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Vicarious Liability of Schools

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About the Author

David Ford is a partner at Carroll & O'Dea Lawyers practising mainly in the charity and education sectors. He has advised charitable and educational institutions throughout Australia for some 40 years.

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- a member of ANZELA and a past President of its NSW Chapter;
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- the editor of *Education Law Notes*, which keep schools throughout Australia up-to-date with education law developments;
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David has presented at conferences in the United Kingdom, South Africa, Belgium, the Czech Republic, New Zealand and throughout Australia, and published numerous papers on topics as varied as governance, employment in faith-based institutions, the principal/board relationship, enrolment procedures and conditions, student rights, teachers' liability, investigations, risk management, teachers, school counsellors and confidentiality, bullying (including cyber bullying), outdoor education, sport, multiculturalism in education, disability, sex, sexual orientation and gender identity discrimination, discipline and child protection.

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"The law of vicarious liability is on the move."[1]

This was the assessment of Lord Phillips of the UK Supreme Court in 2012. Four years later, in the same Court, Lord Reed (with whom Lord Neuberger, Lady Hale, Lord Dyson and Lord Toulson agree) commented: "It has not yet come to a stop."[2] And, in 2024, I say that it is still moving!

Further, as noted by J Forrest J in *DP v Bird*, since the 1950s and 1960s, *"the learning on the scope and limits of the vicarious liability principle – i.e. where the vicarious liability line is to be drawn when the acts of the perpetrator are unlawful and unauthorised – has continued. This is particularly so in recent years in this country with what are now described in this State as "institutional abuse" cases …."*[3]

When a teacher is negligent and a student is injured as a result, the employer school pays the damages. This is because the school is vicariously liable for the teacher's liability arising from his or her failure to take reasonable care for the student's safety. Vicarious liability is a type of strict liability in that the employer is liable although innocent. Under the traditional legal test, employers are vicariously liable for an employee's liability for a negligent act falling within the "scope of employment".[4]

This paper will explore the expansion of the scope of vicarious liability over the past 25 years in schools and like institutions, with reference to court decisions in Canada, the USA, the UK, Singapore and Australia, and to legislative changes in some states and the Northern Territory. This includes seeing how vicarious liability is no longer limited to employees of a school acting negligently in the course of their employment but extends to acts done intentionally (and often criminally) by employees and, where legislative change has occurred, persons akin to an employee where they are performing a role in which the employer placed them and which supplied the occasion (as opposed to the opportunity) for the perpetration of the act.

In those Australian jurisdictions that have not changed their civil liability legislation to broaden the application of vicarious liability to persons who are akin to employees, it remains an issue as to whether the categories of "employment" and "true agency" are the only

[1] *The Catholic Child Welfare Society and others v Various Claimants (FC) and The Institute of the Brothers of the Christian Schools and others* [2012] UKSC 56 per Lord Phillips at para 19

[2] *Cox v Ministry of Justice* [2016] UKSC 10 at para 1

[3] *DP v Bird*, [219].

[4] *Deatons v Flew* (1949) 79 CLR 370

categories of vicarious liability recognised by Australian law? The High Court of Australia may answer that question shortly but sadly not in time for this paper.[5]

Negligence

In *Donoghue v Stevenson,*[6] Lord Atkin said that a duty of care will be imposed where there is a foreseeable risk of injury to someone who is in such proximity to the actor that he should be called a neighbour. This was the beginning of the modern law of negligence. Hence today in the school context, the students are in such close proximity to the teachers that there is a foreseeable risk of injury to the students arising from the acts or omissions of the teachers and, therefore, the teachers have a duty of care to the students. However, for a student to succeed in obtaining damages from a school authority for negligence, the law requires more than the existence of a duty of care. It also requires a breach of the duty and some damage caused by the breach.

A Duty of Care

The duty exists at two levels. First, the teachers have a duty of care to their students. But it is the school authority which is liable for injury to a student caused by the failure of a teacher to take reasonable care for the student's safety. This is a vicarious liability. Second, the school authority is directly liable where the injury is caused by a failure in the authority's administration of its education system.[7] The school cannot delegate this duty. In other words, the duty is not discharged simply by appointing competent teaching staff and leaving it to them to take appropriate steps for the care of the students. It is a duty to ensure that reasonable steps are taken for the safety of the students.

Breach of the Duty of Care

The duty of care is breached if a teacher or school authority fails to act as the reasonable person would have acted, in their position, to eliminate the risk of injury or to prevent the injury from occurring. Breach of duty in negligence is established if the injured student can show that:

(a) the way in which the injury occurred was reasonably foreseeable;

(b) if so, the likelihood or probability of it happening was more than insignificant; and

[5] *Bird v. DP (A Pseudonym)* High Court of Australia Case No M82/2023 being an appeal from *Bird v DP (a pseudonym)* [2023] VSCA 66 (3 April 2023)

6 [1932] 1 AC 562

7 *Commonwealth of Australia v Introvigne* (1981) 150 CLR 258

(c) if so, the teacher or school authority has not taken reasonable steps to prevent the injury from occurring.[8]

Injury caused by the Breach

There are two elements to this. First, there must be some actual damage or injury suffered for which the law will compensate. This is an issue where the injury is not physical but rather psychological following, for example, some bullying. The second element is that the injured person must show that the negligence has caused the injury.[9]

Vicarious Liability

As noted above, vicarious liability[10] is the term used to describe the liability of employers for the wrongful or negligent acts of their employees: employers stand in the place of their employees and assume the liability that the employees' acts have incurred. Vicarious liability is a type of strict liability in that the employer is liable although innocent.

