

**VICARIOUS LIABILITY, NON-DELEGABLE DUTY AND
CHILD SEXUAL ABUSE: IS THERE ANOTHER
SOLUTION FOR SEXUAL ABUSE PLAINTIFFS IN
AUSTRALIA AFTER THE *MAGA* DECISION IN THE UK?**

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Abstract

Sexual abuse plaintiffs in Australia do not succeed when they make vicarious liability claims against institutions. The recent *Maga*¹ decision of the UK Court of Appeal against the Catholic Church provided that plaintiff with relief. Does that decision provide any more clarity for Australia? This article reviews the existing Australian law alongside *Maga* and its foundations in the Canadian decision in *Bazley*, developed by the House of Lords in *Lister*. The likely impact of the new state Child Protection legislation in most Australian jurisdictions, is also factored in. While the High Court of Australia has not yet found 'a grand principle' that can unify the relevant jurisprudence, this author suggests there is may be an underlying rule after all.

D INTRODUCTION

A number of Australian legal scholars have expressed concern that Australian law is unfair to sexual abuse plaintiffs and denies remedies that have been made available under common law in other western countries.

¹ *Maga (by his Litigation Friend, the Official Solicitor) v Trustees of the Birmingham Archdiocese of the Roman Catholic Church* [2010] 1 WLR 1441.

The High Court of Australia has not been prepared to accept that institutions should be vicariously responsible for the intentional torts or the crimes of their officers. The suggestion that institutions should be liable in tort to sexual abuse victims because those institutions owe them a non-delegable duty of care has similarly been unsuccessful in Australian courts. Australian courts have also declined to introduce the North American idea that institutions owe fiduciary duties to sexual abuse victims since Australian courts have only ever acknowledged the notion of fiduciary duty as applicable in cases of pure economic loss.

In the wake of the *Lepore* decision² of the High Court of Australia in 2003, Jane Wangmann³ expressed concern that the “general lack of appreciation of the context and nature of sexual assault in schools”⁴ revealed a “lack of [judicial] appreciation of the role of power in child sexual assault.”⁵ She expressed general concern as to whether sexual assault victims could succeed in the High Court of Australia given the state of the relevant legal doctrines in Australia at that time.⁶ She thought that then recent decisions of the Supreme Court of Canada⁷ and the House of Lords in the United

² *New South Wales v Lepore* (2003) 212 CLR 511.

³ J Wangmann, ‘Liability for Institutional Child Sexual Assault: Where does *Lepore* leave Australia?’ (2004) 28 *Melbourne University Law Review* 1, 169.

⁴ *Ibid* 1. Lisa Khou expressed similar concerns more recently in ‘Fiduciary Law, Non-Economic Interests and Amicus Curiae’ (2008) 32 *Melbourne University Law Review* 36.

⁵ Wangmann, above n 3, 169 (headnote).

⁶ *Ibid* where she said “this decision does not bode well for victims in future cases”. In Part IV of her article she “outline[d] the ways in which the High Court demonstrated a limited understanding in this judgment of child sexual assault within institutional settings” (171). In her conclusion, she also stated that a recognition of “power disparities and the special vulnerability of children” were mostly “absent from the judgments of most members of the High Court, or...[were] assessed in ways to avoid the imposition of liability” (200).

⁷ *Bazley v Curry* [1999] 2 SCR 534 and *Jacobi v Griffiths* [1999] 2 SCR 570.

Kingdom,⁸ had provided an adequate intellectual foundation for a more empathetic approach which took account of the interests of the child victims. Steven White and Graeme Orr concluded their analysis of the *Lepore* decision with the observation that there was no principled basis for the distinction between the victims of the intentional torts done by employees on the one hand and sub-contractors on the other.⁹ Prue Vines said that the High Court had left “real clarification of the limits of vicarious liability for intentional conduct...hovering just over the horizon”.¹⁰

In Laura Hoyano's more recent comment on the favourable decision of the UK Court of Appeal in *Maga*,¹¹ which confirms the “rewritten rules for vicarious liability for intentional torts propounded by the Supreme Court of Canada in...*Bazley* and by the House of Lords in *Lister*”,¹² she has hoped that “the imposition of primary tort liability”¹³ may yet bring justice to the child victims of historic sexual assault in the United Kingdom.

But is it likely that the UK Court of Appeal's decision in *Maga* will make a difference for sexual assault plaintiffs in Australia? There has been an additional High Court decision handed down on vicarious liability since the

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

⁹ Steven White and Graeme Orr, “Precarious liability: The High Court in *Lepore*, *Samin* and *Rich* on school responsibility for assaults by teachers”, (2003) 11 *Torts Law Journal* 101, 116.

¹⁰ P Vines, ‘Schools' Responsibility for Teachers' Sexual Assault: Non-Delegable Duty and Vicarious Liability’ (2003) 27 *Melbourne University Law Review* 612, 626 (see also <<http://www.austlii.edu.au/au/journals/MULR/2003/22.html>>).

¹¹ *Maga (by his Litigation Friend, the Official Solicitor) v Trustees of the Birmingham Archdiocese of the Roman Catholic Church* [2010] 1 WLR 1441.

¹² L Hoyano, “Ecclesiastical Responsibility for Clerical Wrongdoing”, (2010) 18 *Tort Law Review* 154. See also <papers.ssrn.com/sol3/papers.cfm?abstract_id=1856705>.

¹³ *Ibid* 164.

High Court considered the 'new jurisprudence' of the Supreme Court of Canada and the House of Lords in *Lepore*,¹⁴ and it seems clear that the impasse that Prue Vines observed in her 2004 case note¹⁵ remains.

