explicit reference to *Deatons*, there was a specific disclaimer before Downs DCJ, and in the Court of Appeal, of any reliance on vicarious liability[311]. The same disclaimer was noted in the Queensland Court of Appeal in the claims of Ms Rich and Ms Samin[312].

284 In this Court, having regard to the developments of the common law in the House of Lords and the Supreme Court of Canada already mentioned, fresh attention was given to the possibility that vicarious liability might be established. It was not suggested that any relevant procedural injustice would be suffered by the States concerned in the examination of this legal question by this Court[313]. This was clearly a correct concession, given that the issue presented is one of basic legal principle. It involves the assignment of the respective cases to their correct legal category. If an applicable category is arguably established, it would remain, on the retrial (in Mr Lepore's case) or the trial (in the cases of Ms Rich and Ms Samin), for the relevant evidence to be adduced to which the applicable legal rule would then be applied. All of these appeals are before this Court to clarify the correct legal approach to these and like claims. It is desirable that this Court should establish the applicable principles. That is the obligation that the House of Lords and the Supreme Court of Canada accepted. This Court should do no less.

Non-delegable duty

285 *Priority issue in appeals*: For three reasons, it is appropriate to address first the claims made by Mr Lepore, Ms Samin and Ms Rich, based upon the alleged liability of each State to them pursuant to a school authority's primary or original, and non-delegable, duty of care to its students.

---

310 (1949) 79 CLR 370.

311 cf reasons of Gleeson CJ at [12].

312 *Rich v State of Queensland; Samin v State of Queensland* (2001) Aust Torts Reports ¶81-626 at 67,394 [24].

313 cf *Coulton v Holcombe* (1986) 162 CLR 1 at 7-8.

286 First, there is a special category of liability of school authorities that has been considered by this Court in *The Commonwealth v Introvigne*[314]. The principle there stated has been accepted in later decisions[315]. The nature of the duty has not been doubted, although the scope and content of such duty is subject to dispute. However, no party in these appeals sought to challenge the correctness of the decision in *Introvigne*. None asked that it be overruled or qualified.

287 Secondly, if it applies to the present cases, the non-delegable principle might avoid any necessity to reconsider the operation of the vicarious liability principle or the applicability in cases such as the present of what was said in *Deatons*. It would mean that the reconsideration of the modern doctrinal basis for vicarious liability could, once again, be postponed[316]. Any discussion of the influence of recent decisions in the Supreme Court of Canada and the House of Lords in England in this respect would then be deferred.

288 Thirdly, one member of this Court, McHugh J, considers that the rule established in *Introvigne* provides a complete answer to the challenges by the States to each of the claims of Mr Lepore, Ms Samin and Ms Rich. McHugh J has expressed his opinion that the holding in *Introvigne* sustains each of their assertions that the educational authority was in breach of its non-delegable duty to take reasonable care for their safety. Because, in his Honour's view, *Introvigne* represents a "simpler and stricter test of liability" established by the Australian common law[317], it is proper to have regard to it before other approaches are considered. I agree with McHugh J's view as to the logical priority of this question. I will therefore consider it first.

289 *Authority on non-delegable duties*: A number of difficulties arise in identifying the "precise characteristics of relationships said to justify the imposition of the exceptional non-delegable duty of care"[318]. This is a reason

---

314 (1982) 150 CLR 258.

315 *Kondis v State Transport Authority* (1984) 154 CLR 672 at 685-686; *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520 at 575; *Northern Sandblasting Pty Ltd v Harris* (1997) 188 CLR 313 at 331-332.

316 cf *Northern Sandblasting Pty Ltd v Harris* (1997) 188 CLR 313 at 366-367, 392-393; *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21 at 36 [32].

317 Reasons of McHugh J at [166].

318 *Northern Sandblasting Pty Ltd v Harris* (1997) 188 CLR 313 at 395; cf Swanton, "Non-delegable Duties: Liability for the Negligence of Independent Contractors", (1991) 4 *Journal of Contract Law* 183 at 183 citing Williams, "Liability for Independent Contractors", (1956) *Cambridge Law Journal* 180.

why, in the past, I have resisted efforts to expand the categories already identified such as employer/employee[319]; hospital/patient[320]; school authority/pupil[321] and possibly occupier/contractual entrant in circumstances of extra-hazardous activities[322]. Thus, I was unwilling to accept the proposition that landlord/tenant had joined this select group[323]. At the heart of my reluctance lies a concern that I feel about the doctrinal foundations of this exceptional principle of tortious liability.

290 The purpose of developing the doctrine of non-delegable duties seems to have been to ensure that, in cases in which courts have considered that liability "should", or "ought" to[324], be imposed, the principles of vicarious liability, specifically the restriction on an employer's vicarious liability for the conduct of an independent contractor, should not act as a barrier to such liability. Liability on the basis of non-delegable duties has therefore been described as a "disguised form of vicarious liability"[325].

291 However, the non-delegable nature of the duty was not designed, as I read the cases, to expand the *content* of the duty imposed upon the superior party to the relationship, so as to enlarge that duty into one of strict liability or insurance. It was simply a device to bring home liability in instances that would otherwise have fallen outside the recognised categories of vicarious liability. *Introvigne* is the case propounded as establishing such a non-delegable duty on schools. Yet it is clear there from the reasons of Mason J that the scope of both forms of duty is the same: "The Commonwealth is … as liable for the acts and omissions of its borrowed staff as it would have been for staff directly employed by [it] as teachers in schools established by it."[326]

---

319 *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16 at 44.

320 *Albrighton v Royal Prince Alfred Hospital* [1980] 2 NSWLR 542; *Ellis v Wallsend District Hospital* (1989) 17 NSWLR 553.

321 *The Commonwealth v Introvigne* (1982) 150 CLR 258.

322 *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520; cf *Stevens v Brodribb Sawmilling Pty Ltd* (1986) 160 CLR 16 at 29-30.

323 *Northern Sandblasting Pty Ltd v Harris* (1997) 188 CLR 313 at 399-404.

324 cf Barak, "Mixed and Vicarious Liability – A Suggested Distinction", (1966) 29 *Modern Law Review* 160 at 160-161.

325 Fleming, *The Law of Torts*, 9th ed (1998) at 434.

326 *The Commonwealth v Introvigne* (1982) 150 CLR 258 at 273.