The traditional test, adopted by the English courts, was articulated by Salmond, who wrote in the first edition of his textbook, *The Law of Torts*, published in 1907:

> *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 his master.*[11]

Under this test, employers are vicariously liable for employee wrongful or negligent acts falling within the scope or course of employment. Employees' wrongful conduct is said to fall within the scope and course of their employment where it consists of either acts authorised by the employer or unauthorised acts that are so connected with acts that the employer has authorised that they may rightly be regarded as modes, although improper modes, of doing what has been authorised. As Gleeson CJ observed in *New South Wales v Lepore* (*Lepore*), "The test serves well in many cases, but it has its limitations."[12]

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[8] See, for example, section 5B of the *Civil Liability Act 2002* (NSW) and comparable legislation in the other states and territories. In relation to probability, compare the former common law test which said that a risk could be ignored if it was far-fetched or fanciful.

9 *Australian Capital Territory Schools Authority v El-Sheik* (2000) ATR 9181 – 577

[10] The adjective "vicarious" comes from the Latin adjective and noun vicārius meaning "substituting, taking the place of another". Vicarious entered English in the 17th century.

[11] John Salmond, Salmond on Torts (1st ed, 1907) 83

[12] [2003] HCA 4; 212 CLR 511 per Gleeson CJ at para 51

Despite this legal reasoning, vicarious liability has always been concerned with policy.[13] Indeed, it represents a compromise between two policies: the social interest in furnishing an innocent victim with recourse against a financially responsible defendant, and a concern not to foist undue burdens on business enterprises. The first seeks to provide a just and practical remedy for the harm. In the school situation (as in others), vicarious liability improves the chances that the student who has been harmed can recover from a financially solvent entity. The second recognises that effective compensation must also be just, in the sense that it must seem fair to place liability for the wrong on the school. Vicarious liability is arguably fair in this sense. The school operates an educational enterprise in the community which carries with it certain risks. When those risks materialise and injure a student, despite the school's reasonable efforts, it is said that it is fair that the school proprietor that creates the risk should bear the loss. This is reinforced by the fact that the school is often in the best position to share the risk of loss through insurance. The other major policy consideration underlying vicarious liability is deterrence of future harm. Fixing the school with responsibility for the employee's wrongful act, even where the school employer is not negligent, arguably has a deterrent effect because employers are often in a position to reduce accidents and intentional wrongs by efficient organisation and supervision. Of course, this is open to debate.

Can a school be vicariously liable if a teacher sexually abuses a student?

Lepore, Rich and Samin

So far, we have seen that the school employer can be vicariously liable for the negligence of a teacher. Now, we must ask if a school can be liable for the intentional, even criminal, conduct of a teacher. In particular, can a school be vicariously liable if a teacher sexually abuses a student?

Generally, an employer is not vicariously liable for the criminal conduct of an employee because criminal conduct is usually outside of the course of employment. This position was examined in *Lepore*. In that case, Mr Mitchell was a second class teacher at a State primary school. On numerous occasions, he directed Angelo Lepore, a child of 7 or 8, to go into a storeroom where he told the boy to strip and put his hands on his head. Angelo alleged that Mr Mitchell then touched him all over the body, including his private parts. On occasions, another boy would be brought into the room and required to do the same thing, with the teacher telling the two boys to touch each other. This is said to have happened approximately 10 times. On one occasion, a female student was present. Mr Mitchell did not admit to all that was alleged. Nevertheless, it was undisputed that he had struck each of the children upon their

[13] See for example *Hollis v Vabu Pty Ltd* [2001] 207 CLR 21 at para 34

bare bottoms at least once over an unspecified time in about September 1978. Mr Mitchell was convicted of several assault charges.

Angelo sued the State of NSW in negligence, alleging that it had failed in its duty to ensure that reasonable care was taken of him, a student attending the State's school. There was no evidence that the State had failed to supervise properly. Further, Angelo chose not to argue that the State was vicariously liable for the acts of Mr Mitchell. This is not surprising given the High Court decisions on the extent of vicarious liability.

The main case is *Deatons Pty Ltd v Flew*[14] where a barmaid threw a glass of beer and the glass at a patron with whom she was upset. The High Court said the barmaid's action was not a means of keeping order in the bar nor was it incidental to the work she had been employed to do. It was an independent personal act.

Therefore, the specific issue in *Lepore* was whether the duty of care owed to school students is breached by the intentional misconduct of an employee teacher. Mason P and Davies AJA, in the NSW Court of Appeal, said a school authority's duty to take reasonable care to ensure the safety of a student extends to protecting the student from physical and/or sexual abuse, at least where due care would have avoided it. Mason P noted that "the attribution of vicarious liability or a non-delegable duty of care are situations where legal responsibility is fixed upon an 'innocent' party by reason of some antecedent relationship with the victim and some capacity to control the conduct of the individual wrongdoer".

Mason P also echoed the Supreme Court of Canada (as to which, see below) when he said that policy-based arguments can be advanced for and against the imposition of liability in cases like *Lepore*. In many areas, he said, tort law recognises that a person who introduces a risk incurs a duty to those who may be injured. Tort law also aims to improve safety by the deterrent effect of imposition of liability. Mason P 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 focus was on the school's non-delegable duty of care, not on vicarious liability.