In Part I of this essay, I review the state of vicarious liability law in Australia in light of the most recent decision of the High Court of Australia in *Sweeney v Boylan Nominees*.¹⁶ I discuss the diversity of the *Lepore* judgments, and the common threads which may unite some of the different opinions. I note that the concept of non-delegable duty favoured by McHugh J is dead. I note that Justices Gleeson CJ, Gummow, Hayne and Callinan JJ seem united in the traditional conservative idea that intentional torts and crimes can never form part of the scope of employment, though I note that Gleeson CJ left the impression that he might be persuaded otherwise. I note Kirby J's support for a broad general vicarious liability principle that would make employers responsible for the intentional torts of not only their employees but also their agents and volunteers. I further note that he maintained this view in *Sweeney* but that he did not garner any support from his fellow Justices. And I note Gaudron J's belief that vicarious liability doctrine ought to be seen as a subset of agency law – an understanding which I develop in Part III.

In Part II, I assess what impact, if any, the *Maga* decision will have in Australia. I explain the common threads and the differences between the vicarious liability jurisprudence of the United Kingdom and Canada. I note

¹⁴ *Sweeney v Boylan Nominees Pty Ltd* (2006) 226 CLR 161.

¹⁵ Vines, above n 10, 623. She wrote "Is it therefore possible for a school authority to be held vicariously liable for the sexual assault of a pupil by a teacher at school? Three judges seemed to consider that it might be possible — Gleeson CJ, Gaudron and Kirby JJ. Three judges seemed to think it was not possible — Callinan, Gummow and Hayne JJ".

¹⁶ *Sweeney v Boylan Nominees Pty Ltd* (2006) 226 CLR 161.

that even though the Supreme Court of Canada seems to have moved away from traditional ‘scope of employment’ analysis if the employer has introduced a material risk into the marketplace and it is fair to make the employer vicariously responsible if such risk eventuates, the scope of employment analysis is still there and likely explains the difference between its same day decisions in the *Bazley*¹⁷ and *Jacobi*¹⁸ cases. In the United Kingdom, I note that despite very clear approval of the Canadian jurisprudence by Lord Steyn in the *Lister* case,¹⁹ the UK courts have in fact retained the ‘scope of employment’ test for vicarious responsibility. They have however, moved away from a mechanistic application of the century old Salmond test to more flexibly require only that a plaintiff demonstrate a ‘close connection’ between even the intentional wrongs of an employee and the scope of the employment. I conclude Part II with an assessment of the likely impact of legislative changes in Australia since *Lepore* was decided. I identify the legislation that has been passed to foreclose long delayed cases and discuss decisions in the United Kingdom and New Zealand which have enlarged time despite even abridged time limitation periods in statute. I then discuss the likely impact of the child protection regimes which have been introduced and improved in all Australian states and territories except in Tasmania and the ACT since the *Lepore* decision was handed down. Controversially perhaps, I opine that these new child protection ‘codes’ will likely protect institutions against vicarious liability claims where they have fully complied, but will lead to direct liability in negligence and for breach of statutory duty when they have not – the

¹⁷ *Bazley v Curry* [1999] 2 SCR 534.

¹⁸ *Jacobi v Griffiths* [1999] 2 SCR 570.

¹⁹ *Lister v Hesley Hall Ltd* [2002] 1 AC 215.

upshot being, that vicarious liability issues in sexual abuse cases are likely to become more and more scarce.

In Part III, I discuss the doctrine that an institution may owe the vulnerable a non-delegable duty of care in light of Gaudron J's *Lepore* suggestion that there is still room for such argument, and I dismiss it. I review the Australian rejection of the Canadian (and American) idea that institutions may owe the vulnerable a fiduciary duty and whether there is any likelihood that this idea might be resurrected in Australia in the future. But I conclude that so long as the Australian courts fail to recognise fiduciary responsibility for non-economic torts, this avenue for sexual abuse plaintiff recovery against institutions is likewise closed. Part III concludes with my discussion of Gaudron J's statement in *Lepore* that vicarious liability doctrine is properly seen as forming part of a broader ostensible authority doctrine in agency law. While I agree with her opinion that this general insight does indeed explain all the cases (except *Sweeney* which was decided subsequently), I do not expect her insight will make any difference to the way the Australian law develops - because it really makes no difference to say that an employer is vicariously responsible because there was a close connection between an employee's intentional tort and his employment or to say the employer is vicariously liable because the intentional tort was perpetrated within the scope of the employee's ostensible authority.

I conclude that the *Maga* decision will not have significant impact in Australian sexual abuse jurisprudence. Partly, that is because the idea that an intentional tort can never be within the scope of employment is so deeply set in the minds of the Australian judges. In practice however, it is not that set of the Australian jurisprudential sails that will prevent Australian sexual abuse jurisprudence developing along Canadian and

English lines. Rather, the advent of statutory child protection regimes in Australia will ensure that any future cases that do arise are argued in terms of direct institutional negligence and breach of statutory duty if there has been non-compliance with the applicable child protection regime. Vicarious liability arguments will thus fall into disuse where sex abuse takes place in institutional settings in the future. Hopefully there will not be as many sexual abuse cases in the future anyway because the statutory child protection regimes will work at preventing child sexual abuse in the first place.

E VICARIOUS LIABILITY IN AUSTRALIA

In her late 2003 comment on the High Court of Australia decision in the *Lepore* case Prue Vines concluded

Unfortunately, the High Court has once again failed to clarify the law to the point where solicitors can safely advise their clients. The initial excitement at finding a six to one decision quickly fades when one realises that the ratio of *Lepore* is difficult to find and that the judgments differ on various points. It is clear that non-delegable duty is not to be expanded to cover intentional torts, but real clarification of the limits of vicarious liability for intentional conduct remains hovering just over the horizon. Unfortunately, despite the opportunity offered by a case raising the issue, the High Court has failed to give education authorities and other employers clear guidance on how to protect themselves. This failure raises the prospect of innocent victims again being forced onto the long road of litigation all the way to the High Court.²⁰

²⁰ Vines, above n 10, 626.