292 In his reasons with respect to Mr Lepore, McHugh J, correctly in my opinion, draws attention to the distinction that is drawn in that case in the reasons of Mason P in the Court of Appeal between the assignment of the duty of care to the State, as provider of the school and its teachers, and the scope of the duty so assigned[327]. McHugh J rejects the formulation of the learned President so far as it suggests that the existence of a non-delegable duty imported an absolute duty to prevent harm to all pupils. However, that is an error that can easily occur if the non-delegable principle is pushed beyond its purpose of affording a means of bringing liability home to a superior party which is in the best position to accept such liability, so that, instead, it becomes a means of turning the superior into an effective insurer for all acts and omissions of its agents.

293 One issue which is raised in the reasons of Gummow and Hayne JJ is whether intentional wrongdoing can form the basis of a finding of breach of a non-delegable duty[328]. I will outline my approach to this issue as it affects vicarious liability[329]. Prima facie it would be no different in relation to non-delegable duties. However, this is not an issue that directly arises because of the conclusion I reach concerning the applicability of non-delegable duties to these appeals. I will therefore reserve my position on that issue.

294 *Conclusion*: In each of the present appeals, the teacher, sued as personally liable for the torts alleged (assault and battery and negligence), was not an independent contractor of the educational authority. Nor was he an employee of some other authority to which the State concerned had delegated, or contracted, its educational obligations with respect to each of the plaintiffs. No constitutional or statutory impediment to recovery from the State for the wrongs of an employee was propounded. In each case, the teacher concerned was a State civil servant. For practical purposes, he could be treated as an employee of the State, or at least of the educational authority of the State, in question.

295 This being the case, there was no issue in the litigation (such as arose in the peculiar circumstances of *Introvigne*) that necessitated consideration of the non-delegable duty principle in order to bring home liability (so far as it existed) from the teacher, or from some other independent authority or body, to the State concerned. Because each teacher was an employee, the applicable category for determining both the identification of the relevant superior and the scope of that superior's duty, was the common law principle of vicarious liability. Employers,

---

327 Reasons of McHugh J at [159].

328 Reasons of Gummow and Hayne JJ at [256], [270].

329 Below in these reasons at [309]-[314].

including employers such as a State of the Commonwealth, are vicariously liable for specified torts on the part of their employees. Special rules, such as the principle of non-delegable duty, developed over time to deal with specific circumstances, should not be applied when the broader basis of vicarious liability applies to the circumstances, as it does here. Such an approach is consistent with the recent decision of this Court in *Tame v New South Wales*[330], where it was held that the specific rules relating to nervous shock must not distract attention from the underlying principle, that liability in negligence is imposed where it is reasonable to find that a duty of care exists.

296 It follows that I cannot agree that any legal foundation is provided for Mr Lepore, Ms Samin or Ms Rich to maintain their respective actions against the States concerned based on the principle of the non-delegable duty of school authorities to ensure the reasonable care of pupils. Respectfully, I cannot therefore agree with the analysis, or conclusions, of McHugh J.

Vicarious liability

297 *The pleadings*: In this Court, Ms Rich and Ms Samin tendered an amended statement of claim which, like Mr Lepore in his original pleading, foreshadowed claims based upon the alleged vicarious liability of the State for the acts of the employed teacher concerned. Such pleadings present for decision the legal arguability of the claims based on the vicarious liability principle. As that argument is formally relevant to the orders disposing of Mr Lepore's appeal and is also critical to any future proceedings upon the amended statements of claim produced to this Court by Ms Rich and Ms Samin (and as the relevant issues are objectively important and have been canvassed at length in these appeals) it is appropriate to consider whether there is substance in such claims.

298 *The issue*: In a number of recent cases in this Court, McHugh J and I have raised the question whether there should be a basic reconsideration of the common law doctrine governing vicarious liability[331]. That issue now falls for determination in light of decisions in the highest courts of the United Kingdom and Canada. There is a diversity of opinion in this Court. Gummow and Hayne JJ do not favour the analysis of risk adopted by the Supreme Court of Canada in *Bazley*[332]. Callinan J rejects the application of vicarious liability to

---

330 (2002) 76 ALJR 1348; 191 ALR 449.

331 eg *Northern Sandblasting Pty Ltd v Harris* (1997) 188 CLR 313 at 366-367 per McHugh J, 392-393 of my own reasons.

332 Reasons of Gummow and Hayne JJ at [214]-[224].

situations of intentional wrongdoing by employees[333]. For McHugh J the issue does not arise for decision. Gaudron J introduces an analysis based on the law of estoppel[334]. On the other hand, the reasons of Gleeson CJ are influenced by the analysis of vicarious liability in the English and Canadian decisions[335]. So are mine.

299 *Vicarious liability – an unstable principle*: The joint reasons in this Court in *Hollis v Vabu Pty Ltd*[336] remarked that a "fully satisfactory rationale for the imposition of vicarious liability in the employment relationship" was "slow to appear in the case law"[337] and that no single explanation could be offered which was "completely satisfactory for all cases"[338]. Even now, none has really emerged. The history of the imposition of vicarious liability demonstrates that the foundation for such liability has been uncertain and variable. Initially, the responsibility of a person for wrongs committed by that person's wife or servants (or slaves) probably derived from medieval conceptions of property, and its incidents[339]. By the sixteenth century the common law of England had relieved an employer of liability for a servant's wrongs unless the employer had specifically commanded, or consented to, the act causing the wrong[340]. By the eighteenth century, the common law had changed again. It reintroduced the notion of liability for a servant's wrongs on the basis of a fiction that such wrongs derived from an implied command of the employer[341]. Under this theory, the employer's liability was direct, not derivative. Ultimately, the fiction of the

---

333 Reasons of Callinan J at [342], [350].

334 Reasons of Gaudron J at [130]-[131].

335 Reasons of Gleeson CJ at [64]-[72].

336 (2001) 207 CLR 21.

337 (2001) 207 CLR 21 at 37 [35].

338 (2001) 207 CLR 21 at 38 [35].

339 Wigmore, "Responsibility for Tortious Acts: Its History", (1894) 7 *Harvard Law Review* 315 at 330-337; Holmes, "Agency", (1891) 4 *Harvard Law Review* 345 at 355-358, 363-364; cf *Lister* [2002] 1 AC 215 at 231 [34].

340 Wigmore, "Responsibility for Tortious Acts: Its History – II", (1894) 7 *Harvard Law Review* 383 at 392; cf *Scott v Davis* (2000) 204 CLR 333 at 385-386 [160]-[161], 409-410 [230].

341 *Brucker v Fromont* (1796) 6 T R 659 [101 ER 758]; cf Giliker, "Rough Justice in an Unjust World", (2002) 65 *Modern Law Review* 269 at 272.