Heydon JA delivered a very strong dissenting judgment, saying:

> *It would be an unusual use of language to describe the deliberate causing of harm by a teacher to a pupil by sexual batteries in flagrant breaches of his contract of employment in circumstances where the employer did not fail in any duty to take*

14 (1949) 79 CLR 370

> *reasonable care as a breach by the employer of "a duty to ensure that reasonable care was taken".*

At much the same time as *Lepore* was before the courts in NSW, two cases reached the Queensland Court of Appeal: *Rich v State of Queensland; Samin v State of Queensland*[15]. Many years ago, two girls aged between about 7 and 10 were attending the State School at Yalleroi in Queensland's mid-west. William D'Arcy was the only teacher at the Yalleroi State School, a "one-teacher" school. D'Arcy is alleged to have sexually assaulted the girls, with at least one assault amounting to rape. As in *Lepore's Case*, the girls did not allege that the State of Queensland was vicariously liable for D'Arcy's acts. As McPherson JA said:

> *Despite the very recent decision of the House of Lords in Lister v Hesley Hall Ltd, it remains the law in Australia that an employer is generally not vicariously liable for an assault by an employee that is an independent personal act not connected with or incidental in any way to work the employee is expressly or impliedly authorised to perform. See Deatons Pty Limited v Flew. ... Nothing can be clearer than that the assaults alleged to have been committed here were independent and personal acts of misconduct by D'Arcy. 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.*[16]

The girls therefore alleged that the State of Queensland breached a duty owed by it to all students at State schools, namely a duty that reasonable care be taken of them whilst they were at school. The girls argued that this was a duty to ensure that teachers to whom the State delegated its responsibility did not wrongfully harm those in their care. This duty was said to be absolute. That is, it does not depend on any fault on the part of the State. The Queensland Court of Appeal, taking a view quite different to the NSW Court of Appeal, said that, while the State's duty to students was non-delegable, it was not an absolute duty which did not depend upon proof of fault. Rather, the duty is simply to exercise reasonable care to ensure the safety of students at school.

In March 2002, the girls, who lost in Queensland, and the Department of Education and Training, which lost in New South Wales, both sought leave to appeal to the High Court of Australia. The High Court granted leave[17] and heard the cases together. By majority (French CJ, Kiefel, Bell, Keane and Nettle JJ), the Court held that schools were vicariously liable for acts performed in the course of teachers' employment, but that sexual abuse was generally too

15 [2001] QCA 295 (27 July 2001)

16 [2001] QCA 295 (27 July 2001) at paragraph 6

17 S104/2001 (5 March 2002)

far removed from a teacher's duties to be regarded as occurring in the course of their employment.

Gleeson CJ noted that:

> *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.*[18]

He proceeded to examine the Canadian, US and UK cases, which are considered below, concluding:

> *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.*
>
> *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 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.*
>
> *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,*

[18] *Lepore* at para 54

> *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.* [19]

Gaudron J took a different approach saying:

> *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.*[20]

Her Honour preferred to base vicarious liability on an agency basis. She cited McHugh J in *Hollis v Vabu Pty Ltd*[21] although he had said that he did not think an employer could be vicariously liable for the acts of an independent contractor.

Gummow and Hayne JJ in a joint judgment took a different view again. They noted the policy issues and then held that vicarious liability for abuse by a teacher was only possible in limited circumstances:

> *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*

[19] *Lepore* per Gleeson CJ at para 72, 73 and 74

[20] *Lepore* per Gaudron J at para 130

[21] (2001) 207 CLR 21 at 58

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.

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. ... When a teacher sexually assaults a pupil, the teacher has not the slightest semblance of proper authority to touch the pupil in that way.

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.

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.[22]

Kirby J approved of the developments in the law in Canada and the United Kingdom, quoting *Jacobi v Griffiths*[23] to the effect that the applicable test was "where the employment '*materially and significantly* enhanced or exacerbated the risk of [the tort]' or where there is a

[22] *Lepore* per Gummow and Hayne JJ at paras 240 to 243

[23] [1999] 2 SCR 570 at 585 [20]

significant connection between the creation or enhancement of the risk and the wrong that it occasions within the employer's enterprise; or alternatively, where the conduct may '*fairly and properly be regarded as done [within the scope of employment]*.'"[24]

Sexual assault, Kirby J said, was "arguably inherent in close intimacy between adults and vulnerable children that may arise in the specific circumstances of a school setting."[25]

Callinan J did not articulate a clear test but observed that said that under no circumstances:

> *Distinguishing between "opportunity" which would almost always be available to any teacher, and a "connexion" of the kind referred to by their Lordships* [in *Lister v Hesley Hall Ltd*] *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.*[26]

In summary, the High Court left open the possibility that schools could be vicariously liable for the sexual abuse of a student by a teacher. Unfortunately, because of the separate judgments and the fact that, while most of the High Court judges said vicarious liability for sexual abuse was possible, they proposed very different tests to determine whether a school would be vicariously liable. It was therefore unclear in what circumstances a school could be vicariously liable and what test would apply.

Prince Alfred College

In 1962, a boarding housemaster at Prince Alfred College sexually abused a 12-year-old boarder. There was no dispute about whether the abuse occurred. Mr Bain, the housemaster, had been convicted of the sexual assaults and was in prison. The issues were whether the College was liable for the abuse and, if so, on what basis did that liability arise. In finding the College vicariously liable, Chief Justice Kourakis and Justice Peek in the Full Court of the South Australian Supreme Court endorsed the test proposed by Gleeson CJ in *Lepore*.[27]

The College's appeal to the High Court, decided in 2016, is an important case in the development of the law about vicarious liability in Australia.[28] While the boy's claim was

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[24] *Lepore* per Kirby J at para 318

[25] *Lepore* at [327]

[26] *Lepore* at [345]

[27] *DC v Prince Alfred College Inc* [2015] SASCFC 161

[28] *Prince Alfred College v ADC* (2016) 258 CLR 134

unsuccessful because it was brought out of time, the High Court discussed at length the potential vicarious liability of the College. The Court was critical of the English decisions which looked for the "sufficiently close connection" to find the employer liable, noting that the English judges were looking for a sufficiently close connection to make it "fair and just" to impose liability. The High Court was concerned that this requirement imported a value judgement on the part of the primary judge which, even if explained by reasons, would not proceed on any principled basis or by reference to previous decisions.