In the abstract to her article she summarised both “that non-delegable duty in the context of schools may not be seen favourably in the future”,²¹ and that the division in the *Lepore* decision was best explained by a “deep-seated concern about the basis of vicarious liability in a tort system that is deeply fault-oriented”.²²

There were six separate judgments in *Lepore*. Only Gummow and Hayne JJ concurred. Only McHugh J dissented. He thought a decision in favour of all three victims²³ could be justified under the doctrine of non-delegable duty – a doctrine from which all the other members of the court retreated. Several members of the Court considered that the non-delegable duty of care cause of action was not available in the case of intentional torts as opposed to torts arising out of negligence.²⁴ Gaudron J seemed to accept

²¹ Ibid 612 (headnote). For more detail, see above n 24.

²² Ibid.

²³ Three different appeals were heard together. *NSW v Lepore* where Lepore, a student from a state school in the 1970s had succeeded in the NSW Court of Appeal because the State had failed to prevent a teacher's sexual assault when the State was under a non-delegable duty of care; and two Queensland cases (*Rich v State of Queensland* and *Samin v State of Queensland*) arising out of 1960s sexual abuse by the teacher in a one teacher rural school, but where the Queensland Court of Appeal had not accepted the non-delegable duty of care argument which had succeeded in the *Lepore* case in New South Wales.

²⁴ *New South Wales v Lepore* (2003) 212 CLR 511. At [34], Gleeson CJ stated “The proposition that, because a school authority's duty of care to a pupil is non-delegable, the authority is liable for any injury...is too broad, and the responsibility with which it fixes school authorities is too demanding”. At [256] and [266], Gummow and Hayne JJ stated “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...In the present cases...[n]either plaintiff suffered injury as a result of any negligent conduct of the teacher” (underlining original). They continued “[T]o 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... 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”. Callinan J was more direct still when he said at [340] “Education authorities do not owe to

that a school could have a non-delegable duty “to take steps to eliminate abuse”²⁵ which suggests that “a school could be liable on the basis of a non-delegable duty when an intentional tort has been carried out”.²⁶ But she thought that even the cases which suggested that employers could be vicariously responsible for the intentional torts of their employees, could be explained by a principle of estoppel. That is, since the employer in even the supposedly intentional tort cases had given the employee the relevant task to fulfill, the employer was estopped from denying personal liability for the resulting loss or damage.²⁷ But her rationale²⁸ for deciding difficult vicarious liability cases did not gain traction with any other members of the court. Kirby J was persuaded by the Canadian idea that an enterprise should be vicariously liable for all the risks that flowed from its business whether they were at fault or not.²⁹ But he was essentially alone in that

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”. At [295], Kirby J simply considered that “[s]pecial rules, such as non-delegable duty of care...should not be applied when the broader basis of vicarious liability applies to the circumstances as it does here”.

²⁵ Vines, above n 10, 615.

²⁶ Ibid.

²⁷ *New South Wales v Lepore* (2003) 212 CLR 511, [113] and [131].

²⁸ White and Orr said Gaudron J “developed a novel approach to vicarious liability”. She “stated that to apply the traditional course of employment test is 'simply to apply the ordinary law of agency’”: Steven White and Graeme Orr, ‘Precarious liability: The High Court in *Lepore*, *Samin* and *Rich* on school responsibility for assaults by teachers’ (2003) 11 *Torts Law Journal* 101, 108.

²⁹ *New South Wales v Lepore* (2003) 212 CLR 511, [303]. At [307][308] Kirby J explained why the Canadian approach was a “return to a classic formulation” and opined that Salmond's formulation of the scope of employment had provided the “germ of the more modern analysis of the scope of employment” ([316]) developed by the Supreme Court of Canada in *Bazley* and the House of Lords in *Lister*.

opinion³⁰ and his view did not affect the result since he agreed with the majority that all three cases involved in this appeal should be reheard at first instance. As Prue Vines has opined above,³¹ there is no common theme and accordingly *Lepore* did not authoritatively answer any vicarious liability questions in Australian law nor signal a future direction. Five of the judges said that the *Lepore* case could be reheard so that further facts might be adduced to determine whether Lepore's conduct did fall within the scope of his employment. But Gleeson CJ, Gummow, Hayne and Callinan JJ all doubted whether an intentional tort and especially a criminal act, could ever fall within the scope of employment.³² McHugh and Kirby JJ considered that the employer could be liable for both an employee's intentional torts and criminal acts though their reasons were quite different and they disagreed with each other. While Gaudron J concurred in the decision to require a new trial in *Lepore* because the appellate courts did

³⁰ While Gleeson CJ was also attracted by the Canadian jurisprudence in *Bazley* and the House of Lord's review of same in *Lister*, Gleeson CJ considered that the school authority would only be liable for the intentional tort of the teacher in *Lepore* if it could be shown at a rehearing that "the alleged misconduct...could properly be regarded as excessive chastisement" (*Lepore*, [78]) and therefore within the more traditional scope of employment of a teacher.

³¹ Vines, above n 10 and supporting text.

³² Though Gleeson CJ acknowledged that historically sexual abuse would never have been adjudged as falling within the scope of employment (*Lepore*, [54]), he conceded it was possible that the scope of employment could enable the relationship which led to the abuse in some way, but this would have to be demonstrated before vicarious liability could be imposed (*Lepore*, [40], [78] and [85]). Gummow, Hayne and Callinan JJ were much more traditional. Gummow and Hayne JJ said that the idea that an employer should be vicariously liable if it had introduced a material risk which eventuated was unacceptable because that would mean the employer would always be liable (*Lepore*, [217]) and that "to adopt this approach would represent a radical departure from what has hitherto been accepted as an essential aspect of the rules of vicarious liability: the requirement that the wrongdoing be legally characterised as having been done in the course of employment" (*Lepore*, [223]). Callinan J said "deliberate criminal conduct lies outside, and indeed will usually lie far outside, the scope or course of an employed teacher's duties" (*Lepore*, [342]).

not have enough facts from which to make a decision, her belief that an employee could be estopped from denying responsibility for an employee's torts or crimes under the general law of agency distance her from the doubts of the rest of the majority.³³ But all three judges who thus seemed willing to develop the jurisprudence in favour of victims have now retired from the High Court.