"master's tort" was abandoned. It was accepted that the employer's liability derived from the liability of the servant.

300 *Policy as the decisive factor*: When a final court is called upon to respond to a new problem for society (such as civil liability for widespread complaints of sexual abuse of school pupils) it is inevitable that, as in the past, the common law will give an answer exhibiting a mixture of principle and pragmatism. The principle of vicarious liability, and its application, have not grown from a single, logical legal rule but from judicial perceptions of individual justice and social requirements that vary over time[342]. In any re-expression of the common law in Australia, it is normal now[343] to have regard to considerations of legal principle and policy, as well as any relevant legal authority[344]. This is all the more relevant in these appeals where the focus is vicarious liability, the justification for which has long been accepted as ultimately based on legal policy[345].

301 Vicarious liability in the law of torts is, above all, a subject fashioned by judges at different times, holding different ideas about its justification and social purposes, "or no idea at all"[346]. This is not to say that the law of vicarious liability is totally lacking in coherency or that it is susceptible to expansion or contraction at nothing more than judicial whim. In *Hollis*, McHugh J said, rightly in my view[347]:

> "If the law of vicarious liability is to remain relevant in the contemporary world, it needs to be developed and applied in a way that will accommodate the changing nature of employment relationships. But any such developments or applications must be done consistently with the principles that have shaped the development of vicarious liability and the

---

342 *Imperial Chemical Industries Ltd v Shatwell* [1965] AC 656 at 685.

343 Contrast *Rootes v Shelton* (1967) 116 CLR 383 at 386-387 per Kitto J.

344 *Oceanic Sun Line Special Shipping Co Inc v Fay* (1988) 165 CLR 197 at 252; *Northern Territory v Mengel* (1995) 185 CLR 307 at 352; cf Feldthusen, "Vicarious Liability for Sexual Abuse", (2001) 9 *Tort Law Review* 173 at 178.

345 *Imperial Chemical Industries Ltd v Shatwell* [1965] AC 656 at 685; *Rose v Plenty* [1976] 1 WLR 141 at 147; [1976] 1 All ER 97 at 103; *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21 at 37-38 [33]-[35]; *Lister* [2002] 1 AC 215 at 243-244 [65]-[66].

346 Williams, "Vicarious Liability and the Master's Indemnity", (1957) 20 *Modern Law Review* 220 at 231; cf Giliker, "Rough Justice in an Unjust World", (2002) 65 *Modern Law Review* 269 at 269.

347 (2001) 207 CLR 21 at 54 [85].

rationales of those principles. They should also be done in a way that has the least impact on the settled expectations of employers and those with whom they contract."

302 *Suggested rationales for vicarious liability*: There are a number of bases for imposing liability vicariously. The main ones, outlined in the opinion of the Supreme Court of Canada in *Bazley* and cited in *Hollis*, are the fair and efficient compensation for wrongful conduct and "the deterrence of future harm"[348].

303 "Fair and efficient" compensation is concerned with the search for a solvent defendant whom it is just and reasonable to burden with the legal liability for damages. The basis upon which the Canadian Supreme Court concluded that a party can be justly burdened is through the application of an "enterprise risk" analysis, which I regard as persuasive[349]. Such analysis has its foundations in the argument that profit-making enterprises, which derive financial benefits from an operation, must bear the cost of any particular risks which such operation introduces into the community or exacerbates. At first glance it may seem difficult to accept that non-profit enterprises (such as public schools) should be the subject of such a burden, as the cost to them is not balanced by any financial gain. However, upon closer analysis, "enterprise risk" can be extended justifiably to such enterprises as public schools, with the result that the community bears the cost. The reasoning is essentially the same as for profit-driven enterprises. Schools undoubtedly benefit the community, with the education and development services they provide for students. In that way, the broader tax-paying community that "profits" from the enterprise should also bear the cost of any particular risks which evidence establishes would be closely associated with the functioning of such an institution.

304 This analysis can be seen in the seminal description of vicarious liability written by Sir John Salmond nearly a century ago, but still instructive. Citing *Barwick v English Joint Stock Bank*[350], Salmond justified the imposition of vicarious liability on the footing that, an employer, having placed "the agent …

---

348 (2001) 207 CLR 21 at 39 [41] citing Seavey, "Speculations as to 'Respondeat Superior'", in *Harvard Legal Essays*, (1934) 433 at 448. There is much debate concerning the basis for vicarious liability generally, as well as its application to novel situations. In relation to such liability arising from wrongs done on the Internet see Hamdani, "Who's Liable for Cyberwrongs?", (2002) 87 *Cornell Law Review* 901 at 943-949 where tests of power of supervision and direct financial interest are propounded.

349 cf *Modbury Triangle Shopping Centre Pty Ltd v Anzil* (2000) 205 CLR 254 at 285-286 [90]-[91].

350 (1867) LR 2 Ex 259 at 266.

to do that class of acts, … he must be answerable for the manner in which the agent has conducted himself in doing the business which it was the act of his master to place him in"[351].

305 The second policy basis of vicarious liability is deterrence. It is seriously unjust to leave the burden of the damage, and thus of prevention of harm, on the victim[352]. The only truly effective way of encouraging employers (in enterprises that expose vulnerable people to risks of sexual abuse) to reduce that risk by introducing effective precautions and other initiatives, is by imposing economic sanctions on employers in cases where harm is proved. So long as those who suffer such damage are left to bear it alone, there will be no, or no sufficient, stimulus upon employers to put in place the necessary preventive and supervisory precautions and remedies. I accept that this argument is less persuasive in the circumstances of the present appeals. The school may not have been able to prevent the assaults. As Gummow and Hayne JJ point out[353], there already were criminal sanctions in place to deter such acts. However, they failed to have the desired deterrent effect.

306 Nevertheless, deterrence is neither the main nor only factor to consider in judging whether vicarious liability is imposed by the law. It should be taken together with the risk analysis above and with a candid acknowledgment that vicarious liability is a loss distribution device available in the cases to which it applies. It is essential to examine the problem of liability from the point of view of the victims of criminal wrongdoings. Ordinarily (and in the circumstances of the present cases) such victims are completely innocent of any wrong. Commonly, at least in respect of those who pursue claims at law, they will have suffered harm and incurred medical and other costs. The teacher who performed the wrongs may not have assets sufficient to afford redress. The parents, or the pupils themselves in later life, will by hypothesis have been put to expense and have suffered damage. The parents or guardians will have entrusted the children to the school, acting *in loco parentis*, on the assumption that they will be cared for, not abused. The common law does not usually disappoint legitimate and reasonable expectations in such matters.