The High Court said that:

> *... in cases of this kind, the relevant approach is to consider any special role that the employer has assigned to the employee and the position in which the employee is thereby placed vis-à-vis the victim. In determining whether the apparent performance of such a role may be said to give the 'occasion' for the wrongful act, particular features may be taken into account. They include authority, power, trust, control and the ability to achieve intimacy with the victim. The latter feature may be especially important. Where, in such circumstances, the employee takes advantage of his or her position with respect to the victim, that may suffice to determine that the wrongful act should be regarded as committed in the course or scope of employment and as such render the employer vicariously liable.*[29]

Applying this approach to the facts, the majority found:

> *In the present case, the appropriate enquiry is whether Bain's role as housemaster placed him in a position of power and intimacy vis-à-vis the respondent, such that Bain's apparent performance of his role as housemaster gave the occasion for the wrongful acts, and that because he misused or took advantage of his position, the wrongful acts could be regarded as having been committed in the course or scope of his employment. The relevant approach requires a careful examination of the role that the PAC actually assigned to housemasters and the position in which Bain was thereby placed vis-à-vis the respondent and the other children.*[30]

The practical application of the *"relevant approach"*, as articulated by the majority, appeared to require the Court to carefully consider:

(a) the role the College actually assigned to housemasters; and

(b) the position in which Bain was thereby placed vis-à-vis ADC and other children.

[29] *Prince Alfred College* at para 81

[30] *Prince Alfred College* at para 84

Unfortunately, much of the evidence necessary for the determination of the role assigned to Mr Bain by the College had been lost.[31]

In a separate judgment, Gageler and Gordon JJ noted:

> *We accept that the approach described in the other reasons as the "relevant approach" will now be applied in Australia. That general approach does not adopt or endorse the generally applicable "tests" for vicarious liability for intentional wrongdoing developed in the United Kingdom or Canada (or the policy underlying those tests), although it does draw heavily on various factors identified in cases involving child sexual abuse in those jurisdictions.*
>
> *The 'relevant approach' described in the other reasons is necessarily general it does not and cannot prescribe an absolute rule. Applications of the approach must and will develop case-by-case. Some plaintiffs will win. Some plaintiffs will lose. The criteria that will mark those cases in which an employee is liable or where there is no liability must and will develop in accordance with ordinary common law methods. The court cannot and does not mark out the exact boundaries of any principle of vicarious liability in this case.*[32]

Another consideration is whether the abuse occurred away from the school. In *Prince Alfred College*, most of Mr Bain's alleged wrongful acts against the boy were committed in the boarding house but one was committed outside the College. The majority commented:

> *Depending on all the facts and circumstances of a given case, it is at least conceivable that unlawful acts committed by a housemaster in a boarding house would be seen to attract vicarious liability, whereas some or all of other such unlawful acts committed by the housemaster elsewhere in or beyond the school would not. In the course of argument for the respondent, it is conceded that acts outside the school might well fall into a different category from those which took place in the boarding house.*[33]

Accordingly, the location of the abuse will be a relevant factor in future claims.

The question remains as to whether an act is "in the course or scope of employment". The majority held that, in the common law, this test remains an essential element for vicarious liability.[34] They also held that "the fact that the employment affords an opportunity for the commission of a wrongful act is not of itself a sufficient reason to attract vicarious liability."[35]

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[31] *Prince Alfred College* at para 85

[32] *Prince Alfred College* at paras 130 to 131

[33] *Prince Alfred College* at para 94

[34] *Prince Alfred College* at para 41

[35] *Prince Alfred College* at para 80

The majority, following Gleeson CJ in *Lepore* and the Canadian cases, held that in determining whether a finding of vicarious liability ought be imposed, "the role given to the employee and the nature of the employee's responsibilities may justify the conclusion that the employment not only provided an opportunity but was also the occasion for the commission of the wrongful act."[36] This involves consideration of the role which the organisation actually assigned to the perpetrator (the opportunity) and the position they are placed in vis-à-vis the victim and other children (the occasion).

Palframan

PCB attended the "House of Guilds" on the grounds of the senior campus of Geelong College while in grade 8 (in 1988). The House of Guilds was a wood working, ceramics and arts/crafts workshop that could be attended by College students after school. The House of Guilds was a space that could also be attended by students at nearby schools, and importantly for this matter, was considered by the College as a community space that, with a membership payment, could be accessed by members of the community with no formal affiliation with the school.

Mr Palframan was an honorary member of the House of Guilds. At the relevant time, he was aged in his early 70s and regularly attended the woodwork area between late 1988 to the mid-1990s. Several witnesses said that he did not seem to be working on his own projects while he was there.

It was not in dispute that PCB was sexually abused by Mr Palframan. It was argued that he was groomed at the House of Guilds, and that the abuse would regularly commence in the woodwork room and continue to Mr Palframan's car and home. On one occasion, the abuse occurred in PCB's own home. The abuse came to an end in mid-1990 when PCB was in year 10 and able to resist the abuse.