*Sweeney v Boylan Nominees*³⁴ is the only case where the High Court has considered vicarious liability again since *Lepore*. But there is a sense that it does not really add much, perhaps because the facts arose outside of the more problematic sexual abuse context. Still, since the advocates of a more empathetic approach to sexual abuse cases necessarily make their arguments in terms of the need for grand principle, and because the case featured two members new to the High Court since *Lepore*,³⁵ *Sweeney* cannot be ignored.

Maria Sweeney was injured at service station and convenience store in Pymble, New South Wales when the door of a fridge fell on her when she tried to open it. She sued those whom “she alleged were the owners and operators of the service station...and the...respondents”.³⁶ Those respondents had leased the fridge to Australian Cooperative Foods Ltd (ACF), but there was no evidence at trial as to the arrangements between ACF and the owners and operators of the service station.³⁷ The lease between the respondent Boylan and ACF, obliged Boylan “to service and

³³ *New South Wales v Lepore* (2003) 212 CLR 511, [127][131].

³⁴ *Sweeney v Boylan Nominees Pty Ltd* (2006) 227 ALR 46.

³⁵ Gaudron J retired from the High Court on 10 February 2003 and McHugh J on 1 November 2005. They were succeeded respectively by Heydon and Crennan JJ.

³⁶ *Sweeney v Boylan Nominees Pty Ltd* (2006) 227 ALR 46, [4].

³⁷ *Ibid.*

maintain the refrigerator in a proper and workmanlike manner and to replace any part which required replacement due to the normal operation of the refrigerator”.³⁸ “The owners and occupiers were found to have done all that they could reasonably be expected to have done in the circumstances and were thus not negligent.”³⁹

The negligent mechanic was described at trial as a contractor to the defendant. He ran his own business, though it is not clear from the report whether he did so as a sole trader or through a corporate entity of some kind.⁴⁰ The issue at trial was whether Boylan was vicariously responsible for the negligence of the mechanic. If so, was that because the mechanic was an employee, an agent or a representative of some kind?

In *Hollis v Vabu Pty Ltd*,⁴¹ Vabu was vicariously liable for the negligence of a bicycle courier who was an independent contractor for tax purposes. He was deemed an employee for vicarious liability purposes because he wore the uniform of Vabu and was extensively subject to Vabu's direction and supervision.⁴² He was an “emanation”⁴³ of Vabu.

In *Colonial Mutual Life Assurance Society Ltd v Producers and Citizens Co-operative Assurance Co of Australia Ltd*,⁴⁴ CML was found vicariously liable for the slander of one its representatives because it had “authorized

³⁸ Ibid [3].

³⁹ Ibid.

⁴⁰ Ibid [3] and [31].

⁴¹ *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21.

⁴² *Sweeney v Boylan Nominees Pty Ltd* (2006) 227 ALR 46, [32].

⁴³ *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21, [50]

⁴⁴ *Colonial Mutual Life Assurance Society Ltd v Producers and Citizens Co-operative Assurance Co of Australia Ltd* (1931) 46 CLR 41.

him on its behalf to address to prospective proponents such observations as appeared to him appropriate”.⁴⁵ According to the majority in *Sweeney*, the representative in *CML*, “acted in right of the principal, and not in an independent capacity, because he acted in execution of his authority to canvass for offers to contract with his principal.”⁴⁶

Though “the development of the law in this area has not always proceeded on a correct understanding of the basis of earlier decisions”,⁴⁷ and though “there is no adequate and complete explanation of the modern law, except by the survival in practice of rules which lost their true meaning when the objects of them ceased to be slaves”,⁴⁸ a principal could be liable for his independent contractor's acts if that contractor was acting as the principal's agent.⁴⁹ But in the *Sweeney* case, the mechanic was adjudged not to be acting as Boylan's agent. He was truly an independent contractor. McHugh J's broader proposition in *Scott v Davis*⁵⁰ and in *Hollis v Vabu Pty Ltd* “that if A “represents” B, B is vicariously liable for the conduct of A”⁵¹ was simply too broad for the majority of the court.⁵² Boylan was not responsible for the negligence of the mechanic simply because he was an independent contractor.

⁴⁵ Ibid 50 (Dixon J).

⁴⁶ *Sweeney v Boylan Nominees Pty Ltd* (2006) 226 CLR 161, [18].

⁴⁷ Ibid [11].

⁴⁸ Ibid [20] quoting Oliver Wendell Holmes Jr, *The Common Law* (1881) 232.

⁴⁹ Ibid [22].

⁵⁰ *Scott v Davis* (2000) 204 CLR 333.

⁵¹ Ibid [26].

⁵² Ibid [27] citing the judgments of McHugh J in *Scott v Davis* (2000) 204 CLR 333, 370 [110] and in *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21, 5758 [93].

Kirby J did not agree with the majority. While he agreed that the mechanic was not Boylan's employee,⁵³ he was Boylan's representative agent within the meaning of the High Court's 1931 decision in *CML*.⁵⁴ The mechanic was "integrated into [Boylan's] enterprise."⁵⁵ Because the contractor has been armed with the authority to act as the principal's representative, law and justice sustain the rule in *CML* that, if sued, the principal will be liable for its representative's wrongs to others acting within the scope of that authority.⁵⁶

This reasoning is consistent with Kirby J's judgment in *Lepore*. For while he concurred with most of the other judges who did not believe it appropriate to extend the doctrine of non-delegable duty to cover intentional torts,⁵⁷ he wrote a separate judgment so that he could articulate his idea that the wider doctrine of vicarious liability provided more than ample scope to remedy the injustice caused by the absence of effective remedy in institutional sexual abuse cases. He said simply "Where the employer has authorised the employee's conduct, there is no difficulty in assigning vicarious liability to that employer."⁵⁸ "The issue is whether vicarious liability extends to such situations of intentional wrongdoing of an employee."⁵⁹ Employer vicarious liability to cover the intentional torts of employees was a long established principle and was clear in a long line

⁵³ *Sweeney v Boylan Nominees Pty Ltd* (2006) 227 ALR 46, [73].

⁵⁴ *Ibid* [78][85].