---

351 Salmond, *The Law of Torts*, (1907) at 84.

352 Feldthusen, "Vicarious Liability for Sexual Torts", in Mullany and Linden (eds), *Torts Tomorrow: A Tribute to John Fleming*, (1998) 221 at 225-226; Des Rosiers, "From Precedent to Prevention – Vicarious Liability for Sexual Abuse", (2000) 8 *Tort Law Review* 27 at 29.

353 Reasons of Gummow and Hayne JJ at [218].

307 *Return to a classic formulation*: With these policy considerations in mind, I now turn to examine the formulation of the extent of vicarious liability. The starting point for such an examination is the statement in the first edition of Salmond's text *The Law of Torts*. There, the author stated that "[a] master is not responsible for a wrongful act done by his servant unless it is done in the course of his employment. It is deemed to be so done if it 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."[354]

308 Where the employer has authorised the employee's conduct, there is no difficulty in assigning vicarious liability to that employer. Indeed, as Salmond pointed out, in such a case "liability would exist … even if the relation between the parties were merely one of agency, and not one of service at all"[355]. The difficulty that has been experienced with the foregoing formulation has concerned category (b). Many of the debates in the cases have involved the question whether, in the particular circumstances, the employee, although acting in a wrongful and unauthorised way, has been attempting to perform service for the employer in an unauthorised way or, as it has often been put, was simply engaged in a "frolic of his own"[356].

309 *Intentional wrongdoing is not a bar*: Before going any further, I should address an issue that, for one member of this Court, precludes the application of the principle of vicarious liability to the circumstances raised by these appeals. It is common ground that the acts alleged to have occurred to Mr Lepore, Ms Samin and Ms Rich were intentional. Indeed, some of them have been found to have been criminal. The issue is whether vicarious liability extends to such situations of intentional wrongdoing of an employee. Callinan J concludes that it does not. With respect, I disagree.

310 It has been stated that Salmond's test, outlined above, does not fit well with intentional wrongs committed by an employee[357]. However, that test is merely the starting point from which the law has developed. Considering the instruction of past authority concerning the scope of an employer's vicarious

---

354 Salmond, *The Law of Torts*, (1907) at 83 (original emphasis). See also *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21 at 50-51 [72]-[74], 58-60 [94]-[100] per McHugh J who decided that case on agency principles.

355 Salmond, *The Law of Torts*, (1907) at 83.

356 See reasons of Gleeson CJ at [41] where *Morris v C W Martin & Sons Ltd* [1966] 1 QB 716 at 733-734 is cited. See also *Lister* [2002] 1 AC 215 at 235 [44].

357 *Dubai Aluminium Co Ltd v Salaam* [2002] 3 WLR 1913 at 1942 [123]; [2003] 1 All ER 97 at 126-127.

liability for civil wrongs which also constitute deliberate crimes, this Court now has the benefit of the House of Lords and Canadian Supreme Court analysis.

311 Even an express prohibition by an employer of a wrongful (including criminal) act would not, as Salmond pointed out[358], excuse the employer from vicarious liability. He cited *Limpus v London General Omnibus Co*[359] in support of this proposition. That was a case where the defendant was held liable for an accident caused when one of its drivers drove across the road to obstruct a rival omnibus. It was no defence that specific instructions had been given to drivers not to race with rivals. Nor, by inference, was it an answer that to race and drive the omnibus in that fashion would constitute a breach of road traffic or even of criminal laws. The gross inconvenience, not to say injustice, that would be created if liability attached for negligent driving of motor vehicles according to the civil standard but not for deliberate and criminal driving (causing the same or even greater damage) has been recognised by the courts. As McHugh J points out[360], the deliberate infliction of force by one person on another is not a basis for exempting the employer of a wrongdoer from vicarious liability for trespass to the person or negligence.

312 In the recent decision in *Lister*, Lord Millett makes the point that, despite clear law to the contrary, the "heresy"[361] that an employer is not liable for the deliberate and criminal acts of an employee has proved "remarkably resilient" and difficult to excise. In this regard, the decision to that effect in *Cheshire v Bailey*[362] has cast a long shadow. But it can no longer co-exist with a series of cases in England, Scotland and elsewhere holding employers liable for the criminal acts of employees. The cases in the United Kingdom are collected in the speeches in the House of Lords in *Lister*[363]. I will not repeat the analysis of

---

358 Salmond, *The Law of Torts*, (1907) at 84-85.

359 (1862) 1 H & C 526 [158 ER 993].

360 Reasons of McHugh J at [162].

361 *Lister* [2002] 1 AC 215 at 246 [72]; cf at 224-227 [16]-[20] per Lord Steyn (with whom Lord Hutton agreed at 238 [52]).

362 [1905] 1 KB 237 cited in *Lister* [2002] 1 AC 215 at 245-246 [71].

363 They include *Lloyd v Grace, Smith & Co* [1912] AC 716; *Central Motors (Glasgow) Ltd v Cessnock Garage and Motor Co* (1925) SC 796; *Morris v C W Martin & Sons Ltd* [1966] 1 QB 716; *Williams v A & W Hemphill Ltd* (1966) SC (HL) 31; *Rose v Plenty* [1976] 1 WLR 141; [1976] 1 All ER 97; *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827; and *Racz v Home Office* [1994] 2 AC 45.

those cases by the House of Lords. The feeble attempts to distinguish some of the decisions (eg to show that *Morris v C W Martin & Sons Ltd*[364] was a case of liability of a bailee, not vicarious liability of an employer) are not supported by the way later courts have regarded them[365].

313 Australian authority has also clearly maintained that intentional wrongdoing of an employee is no necessary bar to vicarious liability. Isaacs J said so in this Court in *Bugge v Brown*[366]. He said that "[t]he master's responsibility may even exist where the law itself forbids the [employee's] act as criminal". Statements to a similar effect have been expressed in State Supreme Courts, such as "[t]here is no principle of law that an intentional tortious act by a servant can never be within the scope of his employment"[367]. In decisions of this Court, it has been assumed that intentional wrongs can be the basis of vicarious liability[368]. So they can.

314 It is appropriate to acknowledge the intermittent resistance (including in Australia) to the imposition upon another person of civil liability for the wrongs committed by an employee, especially where such wrongs amount to a deliberate criminal act. However, 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 overwhelmed by too many exceptions. A different principle must therefore be found to differentiate the cases where vicarious liability is upheld from those where it is denied.