In PCB's claim against the College in negligence, he argued that the College was vicariously liable for the assaults perpetrated by Mr Palframan. PCB's lawyers pointed to the decision in *Prince Alfred College*. It was submitted that on account of the "*special role*" that Mr Palframan had occupied in the House of Guilds, the College facilitated a relationship that had characteristics of the necessary "*authority, power, trust, control and the ability to achieve intimacy"* required for vicarious liability to be found, and that Mr Palframan should be taken to have been, in effect, an employee of the College on account of (among other things):

(a) Mr Palframan being acknowledged in the College magazine as helping run the House of Guilds;

[36] *Prince Alfred College* at para 80

(b) some report writing and instruction being given by Mr Palframan to students;

(c) Mr Palframan's description by various witnesses as being part of the 'fabric' of the House of Guilds;

(d) Mr Palframan's relatively free interaction with both staff and students at the House of Guilds; and

(e) Mr Palframan being occasionally involved in supervising students at the House of Guilds.

The Victorian Supreme Court ultimately rejected the argument that *Prince Alfred College* provided the contended framework and held the decision should be interpreted as requiring an employee and employer relationship as a necessary intermediate step for a finding of vicarious liability in abuse claims, and that any "*special role*" the perpetrator held needed to be assigned to them by their employer. This is important for schools in that a finding of vicarious liability may be less likely where the alleged perpetrator is involved in extracurricular or recreational activities with the school, but is not otherwise an employee. There remains, however, a grey area in the case of volunteers who are more formally inducted and engaged by a school.

Bird v DP

DP alleges that he was sexually abused by Father Coffey, a priest incardinated within the Diocese of Ballarat, on two occasions in 1971. The alleged abuse, on both occasions, occurred at DP's family home. At the time of the alleged abuse, Father Coffey was the assistant parish priest to Father O'Dowd at St Patrick's Port Fairy (located within the Diocese) and a teacher at the associated St Patrick's primary school (the school). Father Coffey taught at the school during the relevant period.

DP sued Bishop Bird who represented the Diocese.[37] The judge at first instance found that DP had been abused at least twice. The first question to be determined was whether the relationship between the Diocese and Father Coffey was one which could give rise to vicarious liability. It was common ground that, at the relevant time, Father Coffey was neither an employee of the Diocese, nor was he an independent contractor engaged by it. The judge decided that the Diocese was vicariously liable irrespective of whether Father Coffey was an employee of the Diocese.[38]

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[37] *DP (a pseudonym) v Bird* [2021] VSC 850 before J Forrest J

[38] A detailed analysis of the first instance decision can be found in a paper, *Vicarious Liability*, delivered by Charles Harrison, Partner at Carroll & O'Dea Lawyers, at the Television Education Network Religious Institutions Conference on 22 October 2023. I am indebted to him for his assistance in preparing this paper.

This decision went on appeal to the Victorian Court of Appeal[39] which affirmed the trial judge's decision. The Diocese has appealed to the High Court which heard the matter on 14 March 2024. The decision is pending.

The Canadian Cases

As noted above, the High Court has considered some Canadian and English cases about the turn of the century. For completeness, I will mention them briefly.

In 1999, the vicarious liability issues arose in two cases decided by the Supreme Court of Canada: *Bazley v Curry*[40] and *Jacobi v Griffiths.*[41] In *Bazley v Curry*, the Children's Foundation, a non-profit organisation, operated two residential care facilities for the treatment of emotionally troubled children between the ages of six and twelve. The Foundation hired Mr Curry to work in its Vancouver home, not knowing he was a paedophile. It checked and was told he was a suitable employee. Mr Curry seduced and assaulted Patrick Bazley. Someone complained about Mr Curry. The Foundation inquired and, upon verifying that Mr Curry had abused a child in one of its homes, immediately discharged him. In 1992, Mr Curry was convicted of 19 counts of sexual abuse, two of which related to Mr Bazley.

Mr Bazley sued the Foundation for compensation for the injury he suffered while in its care. The Foundation took the position that, since it had committed no fault in hiring or supervising Mr Curry, it was not legally responsible for what he had done. This is therefore a situation where neither the Foundation's executives nor the Foundation itself were negligent. Mr Bazley argued successfully that the Foundation was vicariously liable for Mr Curry's actions even though the Foundation clearly had not authorised Mr Curry's sexual abuse. The only question, therefore, was whether Mr Curry's wrong was so connected to an authorised act that it could be regarded as a mode of doing that act.

As already noted above, it is often difficult to distinguish between an unauthorised "mode" of performing an authorised act that attracts liability, and an entirely independent "act" that does not. Unfortunately, the test provides no criterion on which to make this distinction. In many cases, like *Bazley v Curry*, it is possible to characterise the wrongful act either as a mode of doing an authorised act, or as an independent act altogether. In such cases, how is the judge to decide between the two alternatives?

The Canadian trial judge said that the assault was a mode, however improper, of doing an authorised act. The Court of Appeal agreed but said that it was better to confront the question of whether liability should rest with the employer directly than to bury it beneath the

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[39] *Bird v DP (a pseudonym)* [2023] VSCA 66 (3 April 2023)

40 (1999) 179 DLR (4th Ed) 45

41 (1999) 179 DLR (4th Ed) 71

semantics of phrases like “unauthorised modes of authorised acts”. The Canadian Supreme Court also agreed and said that, where past cases do not give any clear guidance on what to do, it is in order to determine whether vicarious liability should be imposed in light of the broader policy rationales behind strict liability. The Court also considered previous cases where employers had been found vicariously liable for their employees’ intentional wrongful acts and found a common theme: the judges said that in each case the employee’s conduct was closely tied to a risk that the employer’s enterprise had placed in the community. This is why the employer could justly be held vicariously liable for the employee’s wrong. In summary, the Court said the test for vicarious liability for an employee’s sexual abuse of a child 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. The test must not be applied mechanically, but with a sensitive view to the policy considerations that justify the imposition of vicarious liability: fair and efficient compensation for wrong, and deterrence. This requires trial judges to investigate the employee’s specific duties and determine whether they gave rise to special opportunities for wrongdoing. Because of the peculiar exercises of power and trust that pervade cases such as child abuse, special attention should be paid to the existence of a power or dependency relationship, which on its own often creates a considerable risk of wrongdoing.