⁵⁵ *Ibid* [83].

⁵⁶ *Ibid* [94].

⁵⁷ *New South Wales v Lepore* (2003) 212 CLR 511.

⁵⁸ *New South Wales v Lepore* (2003) 212 CLR 511, [308].

⁵⁹ *Ibid* [309].

of decisions.⁶⁰ Attempts by other members of the court in *Lepore* to distinguish some of these cases were “feeble”.⁶¹

But again, both McHugh and Kirby JJ have now retired from the High Court and the alignment of their replacements with the majority in *Sweeney*, suggest that if anything, the room for extending the scope of either the doctrine of non-delegable duty or vicarious liability so as to encompass the intentional acts of employees, agents or other representatives is less rather than more likely. But is there anything new in the recent decision of the UK Court of Appeal in *Maga (by his Litigation Friend, the Official Solicitor) v Trustees of the Birmingham Archdiocese of the Roman Catholic Church*?⁶² That would persuade the High Court otherwise?

F THE *MAGA* DECISION: WHAT IMPACT IF ANY IN AUSTRALIA?

While he was a 12 or 13 year old boy in 1975 or 1976, Maga was abused by a Catholic priest named Father Clonan who had been authorised by the Church to engage with youth in the community and to run a disco to

⁶⁰ Between [310] and [314], Kirby J cited the following cases as authority for his proposition that employers had been held vicariously responsible for the intentional torts of their employees: *Dubai Aluminium Co Ltd v Salaam* [2002] 3 WLR 1913, 1942 [123]; *Limpus v London General Omnibus Co* (1862) 1 H & C 526 [158 ER 993]; *Lister v Hesley Hall Ltd* [2002] 1 AC 215, 246 [72] per Lord Millett; *Cheshire v Bailey* [1905] 1 KB 237; *Morris v CW Martin & Sons Ltd* [1966] 1 QB 716; *Port Swettenham Authority v TW Wu & Co (M) Sdn Bhd* [1979] AC 580 noted in *Lister* [2002] 1 AC 215, 226 [19], 247 [76]; and even in the High Court of Australia in *Bugge v Brown* (1919) 26 CLR 110 at 117 per Isaacs J, and in other Australian State Courts in *Hayward v Georges Ltd* [1966] VR 202, 211; *Macdonald v Dickson* (1868) 2 SALR 32, 35 per Hanson CJ, with whom Wearing J concurred.

⁶¹ *New South Wales v Lepore* (2003) 212 CLR 511; (2003) 195 ALR 412, [312].

⁶² *Maga (by his Litigation Friend, the Official Solicitor) v Trustees of the Birmingham Archdiocese of the Roman Catholic Church* [2010] 1 WLR 1441.

involve them. Father Clonan was personally wealthy and always had a nice car. Though Maga was not a member of the church, he had come within Father Clonan's influence both through the church authorised disco program and in getting paid to wash the priest's car and to do other chores at the presbytery. The abuse had taken place at the presbytery. Father Ternan was Father Clonan's superior and supervisor. He had received various complaints concerning Father Clonan's relationship with the boys who came within his influence. He had reassured the parents that he would discuss the complaints with Father Clonan. But there was no evidence that he had done anything further. He certainly had not taken action which resulted in Father Clonan's dismissal. Long before this civil matter came on for trial, Father Clonan had disappeared first to Ireland and then to Australia, but he was now presumed dead. Father Ternan had also previously died.

The Court of Appeal agreed with the first instance decision that Maga was entitled to bring the claim out of time.⁶³ But because Maga was not a Catholic, at first instance Jack J found that there was insufficient connection between the abuse and Father Clonan's duties as a priest for the Birmingham Archdiocese to be vicariously liable for these intentional torts against the boy.⁶⁴ With only minor variation as to the scope of Father

⁶³ Ibid [28].

⁶⁴ In the trial at first instance (*Maga v Roman Catholic Archdiocese of Birmingham* [2009] EWHC 780), Jack J said at [100] I accept that it was Father Clonan's position as a priest which gave him the opportunity to abuse the claimant. But, as *Jacobi* shows, that is not by itself sufficient...Father Clonan's association with the claimant was founded on his use of the claimant for money to wash his car, to do cleaning in the Presbytery and in other houses, and to iron his clothes. That employment was not a priestly activity. Father Clonan did not do anything to draw the claimant into the activities of the Church. The association was not part of evangelisation, before "even" in its most extended sense. I therefore conclude that the assaults which Father Clonan carried out on the claimant were not so closely

Clonan's employment,⁶⁵ the Court of Appeal was unanimous in upholding the appeal. Lord Neuberger MR said, that even though the claimant was not a Roman Catholic, there are a number of factors, which, when taken together, persuade me that there was a sufficiently close connection between Father Clonan's employment as priest at the Church and the abuse which he inflicted on the claimant to render it fair and just to impose vicarious liability for the abuse on his employer, the Archdiocese.⁶⁶

Lord Longmore considered that it was not necessary, in defining the scope of Father Clonan's employment, that the Court of Appeal find that his duties included the duty to evangelise.⁶⁷ Lady Justice Smith did not think it mattered whether the scope of employment included or did not include the duty to evangelise and so encompass ministry to non-members of the church. Vicarious liability applied either way.⁶⁸

All were agreed Father Clonan was normally dressed in clerical garb, and was so dressed, when he first met the claimant. At the very least, this factor...sets the scene. A priest has a special role, which involves trust and responsibility in a more general way even than a teacher, a doctor, or a nurse. He is, in a sense, never off duty; thus, he will normally be dressed in

connected with Father Clonan's employment or quasi-employment by the Church that it would be fair and just to hold the Church liable.

⁶⁵ The parties had agreed for the purposes of this case 'that Father Clonan should be treated as its employee for the purposes of this case, but Mr Faulks emphasises that this should not be taken as a general admission that a priest is, or is in the same position as, an employee, of the Archdiocese.': *Maga (by his Litigation Friend, the Official Solicitor) v Trustees of the Birmingham Archdiocese of the Roman Catholic Church* [2010] 1 WLR 1441, [36].