315 *Proposed criterion – a sufficiently close connection*: The key to understanding how a broader principle is derived lies in the appreciation of the fundamental element in Salmond's original formulation, that the act of the employee be done in the "course of employment". I agree that the phrase should

---

364 [1966] 1 QB 716.

365 eg *Port Swettenham Authority v T W Wu and Co (M) Sdn Bhd* [1979] AC 580 noted in *Lister* [2002] 1 AC 215 at 226 [19], 247 [76].

366 (1919) 26 CLR 110 at 117.

367 *Hayward v Georges Ltd* [1966] VR 202 at 211; see also *Macdonald v Dickson* (1868) 2 SALR 32 at 35 per Hanson CJ, with whom Wearing J concurred.

368 See *Deatons Pty Ltd v Flew* (1949) 79 CLR 370, where each of the reasons assumes that the assault in question *could* have rendered the employer liable, but that on the facts, it did not occur within the scope of the barmaid's employment; see also *Scott v Davis* (2000) 204 CLR 333 at 357 [68] per McHugh J.

be interpreted broadly[369], viewing the activities of the employment in general terms rather than concentrating only on the particular actions or omissions of the employee in question. However, that does not give much guidance as to *how* the "scope" is to be determined. Some assistance may be gained by returning to examine Salmond's statement in context. In a passage not much noticed until addressed in the recent cases, Salmond continued his exposition of basic principle by stating[370]:

> "[A] master, as opposed to the employer of an independent contractor, is liable even for acts which he has not authorised, provided they are *so connected with* acts which he has authorised, that they may rightly be regarded as modes – although improper modes – of doing them."

316 This statement has become the "germ"[371] of the more modern analysis of scope of employment, that is, an examination of the *connection* between the enterprise and the acts alleged to constitute wrongdoing for which the employer should be held liable. This is the approach that has now been followed by the highest courts in Canada and the United Kingdom. In the recent case of *Bazley*, for example, the Canadian Supreme Court stated[372]:

> "[W]here the employee's conduct is *closely tied* to a risk that the employer's enterprise has placed in the community, the employer may justly be held vicariously liable for the employee's wrong."

317 This passage was cited with apparent approval in this Court in the joint reasons in *Hollis*, which then proceeded to demonstrate that the approach also found reflection in United States judicial authority[373]:

> "Earlier, in *Ira S Bushey & Sons, Inc v United States*[374], Judge Friendly had said that the doctrine of respondeat superior rests 'in a deeply rooted sentiment that a business enterprise cannot justly disclaim responsibility

---

369 *Lister* [2002] 1 AC 215 at 234-235 [42]-[45].

370 Salmond, *The Law of Torts*, (1907) at 83-84 (emphasis added); cf *Salmond & Heuston on the Law of Torts*, 21st ed (1996) at 443 and *Lister* [2002] 1 AC 215 at 223-224 [15], 232 [36].

371 *Lister* [2002] 1 AC 215 at 224 [15].

372 [1999] 2 SCR 534 at 548-549 [22] (emphasis added).

373 (2001) 207 CLR 21 at 40 [42].

374 398 F 2d 167 at 171 (1968); cf Dobbs, *The Law of Torts*, (2001), vol 2, §§334, 338.

for accidents which may fairly be said to be characteristic of its activities'."

318 Yet how is the relevant connection to be determined? As McHugh J stated, in the passage from *Hollis* referred to above[375], vicarious liability must be determined "consistently with the principles that have shaped the development of vicarious liability and the rationales of those principles". The "connection" which satisfies the imposition of liability must, therefore, comply with the risk analysis considered above. Thus, it has been expressed as where the employment "*materially* and *significantly* enhanced or exacerbated the risk of [the tort]"[376] or where there is a significant connection between the creation or enhancement of the risk and the wrong that it occasions within the employer's enterprise[377]; or alternatively, where the conduct may "*fairly and properly be regarded* as done [within the scope of employment]"[378].

319 As noted above[379], the Canadian and English courts did not depart from precedent in establishing the "close connection" analysis. They merely developed and elaborated the traditional approach. Indeed, the "modern" connection analysis may find its intellectual roots in Lord Denning's "organisation" test[380]. That test, which asks whether the work done is "an integral part of the business … [or] only accessory to it"[381], was itself a development that arose out of judicial dissatisfaction with the "control" test as a basis for establishing a putative employer's liability. The control test has been

---

375 These reasons at [301].

376 *Jacobi v Griffiths* [1999] 2 SCR 570 at 585 [20] (original emphasis); cf *Bazley v Curry* [1999] 2 SCR 534 at 558-559 [40], 560 [42].

377 *Bazley v Curry* [1999] 2 SCR 534 at 555-556 [34]-[35].

378 *Dubai Aluminium Co Ltd v Salaam* [2002] 3 WLR 1913 at 1920 [23] (original emphasis); [2003] 1 All ER 97 at 105-106.

379 These reasons at [275].

380 See Fleming, *The Law of Torts*, 9th ed (1998) at 416-417; Grunfeld, "Recent Developments in the Hospital Cases", (1954) 17 *Modern Law Review* 547 at 550.

381 *Stevenson Jordan and Harrison Ltd v Macdonald and Evans* [1952] 1 TLR 101 at 111.

questioned in later decisions of this Court and does not now state a universal rule[382] – assuming that it ever did.

320 This broad "connection" analysis cannot be subject to mechanical rules and technicalities, posing as objective criteria. To determine whether conduct is within the scope of vicarious liability I would favour the broader "connection" analysis adopted in England and Canada. That analysis avoids a return to the formulation of specific rules, with their own problems of comprehensiveness and difficulties of application. I regard such purported rules as involving an approach inconsistent with recent pronouncements of this Court. This Court should now give guidance on the general question of when, in all the circumstances, it is reasonable to impose liability on a party[383]. It fails in its duty when it presents formulae specific to one case but inapt to a range of situations. In saying this, I do not overlook the fact that determination of the "connection", necessary to establish legal liability, will itself involve value judgments and policy choices. Ultimately, these oblige the decision maker to answer the question 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. Try as verbal formulae and specific rules might, they cannot ultimately escape the necessity to answer this basal question.

321 *A question of fact and degree*: 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[384]. It might also have to extend to employers of gynaecologists, psychiatrists and university tutors. Nor would it easily be confined to 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. Liability might extend to incidents

---

382 See *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21 at 40-41 [43]-[45]; *Ermogenous v Greek Orthodox Community of SA Inc* (2002) 76 ALJR 465 at 481-482 [81]-[84] in my reasons; 187 ALR 92 at 114-115.