Applying these considerations to the facts of the case, the Foundation was vicariously liable for the sexual misconduct of Mr Curry. The opportunity for intimate private control, and the parental relationship, and power required by the terms of employment, created the special environment that nurtured and brought to fruition Mr Curry’s sexual abuse. The employer’s enterprise created and fostered the risk that led to the ultimate harm. The abuse was not a mere accident of time and place, but the product of the special relationship of intimacy and respect the employer fostered, as well as the special opportunities for exploitation of that relationship it furnished. Indeed, the Court said it is difficult to imagine a job with a greater risk for child sexual abuse. Fairness and the need for deterrence in this critical area of human conduct – the care of vulnerable children – suggest that, as between the Foundation that created and managed the risk and the innocent victim, the Foundation should bear the loss.

The Supreme Court of Canada decided *Jacobi v Griffiths* the same day as *Bazley v Curry*. The Boys’ and Girls’ Club of Vernon employed Harry Griffiths as Program Director from 1980 to 1992. Among others, the objectives of the Club were “to provide behaviour guidance and to promote the health, social, educational, vocational and character development of boys and girls”. As Program Director during this time, Mr Griffiths was encouraged to cultivate positions of trust and respect with his young charges. His relationship with Randal Jacobi and Jody Saur resulted in one incident of sexual assault against Randal and several incidents of assault, culminating in sexual intercourse, with Jody. The disclosure of these events was first

made in 1992, some ten years after they occurred. After being removed from office, pursuant to the instigation of a police investigation, Griffiths pleaded guilty to 14 counts of sexual assault involving Randal and Jody and other children.

Randal and Jody sought damages from both Mr Griffiths and the Club. Activities at the Club generally were held after school and on Saturdays. While most activities occurred on Club premises, various outings took place for camping, sporting, and other purposes. While Randal and Jody were at the Club, Mr Griffiths developed a friendship with them and paid particular attention to them. Every effort was made to present the Club as a trusted place to be and a safe environment. The Club held Mr Griffiths out to be a trusted confidant and role model. Randal and Jody frequented the Club, where they met and developed relationships with Mr Griffiths. In the beginning, the relationships were entirely appropriate. In the end, it is alleged, they culminated in sexual assaults. In the case of Randal, then 10 or 11 years old, the allegation is that while at the Club, Mr Griffiths invited him to his home and engaged him in a conversation of a sexual nature that progressed to an assault. In the case of Jody, it is alleged that after a period of working with her and encouraging her to develop a leadership role, Mr Griffiths repeatedly assaulted her. In one of the incidents, on board a van driving to a Club-related sporting event, Mr Griffiths allegedly placed her hand on his exposed penis.

As neither the Club nor its employees had been negligent, the issue was whether vicarious liability should attach to the Club for Mr Griffiths' intentional sexual misdeeds. The Court applied the same principles it had set out in *Bazley v Curry* but, by a majority of 4 to 3, decided that the Club was not vicariously liable for Mr Griffiths' actions. The majority noted that the theory was that a person who employed others to advance his own economic interest should, in fairness, be placed under a corresponding liability for losses incurred in the course of the enterprise. Non-profit enterprises, however, lacked an efficient mechanism to "internalise" such costs. They did not operate in a market environment and had little or no ability to absorb the cost of such no-fault liability by raising prices to consumers in the usual way to spread the true cost of "doing business". Deterrence, which was another key policy reason supporting vicarious liability, also had to be assessed with some sensitivity to context, including the nature of the conduct sought to be deterred, the nature of the liability sought to be imposed, and the type of enterprise sought to be rendered liable. Given the weakness of the policy justification for the expansion of vicarious liability to non-profit organisations, the Club was entitled to insist that the requirement of a "strong connection" between the enterprise risk and the sexual assault be applied with serious rigour. Where, as here, the chain of events constituted independent initiatives on the part of Mr Griffiths for his personal gratification, the ultimate misconduct was too remote from the Club's enterprise to justify "no fault" liability.

The English Position

Not long after the Canadian decisions, the House of Lords faced a similar issue in *Lister v Hesley Hall Ltd.*[42] In 1979, Axeholme House, a boarding annex of Wilsic Hall School, Wadsworth, Doncaster, was opened. Between 1979 and 1982, two boys aged between 12 and 15 were resident at Axeholme House. The school and boarding annex were owned and managed by Hesley Hall Ltd as a commercial enterprise. In the main, children with emotional and behavioural difficulties were sent to the school by local authorities. Axeholme House, situated about two miles from the school, aimed to provide care to enable the boys to adjust to normal living. It usually accommodated about 18 boys.

The company employed Mr and Mrs Grain as warden and housekeeper to take care of the boys. In court, Hesley Hall Ltd accepted that it was aware of the opportunities for sexual abuse which could present themselves in a boarding school environment. The warden was responsible for the day to day running of Axeholme House and for maintaining discipline. He lived there with his wife, who was disabled. On most days, he and his wife were the only members of staff on the premises. He supervised the boys when they were not at school. His duties included making sure the boys went to bed at night, got up in the morning and got to and from school. He administered pocket money, organised weekend leave and evening activities, and supervised other staff. Axeholme House was intended to be a home for the boys and not an extension of the school environment.