⁶⁶ *Maga (by his Litigation Friend, the Official Solicitor) v Trustees of the Birmingham Archdiocese of the Roman Catholic Church* [2010] 1 WLR 1441, [44].

⁶⁷ *Ibid* [91].

⁶⁸ *Ibid* [96].

"uniform" in public and not just when at his place of work. So, too, he has a degree of general moral authority which no other role enjoys; hence the title of "Father Chris", by which Father Clonan was habitually known. It was his employment as a priest by the Archdiocese which enabled him, indeed was intended to enable him, to hold himself out as having such a role and such authority.⁶⁹

Father Clonan also had a special responsibility to develop relationships with local youth which had enabled him to "groom" the claimant,⁷⁰ he had invited him to a disco on Church premises which he had organised in his role as a priest,⁷¹ he was authorised by his employer to spend time alone with people who were searching for truth,⁷² and "[t]he abuse started at the presbytery and continued there."⁷³ Accordingly, "Father Clonan's sexual abuse of the claimant was 'so closely connected with his employment' as a priest at the Church 'that it would be fair and just to hold the [Archdiocese] vicariously liable'"⁷⁴ within Lord Steyn's test laid down in *Lister*.⁷⁵

All three judges also overruled the trial judge and found that the Archdiocese owed a duty of care to Maga through Father Ternan, "to keep a very careful eye on Father Clonan"⁷⁶ because of all the sexual abuse

⁶⁹ Ibid [45].

⁷⁰ Ibid [47].

⁷¹ Ibid [48].

⁷² Ibid [50].

⁷³ Ibid [51].

⁷⁴ Ibid [55].

⁷⁵ Ibid applying *Lister v Hesley Hall Ltd* [2002] 1 AC 215, [28].

⁷⁶ Ibid [66].

reports he had received against him. If he had not thus been negligent, “the claimant [would not have] be[en] sexually abused”.⁷⁷

*Lister v Hesley Hall*⁷⁸ is generally regarded to have changed the law in favour of sexual abuse plaintiffs in England before *Maga* was heard. In *Lister*, the warden of a school boarding house had been convicted of the sexual abuse of some behaviourally and emotionally challenged boys at the boarding house for whom he stood *in loco parentis*. He ensured order at the boarding house, sent the boys off to school each morning and even tucked them into bed at night. Two years earlier in *Trotman v North Yorkshire CC*,⁷⁹ the UK Court of Appeal had found that the employer of a school headmaster who sexually abused a boy on a school field trip was not vicariously liable for the headmaster’s tort because sexual abuse of a child was not within the scope of his employment as a headmaster. But in *Lister* Lord Steyn gave the leading judgment of the House of Lords and said, referring to and approving the then recent decision of the Supreme Court of Canada in *Bazley v Curry*⁸⁰ and *Jacobi v Griffiths*.⁸¹

Wherever such problems are considered in future in the common law world these judgments will be the starting point....Employing the traditional methodology of English law, I am satisfied that in the case of the appeals under consideration the evidence showed that the employers entrusted the care of the children in Axeholme House to the warden. The question is 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. On

⁷⁷ Ibid [67].

⁷⁸ *Lister v Hesley Hall Ltd* [2002] 1 AC 215.

⁷⁹ *Trotman v North Yorkshire County Council* [1999] LGR 584.

⁸⁰ *Bazley v Curry* [1999] 2 SCR 534.

⁸¹ *Jacobi v Griffiths* [1999] 2 SCR 570.

the facts of the case the answer is yes. After all, the sexual abuse was inextricably interwoven with the carrying out by the warden of his duties in Axeholme House. Matters of degree arise. But the present cases clearly fall on the side of vicarious liability.⁸²

The Salmond test which had been applied in the *North Yorkshire CC* case by the UK Court of Appeal, was stated to hold that an employer was vicariously responsible for the tort of its employee only 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”. In *Lister* the House of Lords said that

it is necessary to face up to the way in which the law of vicarious liability sometimes may embrace intentional wrongdoing by an employee. If one mechanically applies Salmond's test, the result might at first glance be thought to be that a bank is not liable to a customer where a bank employee defrauds a customer by giving him only half the foreign exchange which he paid for, the employee pocketing the difference. A preoccupation with conceptualistic reasoning may lead to the absurd conclusion that there can only be vicarious liability if the bank carries on business in defrauding its customers. Ideas divorced from reality have never held much attraction for judges steeped in the tradition that their task is to deliver principled but practical justice.⁸³

On the face of it, the law of the United Kingdom and Canada is now very much aligned. While it is still accurate to note that the UK jurisprudence has incorporated the “close connection” language into the pre-existing Salmond test⁸⁴ for vicarious liability since the ‘scope of employment’

⁸² *Lister v Hesley Hall Ltd* [2002] 1 AC 215, [27][28].

⁸³ *Ibid* [15][16].

⁸⁴ As quoted in *Lister v Hesley Hall Ltd* [2002] 1 AC 215, [8] and [15]; “*Salmond on Torts*, 1st ed (1907), p 83; *Salmond, Law of Torts*, 9th ed (1936), 95; *Salmond and Heuston, Law of Torts*, 21st ed (1996), 443”.

doctrine remains, it would seem that the practical result will be the same as in Canada. There, if one reads only the *Bazley* decision, the Salmond test seems to have been subsumed into the policy driven idea that if the employer introduced material risks into the community as a part of its enterprise, then it will be fair and just to hold that employer vicariously responsible if those risks materialise into loss or injury. But there is still the difference between the Canadian decisions in *Bazley*⁸⁵ and *Jacobi*.⁸⁶ Is that difference reflected in the most recent English jurisprudence and is it relevant to the state of the law in Australia?