383 *Tame v New South Wales* (2002) 76 ALJR 1348 at 1382 [195] per Gummow and Kirby JJ; see also at 1409 [331] per Callinan J; 191 ALR 449 at 496, 533-534; *Graham Barclay Oysters Pty Ltd v Ryan* [2002] HCA 54 at [240]-[244].

384 Giliker, "Rough Justice in an Unjust World", (2002) 65 *Modern Law Review* 269 at 277.

outside school premises occurring on sports days, vacations[385] and other events involving potential intimacy, made possible by the employment relationship.

322 The potential breadth of possible liability does not detract from its existence where it is just and reasonable that it should apply. That is why the determination of liability, on the basis of the connection between the enterprise and the wrong, is inescapably a question of fact[386] and degree[387]. There will inevitably be differences of opinion, as there were in *Jacobi v Griffiths*[388], a decision of the Supreme Court of Canada delivered on the same day as *Bazley*. Lines have to be drawn. Judicial differences will exist about them. Distinctions of such a kind are inherent in the application of legal rules that are stated in terms of concepts. They are not a reason for adhering to earlier formulations that are themselves difficult to apply. Legislatures may, as they choose, impose arbitrary "caps" and limitations. However, the common law searches for basic principles informed by such notions as justice, reasonableness and fairness.

323 Thus in *Deatons*, there was a significant difference between the analysis of Jordan CJ in the Supreme Court of New South Wales and that adopted by this Court. The former would have left it to the jury to decide whether, on the facts that the jury found, the employee's conduct constituted an unauthorised mode of carrying out her employment duties[389]. This Court held that there was no evidence to justify such a conclusion. *Deatons* was not overlooked by the House of Lords in *Lister*. Lord Millett referred to it but distinguished it on its own facts[390]. He pointed out that the employee in that case was not in charge of the bar. She was not authorised to maintain order. The publican was close at hand. The employee was found to have been paying off a private score of her own.

324 It is unnecessary for this Court to overrule *Deatons*. But neither the statement of the basis for vicarious liability for an employee's conduct expressed

---

385 eg *Trotman v North Yorkshire County Council* [1999] LGR 584 cited in *Lister* [2002] 1 AC 215 at 227-228 [21].

386 *Dubai Aluminium Co Ltd v Salaam* [2002] 3 WLR 1913 at 1918-1919 [16], 1919 [18], 1939-1940 [112]; cf at 1920 [24]; [2003] 1 All ER 97 at 104, 104-105, 124; cf at 106.

387 *Lister* [2002] 1 AC 215 at 230 [28].

388 [1999] 2 SCR 570.

389 *Flew v Deatons Pty Ltd* (1949) 49 SR (NSW) 219 at 222 cited in *Deatons Pty Ltd v Flew* (1949) 79 CLR 370 at 380.

390 *Lister* [2002] 1 AC 215 at 249 [81].

in that case, nor the statement by Salmond in his text earlier, represents a rigid formula to be applied inflexibly to all later cases[391]. With the House of Lords and the Supreme Court of Canada, I am of the view that more recent expositions of the law of vicarious liability require the application of a broader formulation to describe those cases where, by the common law, an employer assumes, derivatively, liability for the wrongs committed by an employee occurring on work premises and in work hours against vulnerable people put at risk by the employer's enterprise although such wrongs were deliberate and even constitute criminal acts on the part of the employee.

325 *Deatons* does not, in my opinion, stand in the way of this conclusion. The more recent analysis by this Court of the issue of vicarious liability[392] suggests that Australian law has already moved in the direction now favoured by the courts in the United Kingdom and Canada. Contrary authority over the course of a century is impossible to reconcile with a string of decisions examined by the House of Lords and the Supreme Court of Canada and similar decisions in Australia.

326 Some guidance can be given concerning how the appropriate analysis should be undertaken. The decision in *Bazley* outlines a number of considerations relevant in a context such as the present appeals[393]. I agree generally with those statements. However, I would add that the expression "connection" potentially connotes either a causal or temporal connection between the acts alleged and the employment, or both. Whether the acts were conducted within school hours and on school property would be a relevant consideration, although not conclusive[394]. When the employment duties of teachers and other temporary guardians of children are viewed in this light, it is much easier to see instances of sexual abuse as "closely connected" to the employer's enterprise than it is if the focus is solely on the isolated sexual acts of the wrongdoers themselves[395]. However, the employment must represent more than the *occasion* for the performance by the teacher of his or her individual criminal and civil wrongs.

---

391 *Lister* [2002] 1 AC 215 at 233-234 [40].

392 Notably in *Scott v Davis* (2000) 204 CLR 333 at 369 [105]-[106] and *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21.

393 *Bazley v Curry* [1999] 2 SCR 534 at 560 [41.3].

394 cf reasons of Gleeson CJ at [40].

395 cf *Bazley v Curry* [1999] 2 SCR 534 at 549-550 [24].

327 In the present appeals, neither of the schools in which the plaintiffs claim they were sexually assaulted was a business enterprise. Yet each was certainly an enterprise, conducted by the respective States, which involved at least an "enterprise risk" that sexual abuse of young children, entrusted by parents or guardians to the care of teachers, would occasionally occur. That risk is, in a sense, arguably inherent in close intimacy between adults and vulnerable children that may arise in the specific circumstances of a school setting.

328 By way of contrast, risks of sexual assault would not normally be introduced to the community by an engineering or accountancy enterprise as such. In the case of an educational authority, involving immature and vulnerable pupils, the risk, although small, is one that may be inherent in the conduct of the particular employer's enterprise. This may be so especially in the case of a "one teacher" school in a remote area where the restraints of supervision and school community are reasonably limited. However regrettable it may be, in certain circumstances, sexual and physical abuse can "fairly be said to be characteristic"[396] of such enterprise in a small minority of cases. Depending on the circumstances, when such cases arise, it may be reasonable and just to conclude that vicarious liability exists on the part of the State for the wrongs done in conducting the employer's enterprise. In this sense, it may be one of the risks associated with that particular enterprise.

329 By such formulations, in respect of Mr Lepore's claim, some at least of the assaults by the teacher of which Mr Lepore complained might fall within the scope of that teacher's authority to discipline a pupil. Depending on the evidence, the administration of corporal punishment might, therefore, be classified as within the course of the employment and the teacher's disciplinary authority at the relevant time. Depending on the circumstances, even the administration of such discipline by exposing one pupil's bare bottom to other pupils might, arguably, be so regarded. However, encouraging the pupils to touch each other and the teacher's fondling of pupils' genitals is different. This analysis of the actual conduct, if proved, demonstrates how permissible employment authority can sometimes merge into unauthorised and criminal conduct. In my view, it will remain conduct for which, derivatively and without differentiation, the employer might be liable if the conduct comprises acts closely connected with the employment so that it is just and reasonable that the employer be held liable on the footing that it is the employer's enterprise that has introduced the risk of such misconduct involving pupils, on the part of the small minority of teachers prone to such misconduct.