Hesley Hall Ltd accepted that, unbeknown to it, the warden systematically sexually abused the boys in Axeholme House. The sexual abuse was preceded by "grooming", being conduct on the part of the warden to establish control over the boys. It involved unwarranted gifts, trips alone with the boys, undeserved leniency, allowing the watching of violent and X-rated videos, and so on. What may initially have been regarded as signs of a relaxed approach to discipline gradually developed into blatant sexual abuse. Neither of the boys made any complaint at the time. In 1982, the warden and his wife left the employ of the school. In the early 1990s, a police investigation led to criminal charges. Mr Grain was sentenced to seven years' imprisonment for multiple offences involving sexual abuse.

As with the Canadian cases, there was no evidence of negligence on the part of Hesley Hall Ltd, the school or its employees. Therefore, the central question before the House of Lords was whether, as a matter of legal principle, the employer of the warden of a school boarding house, who sexually abused boys in his care, may, depending on the particular circumstances, be vicariously liable for the wrongful acts of its employee.

42 [2001] 2 WLR 1311

The House of Lords, heavily influenced by the two Canadian decisions, held the employer, Hesley Hall Ltd, liable for the warden's sexual abuse. Lord Steyn said:

> *... it is not necessary to ask the simplistic question whether in the cases under consideration the acts of sexual abuse were modes of doing authorised acts. It becomes possible to consider the question of vicarious liability on the basis that the employer undertook to care for the boys through the services of the warden and that there is a very close connection between the torts of the warden and his employment. After all, they were committed in the time and on the premises of the employers while the warden was also busy caring for the children.*[43]

The other law lords also stressed the importance of seeing whether the unauthorised acts of the employee are so connected with acts which the employer has authorised that they may properly be regarded as being within the scope of his employment. They noted that the warden's duties provided him with the opportunity to commit indecent assaults on the boys for his own sexual gratification but said that that in itself was not enough to make the school liable. As they observed, the same would be true of the groundsman. However, here, 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.

In summary, the House of Lords held that it was sufficient if the employee's actions were "closely connected" to the employee's employment. Applying the connection test, Hesley Hall Ltd was found vicariously liable because Mr Grain's sexual abuse was inextricably interwoven with the carrying out of his warden's duties.

In 2012, the position shifted following *The Catholic Child Welfare Society and others v Various Claimants and The Institute of the Brothers of the Christian Schools and others*[44] (*Christian Brothers case*) in which the Supreme Court held that, to establish vicarious liability, a two-stage test had to be met. Part one of the test looked at the relationship between the defendant and the wrongdoer, focusing on whether it was an employment relationship or one akin to employment. Part two of the test then looked at the connection between that relationship and the wrongful act – the "close connection" element.

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[43] *Lister v Hesley Hall Ltd* at para 20

[44] [2012] UKSC 56

The Christian Brothers case dealt with sexual abuse committed by members of the Christian Brothers who lived and taught at a Roman Catholic school. The Supreme Court found the relationship between the Christian Brothers members and the Institute to be one akin to employment, as the members were directed to teach and conduct themselves as teachers within the Institute's rules and, when teaching, they were doing so in furtherance of the objectives of the Institute, all essential elements of an employment relationship.

Since the *Christian Brothers case*, the two-stage test has been applied by the UK Supreme Court in many cases dealing with vicarious liability., from *Mohamud v Wm Morrison Supermarkets*[45] in 2016 (*"Mohamud"*), *Various Claimants v Wm Morrison Supermarkets*[46] in 2020 (*"Morrison"*), to *Barclays Bank plc v Various Claimants*[47] also in 2020 (*"Barclays"*).

In *Mohamud,* the defendant was held vicariously liable for its employee who had physically attacked and racially abused a customer whilst working. Notably, the court considered two factors in its assessment of the "close connection" test. Firstly, what functions had been entrusted by the employer to the employee; and secondly, whether there was "sufficient connection" between the employee's position and his wrongful conduct, to make it right for the employer to be vicariously liable. The court also noted that the employee's motive for his actions was irrelevant; it was not important whether his motive was "personal racism rather than a desire to benefit his employer's business". The employer's decision to entrust the employee with serving customers meant it was held responsible for the employee's abuse of that position, regardless of motive. This decision represented a clear widening of the scope of liability on the part of employers for their employee's misbehaviour.

In *Morrison,* the position changed. The employer was not held vicariously liable for data breaches committed by a rogue employee. Here, the Supreme Court explained that the "close connection" test cannot be satisfied simply on the basis there is a temporal or causal connection between the employment and the wrongdoing. In contrast to *Mohamud,* the court also deemed the motive of the wrongdoer to be a "plainly important" and "highly material" point.

In *Barclays,* the scope was narrowed further. A doctor, arranged by the bank to carry out pre-employment medical examinations on job applicants, was accused of sexually assaulting the applicants during those examinations. Reversing the first instance and Court of Appeal decisions, the Supreme Court deemed the relationship between the bank and doctor not akin to employment. It was held that a relationship akin to employment did not extend so far as to make an employer liable for the conduct of "true independent contractors".

[45] [2016] UKSC 11

[46] [2020] UKSC 12

[47] [2020] UKSC 13

The position now

The UK Supreme Court considered vicarious liability again in 2023, in *Trustees of the Barry Congregation of Jehovah's Witnesses v BXB*[48] (*BXB*). A member of the Barry Congregation of the Jehovah's Witnesses was raped by one of the Congregation's elders, Mark Sewell, at his home, following door-to-door evangelising. BXB and her family were close friends of Mr Sewell and his family. The Supreme Court found the trustees of the Barry Congregation not vicariously liable for the actions of the elder. Whilst the relationship of Mr Sewell and the appellant was deemed to be one akin to employment, the respondent had failed to satisfy the "close connection" test. In reaching this conclusion, the Court reasoned that the primary reason the offence took place was because Mr Sewell was abusing his position, not as an elder but as a close friend of BXB and he was not carrying out any activities as an elder when the rape took place. In making its decision, the Court provided clarity on the modern law on vicarious liability through a helpful summary of the law as it currently stands in the UK:[49]

Stage 1

(a) Is the relationship between the defendant and the wrongdoer one of employment or akin to employment?