In *Bazley*, a paedophile unwittingly hired by a Children's Foundation to act as a surrogate parent, sexually abused a mentally troubled child in one of its residential care facilities. McLachlin J providing the unanimous judgment of the Supreme Court of Canada concluded:

the Foundation is vicariously liable for the sexual misconduct of 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 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.⁸⁷

In *Jacobi*, an employee of a Boys' and Girls' Club had sexually abused a brother and a sister, mostly at his home away from the club. McLachlin J who had penned the unanimous decision of the Supreme Court in *Bazley* including its new test to guide lower courts as to when they could

⁸⁵ *Bazley v Curry* [1999] 2 SCR 534.

⁸⁶ *Jacobi v Griffiths* [1999] 2 SCR 570.

⁸⁷ *Bazley v Curry* [1999] 2 SCR 534, [58].

appropriately impose vicarious tort liability for intentional torts, penned the 43 minority decision in *Jacobi*. She and her minority colleagues found that “the Club... positively encouraged an intimate relationship to develop between Griffiths and his young charges.”⁸⁸ Because of his position of trust empowered by the Club, this abuser came to exercise god-like power over these vulnerable victims.⁸⁹ Though most of the sexual assaults took place away from the Club at the abuser's home, “It was his fostering of trust at the Club... that enabled him to commit his despicable acts”.⁹⁰

The majority applied the same test that McLachlin J had formulated in *Bazley* and applied in *Jacobi*, but came to the opposite result. Binnie J wrote the judgment. He and his colleagues considered the Trial Judge had gone “beyond reality...when he accepted Jody’s description at trial of Griffiths as a “god-like” authority.”⁹¹ “The Club provided the employee with an opportunity to meet children”,⁹² but “Griffiths had no job-created authority to insinuate himself into the intimate lives of these children.”⁹³ While McLachlin J for the minority had rejected the suggestion “that an employee’s job must bear a sufficient similarity to parenting to invoke vicarious liability in child abuse cases” (underlining original),⁹⁴ Binnie J for the majority noted:

⁸⁸ *Jacobi v Griffiths* [1999] 2 SCR 570, [17].

⁸⁹ Ibid [18] and [19]. Note that the 'god-like power' phrase was taken by the trial judge from the testimony of the female victim.

⁹⁰ Ibid [21].

⁹¹ Ibid [39].

⁹² Ibid [43].

⁹³ Ibid.

⁹⁴ Ibid [26].

I would not want to be taken as suggesting that creation of a parent-type relationship constitutes a precondition to vicarious liability in child abuse cases. However, not only do the “parental” cases have a particular relevance to the facts of this appeal, they show how high the courts have set the bar before imposing no-fault liability.⁹⁵

He continued:

It is as important on this subject as elsewhere to look at what courts do, and not merely at what they say... Adoption by this Court of the “enterprise risk” theory in *Children’s Foundation* was an effort to explain the existing case law, not to provide a basis for its rejection... [T]he existing case law does not support the imposition of vicarious no-fault liability on the respondent in this appeal.⁹⁶

Policy considerations also dictated that vicarious liability should not be imposed in this case. Competing policy considerations had to be balanced;⁹⁷ it could not be ignored that the imposition of no-fault liability on a not-for-profit corporation would not achieve the same result as in the case of a school or for-profit corporation;⁹⁸ and

the imposition of no-fault liability...would tell non-profit recreational organizations dealing with children that even if they take all of the precautions that could reasonably be expected of them, and despite the lack of any other direct fault for the tort that occurs, they will still be held financially responsible for what, in the negligence sense of foreseeability, are unforeseen and unforeseeable criminal assaults by their employees.⁹⁹

⁹⁵ Ibid [64].

⁹⁶ Ibid [65][66].

⁹⁷ Ibid [67].

⁹⁸ Ibid [68].

⁹⁹ Ibid [75].

Ultimately the case was referred back for retrial because the negligence and fiduciary duty pleadings had not been decided.¹⁰⁰ But this was not a case where the employer should be held vicariously liable for the intentional torts of its employee Griffith.

What is surprising in the *Jacobi* decision is that the majority of the Supreme Court of Canada was as reluctant as the High Court of Australia to impose no-fault vicarious liability upon an employer which had done all it reasonably could to protect vulnerable children. That reluctance does not come out in the House of Lord's decision in *Lister* or in the UK Court of Appeal's more recent decision in *Maga*. Indeed, it seems that the Trial Judge's decision in *Maga* is more closely aligned with the majority in *Jacobi* than the interpretation preferred by the Court of Appeal.

What then is the High Court of Australia likely to decide in a child abuse case argued on vicarious liability grounds in the future? Unless there is a relationship akin to the surrogate parenthood that was required by the employment contract in both *Bazley* and *Lister*, it is submitted that the High Court of Australia is as unlikely as ever to impose vicarious liability on an employer. But legislative developments in Australia since the *Lepore* decision, also make it less likely that the High Court of Australia will decide a vicarious liability case arising from sexual abuse facts against an institutional employer in a plaintiff's favour. Those legislative developments fall into two distinct categories. First, legislation aimed at limiting the disability arguments that have previously succeeded in enabling historic sexual abuse plaintiffs to be heard outside normal statutory limitation periods. And secondly, state and territorial child

¹⁰⁰ Ibid [87].

protection legislation targeted at protecting children in Australian society so that fewer cases arise in future for judicial resolution.

A Limitation Statutes

The statute of limitations in the *Maga* case in the UK posed a significant initial barrier to recovery for that victim. Maga's lawyers had to convince the High Court Judge that he should be allowed to bring his case in 2007, more than 30 years after Father Clonan had abused him. It will be recalled that the alleged offending took place when he was 12 or 13 years old in 1975 or 1976. Most British jurisdictions have passed legislation requiring that actions in tort be brought within no more than six years from the time when the events complained of, took place. But six years is a comparatively generous limitation. Most Australian limitation statutes require that tort actions be brought within no more than two or three years of the relevant events, though extensions can be obtained.¹⁰¹

Maga's strategy to overcome the problem is generic. If his advocates could convince the court that he was suffering from a disability, then he could likely convince the same court that the limitation period should not start to run until the disability ended, if ever. In the case of historic sexual abuse victims, the proof of disability is more difficult because some victims are able to function quite satisfactorily in their regular lives but cannot muster the emotional capacity and strength to confront their abuse, let alone initiate legal action to seek compensation for their losses. Should the court discount their disability claims because they seem inconsistent with their apparently satisfactory functioning in other parts of their lives?