---

396 *Ira S Bushey & Sons, Inc v United States* 398 F 2d 167 at 171 (1968) cited in *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21 at 40 [42].

330 As the Court of Appeal of Queensland remarked in the cases of Ms Rich and Ms Samin, the pleadings in those actions "were the very antithesis of what [the teacher] was employed to do"[397]. Nonetheless, it is equally clear that the acts pleaded assert that the teacher in question did what he did within the hours of the employment at the place at which he was employed to perform his work duties.

331 *Principle and policy favour restatement*: It is not really feasible to apply the common law as stated in Salmond's first edition and restated in *Deatons*, as if decades of judicial decisions holding employers liable for criminal wrongs committed by employees that constitute criminal acts, had not occurred. Nor, in this Court, is it possible to ignore the more recent authority that has adopted an approach to vicarious liability similar to that stated by the Supreme Court of Canada in *Bazley*. As a matter of legal principle, it is impossible, and undesirable, to turn the clock of vicarious liability backwards. It is a subject where the law is in many ways unsatisfactory. Yet it is not improved by ignoring recent legal developments that have grown out of the recognition of the character of, and risks inherent in, the typical enterprise that employs others to perform the functions of the enterprise.

332 There is no reason why the common law of Australia should be less protective of the legal entitlements of child victims of sexual assault on the part of teachers and carers than is the common law of England and Canada. In particular, there is no reason why the common law of Australia should protect those who claim against employers for fraud, theft of property and other property crimes by employees but not protect them for the crime of sexual assault by employees. Consistent with the developments of the common law elsewhere, and with developments that this Court has itself approved in general terms, the same principles of legal liability for the wrongs of employees should apply.

333 It follows that, in my view, considerations of legal principle and policy, in addition to those of legal authority, favour the conclusion, as Mr Lepore, Ms Samin and Ms Rich contend, that the respective States may be vicariously liable for the legal wrongs done to them by the relevant teachers. That conclusion is reasonably arguable on the law of Australia as I would re-express it to be consistent with the recent pronouncements of the highest courts in the United Kingdom and Canada.

---

397 *Rich v State of Queensland; Samin v State of Queensland* (2001) Aust Torts Reports ¶81-626 at 67,394 [24] per Thomas JA; cf *Trotman v North Yorkshire County Council* [1999] LGR 584 at 591 [18]; *Lister* [2002] 1 AC 215 at 238 [53].

Conclusions and orders

334 In the appeal concerning Mr Lepore's case, the conduct of the trial, the separation of the issues, the findings by Downs DCJ and his Honour's reasons are so unsatisfactory for the resolution of the issues joined between the parties that the only just solution is a fresh trial. In this, I agree generally with the approaches and conclusion of Heydon JA in the Court of Appeal[398]. However, alike with other members of this Court[399], I agree that, in any retrial, Mr Lepore should not have liberty to maintain, by amendment of his statement of claim (or otherwise), his argument based on a supposed non-delegable duty of care. The retrial in the District Court should be restricted to the claim based on vicarious liability. It should allow factual findings to be made to permit a determination of whether the State of New South Wales is liable, vicariously, for the assaults, physical and sexual, committed on Mr Lepore by his teacher.

335 It follows that I agree in the orders disposing of the appeal by the State of New South Wales as proposed by Gleeson CJ.

336 In the appeals of Ms Rich and Ms Samin, I agree with Gleeson CJ[400] and with Gummow and Hayne JJ[401] that the Queensland Court of Appeal was correct to reject their claims, framed as they were in a pleading alleging liability based on a non-delegable duty. Such an approach was legally unavailable. Those appeals should therefore be dismissed with costs.

337 However, the argument on the basis of vicarious liability is open to Ms Samin and Ms Rich. Leave to re-plead their claims was reserved by the Court of Appeal. Such leave extends, in my view, to a re-pleading alleging liability on the part of the State of Queensland based on vicarious liability. Whether liability on that basis would be established in fact would depend on the evidence adduced at the trial measured against the criterion of the connection between the particular employing enterprise and the acts alleged to constitute wrongdoing for which that enterprise is said to be vicariously liable. In no case, without more, is the deliberate and criminal character of those acts a complete answer to the claim of vicarious liability. To the extent that it held otherwise, the

---

398 *Lepore v State of New South Wales* (2001) 52 NSWLR 420 at 445 [113]-[114].

399 Reasons of Gleeson CJ at [79] with whom Callinan J generally agrees on the issue of non-delegable duties: reasons of Callinan J at [340]; reasons of Gummow and Hayne JJ at [189]; cf reasons of McHugh J at [166].

400 Reasons of Gleeson CJ at [82].

401 Reasons of Gummow and Hayne JJ at [270]-[271].

Court of Appeal was wrong. The further proceedings of Ms Samin and Ms Rich should avoid the repetition of that error.

CALLINAN J.

Sheree Anne Rich v State of Queensland & Ors
Vivian Christina Samin v State of Queensland & Ors

338 These two appeals were heard at the same time as the appeal in *State of New South Wales v Angelo Lepore & Anor*. It is convenient to deal with them first because the amended pleadings which the appellants sought leave to file throw up more clearly the two issues involved in the three cases: whether education authorities owe a particular and exceptional species of non-delegable duty of care to children attending schools that they conduct; and, if they do not, whether those authorities may nonetheless be vicariously liable for criminal assaults, here assaults of a sexual nature, by teachers whom they employ, upon children at schools.

339 I am indebted to the Chief Justice for his analysis, with which I agree, of the decision of this Court in *The Commonwealth v Introvigne*[402], and also for his review of the case law on the topic of non-delegable duty of care in Australia and other jurisdictions[403].

340 Education authorities do not owe to children for whose education they are responsible (absent relevant contractual provision to the contrary) a particular or unique non-delegable duty of care, in practical terms, giving rise to absolute liability. There is no doubt that the ordinary standard of care in the case of such authorities is a very high one. Their duties include the engagement of reliable, and carefully screened, properly trained employees, and the provision: of suitable premises; an adequate system for the monitoring of employees; and, I would think, because, regrettably, the incidence of sexual abuse seems to have been more common than had previously been thought, an efficient system for the prevention and detection of misconduct of that kind. In saying what I have, I do not intend to state comprehensively a catalogue of the duties to which the relationship of education authority and pupil may give rise. But I do agree with the Chief Justice that absent fault on the part of an education authority, it will not be personally liable in situations of the kind with which these cases are concerned.