(b) If the wrongdoer is a true independent contractor, there will be no vicarious liability.

Stage 2

(a) Is the wrongful conduct so closely connected with acts the wrongdoer was authorised to do that it can fairly and properly be regarded as done by the wrongdoer while acting in the course of their employment or quasi-employment?

(b) The mere existence of a causal connection will not be sufficient. Even if one could say that, but for the wrongdoer's employment the wrongful conduct would not have occurred, this is not enough to give rise to vicarious liability.

The Court further noted that, in more difficult cases, it can be a useful final check on the justice of the outcome to stand back and consider whether that outcome is consistent with the underlying policy; namely, "that the employer or quasi-employer, who is taking the benefit of the activities carried on by a person integrated into its organisation, should bear the cost (or, one might say, should bear the risk) of the wrong committed by that person in the course of those activities."

[48] [2023] UKSC 15

[49] BXB at para 58

Extension of vicarious liability

Sections 6G and 6H of the *Civil Liability Act 2002* (NSW)[50] deal with the vicarious liability of organisations for the conduct of employees and defines an employee to include "an individual who is akin to an employee" which in turn is defined as an individual who carries out activities as an integral part of the activities carried on by the organisation and does so for the benefit of the organisation. The Second Reading Speech of the Attorney-General provides some examples of individuals who will be "akin to an employee":

> *In faith-based organisations, this could include members of the clergy or similar, and in all organisations it could include volunteers or contractors, who are often involved in the child services sector.*

It is interesting to see how the concept "an individual who is akin to an employee", which came from the English cases mentioned above and others,[51] has been incorporated into the legislation of New South Wales, Tasmania, South Australia and the Northern Territory.

Under these provisions, an organisation is vicariously liable for child abuse perpetrated by an employee if the organisation placed the employee in a role that provided the occasion for the abuse. In determining this, a court is to take into account the authority, power or control over the child, the trust of the child, and the ability to achieve intimacy with the child. This is in addition to the common law position outlined by the High Court of Australia in *Prince Alfred College*.

While the intention of these provisions is to create clarity around circumstances in which an organisation can be held vicariously liable for the acts of those within their control, it also clearly delineates circumstances where vicarious liability will not apply. For example, section 6G(3) specifically excludes vicarious liability for the actions of individuals that are "carried out for a recognisably independent business of the individual or of another person or organisation" or for individuals where they are acting as an "authorised carer … in the individual's capacity as an authorised carer".

The awaited High Court decision in *Bird* referred to above, in relation to whether vicarious liability is only to be imposed where there is an employment relationship, will not be relevant to claims going forward in New South Wales, Tasmania, South Australia and the Northern Territory but will be relevant for claims arising before the legislative changes were made.

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[50] Compare similar provisions in *Personal Injuries (Liabilities and Damages) Act 2003* (NT), *Civil Liability Act 2002* (Tas) (section 491), *Civil Liability Act 1936* (SA) (section 50A), However, Queensland, Victoria, Western Australia and the ACT have not made these changes.

[51] Ward LJ used the expression in the English Court of Appeal in *E v English Province of Our Lady of Charity* [2012] EWCA Civ 938, [2013] QB 722

Conclusion

Schools must now face the possibility of being found liable for the intentional wrongful acts of their employees and others either because they are in breach of their primary duty of care or because they are vicariously liable. Schools should therefore examine their insurance policies to make sure that the possible risk of being found liable in this way is covered. The professional indemnity insurance provisions in many school policies include an exclusion in respect of any claim made against the school for actual dishonest, fraudulent, criminal or malicious acts or omissions of employees of the insured. Schools with policies saying something like this should contact their broker urgently to ask if they are covered if a staff member assaults or sexually abuses a student.

This paper underlines the importance for schools of:

(a) taking child abuse seriously;

(b) knowing how to recognise the warning signs;

(c) vetting candidates for employment carefully, always checking references from previous schools;

(d) having systems that limit staff having one-on-one time with students, especially boarders;

(e) having systems that ensure accountability for staff who have authority, power, trust and control over students;

(f) limiting the ability of staff to achieve intimacy with students;

(g) knowing their legal obligations to report suspected child abuse;

(h) ensuring all school staff are trained on child protection issues;

(i) having proper policies and procedures;

(j) keeping proper records of a student's progress and following up on any erratic or abnormal behaviour;

(k) keeping notes of meetings with parents and staff.

In conclusion, I give the last word to the judge in the *Toowoomba Preparatory School Case*:[52]

> *You won't need to be reminded that sexual abuse of children is surely one of the most appalling examples of deviant behaviour, with the potential to wreck young lives. Allegations of that type of abuse must be taken seriously and thoroughly investigated. Complaints must be treated with respect and sensitivity, and genuine victims of sexual abuse usually need substantial support and assistance to deal with them.... But, equally, don't lose sight of the fact that allegations of sexual abuse are sometimes*

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[52] *SV The Corporation of the Synod of the Diocese of Brisbane* [2001] QSC 473, Wilson J (unreported)

falsely made, with potentially catastrophic effects on reputations and careers. The school should have maintained a proper balance between these competing considerations until adequate investigations had been completed.