341 I do however take a different view from the Chief Justice on the question of vicarious liability. As a clear and separate head of liability, vicarious liability appears to have been first recognised by Holt CJ in 1690 in *Boson v Sandford*[404]:

---

402 (1982) 150 CLR 258.

403 See reasons of Gleeson CJ at [19]-[36].

404 (1690) 2 Salk 440 [91 ER 382].

> "[W]hoever employs another is answerable for him, and undertakes for his care to all that make use of him."

The very broad principle stated by his Lordship has not survived. The doctrine of common employment until its abolition by statute made a marked intrusion upon it. The important distinction between personal liability and vicarious liability is itself a clear indication that his Lordship's statement could not be given literal application. The underlying assumption that in the eyes even of strangers, master and servant are one has not been valid for a long time, particularly since the robust growth in articulateness and independence of employees and the organisations which represent them.

342 Negligent, even grossly negligent conduct is one thing, intentional criminal conduct is, and always has been altogether another. In my opinion, deliberate criminal misconduct lies outside, and indeed usually will lie far outside the scope or course of an employed teacher's duty. In *Modbury Triangle Shopping Centre Pty Ltd v Anzil*[405], with respect to a different type of situation, I said that "[t]he problem about criminal conduct is that at one and the same time, it may be both unpredictable in actual incidence, wanton and random, and, on that account, always on the cards." That passage was intended as a reminder that it is almost impossible for even the most diligent, suspicious and pessimistic to prevent criminal conduct at all times and in all circumstances. 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 in my opinion it should reasonably bear.

343 In argument, there was reference to cases in which employers had been held liable for criminal conduct on the part of their employees. One example was of a case of bailment for reward to which special consequences and liability attach[406]. Another, *Lloyd v Grace, Smith & Co*[407], was a case which could have been brought in contract as well as tort.

344 In *Lister v Hesley Hall Ltd*[408], a case of sexual abuse by a warden of a boarding house, Lord Steyn (Lord Hutton agreeing) was in favour of a test, of

---

405 (2000) 205 CLR 254 at 297 [136].

406 *Morris v C W Martin & Sons Ltd* [1966] 1 QB 716.

407 [1912] AC 716.

408 [2002] 1 AC 215 at 230 [28].

such a close connexion with the employee's duties and activities that it would be fair and just to hold the employer vicariously liable. His Lordship also spoke of [mis]conduct "inextricably interwoven with the carrying out by the [employee] of his duties"[409]. Both Lord Clyde[410] and Lord Hobhouse of Woodborough[411] also regarded "connexion" as an indicium of vicarious liability.

345 In practice there would be few situations in which a "connexion" between the duties and the conduct would not be able to be demonstrated. Distinguishing between "opportunity" which would almost always be available to any teacher, and a "connexion" of the kind referred to by their Lordships would be very difficult. Cases would, as a practical matter, be decided according to whether the judge or jury thought it "fair and just" to hold the employer liable. Perceptions of fairness vary greatly. The law in consequence would be thrown into a state of uncertainty. I would not therefore be prepared to adopt their Lordships' or any like test. In my opinion, deliberate 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. Furthermore, it cannot and should not be regarded as being "interwoven" with proper and dutiful conduct, let alone inextricably so.

346 For myself I do not think that anything turns upon the fact that the teacher was a teacher in a one teacher school in rural Queensland, although of course that matter might be relevant in some cases, to the content of the duty of care directly owed by an education authority to the children attending a school of that kind. Neither the case that the appellants originally pleaded however nor the one raised by the proposed amended pleading turns upon any particular feature of a one teacher school.

347 It follows that I would dismiss the appeals. It was agreed that the first respondent would pay the appellants' costs in any event. Accordingly I would order that the appeals be dismissed and that the first respondent pay the appellants' costs of the appeals to this Court.

State of New South Wales v Angelo Lepore & Anor

348 The facts and the relevant case law have been fully stated by the Chief Justice.

---

409 [2002] 1 AC 215 at 230 [28].

410 [2002] 1 AC 215 at 237 [49].

411 [2002] 1 AC 215 at 242 [59].

349 For the reasons that I give in *Sheree Anne Rich v State of Queensland & Ors* and *Vivian Christina Samin v State of Queensland & Ors*, which were argued at the same time as this case, I would hold that the appellant owed no non-delegable duty of care of the kind asserted to the first respondent.

350 Is there here however, unlike in *Rich*'s and *Samin*'s cases, a basis upon which the appellant might be held to be vicariously liable for the actions of the teacher? If the teacher deliberately excessively chastised, or improperly in any way sexually touched or interfered with the child, the teacher committed a serious criminal act. For the reasons which I have given in *Rich*'s and *Samin*'s cases, the appellant would not, in those circumstances, be vicariously liable for the actions of the teacher.

351 If however the teacher unintentionally but negligently exceeded what was reasonable in chastising the first respondent, then in those circumstances there could well be a basis for the imposition of vicarious liability upon the appellant.

352 It is necessary to turn to the finding at first instance to ascertain what was established with respect to the teacher's actions. Among other things, the trial judge found that the assaults "were deliberate and isolated acts of abuse which occurred in an enclosed room" and "were inimical or totally foreign to the second [respondent's] duties as a teacher". Although the exercise of fact finding of the trial judge may have left something to be desired in part no doubt because of his adoption of a course which is to be discouraged of "splitting the trial", the findings of deliberation, and abuse inimical, or totally foreign to the teacher's duties, do amount to an unequivocal finding of improper, deliberate, and criminal conduct for which, for the reasons that I have given in *Rich*'s and *Samin*'s cases, the appellant cannot be vicariously liable.

353 I would not regard the fact that the teacher was convicted on his own plea of guilt to a number of offences of common assault only, and that these attracted relatively light penalties as dictating any different outcome. Common assault is itself a crime which teachers are certainly not engaged to commit. In any event, there was before the trial judge credible evidence which he accepted, of conduct of a much more serious kind than that to which the teacher pleaded guilty in a criminal court.

354 I would accordingly allow the appeal and order that judgment be entered for the appellant. By agreement the appellant is to bear the costs of the appeal to this Court and does not seek to disturb the costs orders made in the Court of Appeal which included orders with respect to the costs of the trial. I would order accordingly.