¹⁰¹ For details of the relevant legislation, see above n 116.

In *Maga*, the trial judge's analysis was upheld by the Court of Appeal.¹⁰² Jack J concluded that Maga did not "have the capacity to conduct legal proceedings" and was therefore "of 'unsound mind' for the purposes"¹⁰³ of the relevant limitation legislation. After analysis, he also concluded that the defendant church would not be prejudiced by the delay in bringing the proceedings.¹⁰⁴ Though the Church denied that this boy was one of those abused by Father Clonan,¹⁰⁵ neither the Church nor the Police had been able to call the alleged abuser as a witness in any of the many other abuse cases that they had settled – and, in any event, the Church had "not ma[d]e enquiries and taken steps" to investigate the abuse claims as they should have done once they had been informed of the abuse "after the cause of action arose".¹⁰⁶ Jack J also doubted "that the Church would want to deny that Father Clonan was an abuser because of the subsequent claims which have been made which have, I understand, all been settled by substantial payments".¹⁰⁷

Similar arguments have been accepted in other courts. For example, in *S v Attorney-General*¹⁰⁸ and in *W v Attorney-General*,¹⁰⁹ the New Zealand

¹⁰² *Maga (by his Litigation Friend, the Official Solicitor) v Trustees of the Birmingham Archdiocese of the Roman Catholic Church* [2010] 1 WLR 1441, [21][29].

¹⁰³ *Maga v Roman Catholic Archdiocese of Birmingham* [2009] EWHC 780, [53].

¹⁰⁴ *Ibid* [69], [70] and [72].

¹⁰⁵ *Ibid* [70].

¹⁰⁶ *Ibid* [76].

¹⁰⁷ *Ibid* [69].

¹⁰⁸ *S v Attorney-General* [2003] NZCA 149.

¹⁰⁹ *W v Attorney-General* [2003] NZCA 150.

Court of Appeal¹¹⁰ decided in 2003, that claims dating back to 1967 could proceed despite the applicable six year statute of limitations.¹¹¹ They accepted expert evidence which the Trial Judge had rejected, that the symptoms of Post Traumatic Stress Disorder and Depression (PTSD) included the “develop[ment of] 'tunnel vision' shutting down stimuli apart from those they are focusing on. Such a person can do well in some areas of their life but at the expense of other functions.”¹¹² They accepted that this “appellant tried to get on with his life and 'parked' or repressed his childhood trauma”.¹¹³ Once he was “released' by the death of his caregiver...and had appropriate medical and psychological support, he then had vigorously pursued the legal claim”.¹¹⁴ The Trial Judge's focus on what the plaintiff could do, had seen him “overlook” the expert's evidence as to the enduring effects of the PTSD. In the *W* case, the Court of Appeal upheld the trial judge's interpretive finding that the six year limitation period did not start until the plaintiff made the link between the abuse and his mental injury in 1996.¹¹⁵

¹¹⁰ When appeals to the Privy Council were abolished effective in July 2004, and two of the five judges who sat in this case were promoted to compose the first New Zealand Supreme Court. Blanchard and Tipping JJ were appointed at the inception of the new court; McGrath and Anderson JJ were appointed in 2005 and 2006 respectively,

¹¹¹ *S v Attorney-General* [2003] NZCA 149, [30].

¹¹² *Ibid* [42].

¹¹³ *Ibid*.

¹¹⁴ *Ibid* [44].

¹¹⁵ *W v Attorney-General* [2003] NZCA 150, [23][24].

B *Other legislative developments in Australia*

While the refinement of the applicable State and Territory Limitation laws in Australia to limit the scope of the disability arguments that plaintiffs can bring in Australia¹¹⁶ may reduce the number and the likely success of historic sexual abuse claims in the future, what is more likely to reduce the number of such actions, is the advent of detailed statutory child protection schemes in most of the states and territories in Australia.¹¹⁷ It is submitted

¹¹⁶ *Limitation Act 1969* (NSW) s 50C(1)(b) now provides a “12 year long-stop limitation period”, though that period can be extended by a Court exercising its discretion under Division 4 of Part 3. Section 27E of the *Victorian Limitation of Actions Act 1958* similarly provides that a person under a disability can bring an action before the earliest to occur of six years after the disability ends or twelve years from when the action accrued. Section 27L is similar to Division 4 of Part 3 of the New South Wales legislation and sets out the basis upon which Courts may further extend these limitation periods. Section 11 of the *Queensland Limitation of Actions Act 1974* provides a three year limitation period in respect of personal injuries. Section 29 provides that period is extended by six years from the date when a disability ceases. Section 36 of the *South Australian Limitation of Actions Act 1936* provides a three year limitation period for personal injury claims, or three years after the claimant becomes aware of the relevant injury. Section 14 of the *West Australian Limitation Act 2005* provides a three year sunset on personal injury actions. Part 3 of the same act makes various provisions for extension depending on the nature of the disability (different minority ages and mental disability). In Tasmania, sections 5 and 5A of the *Limitation Act 1974* make a distinction between causes of action accrued before and after the date of the commencement of the act, with extensions possible under Part III for similar reasons that apply in NSW and Victoria. In the ACT, section 11 of the *Limitation Act 1985* provides a six year limitation on all causes of action, but section 35 grants the court discretion to enlarge that time after reviewing specified criteria. Section 12 of the *Limitation Act 2008* in the Northern Territory prescribes a three year limitation period on actions in tort. But section 36 provides for an extension of three years after the disability ends. It is also arguable that greater detail in the legislation where disability is concerned in fact enables disabled plaintiffs to more easily make their cases since the legislatures clearly contemplated that they might not be competent to bring cases within normal limitation periods and therefore actively gave courts discretion to extend time when necessary.

¹¹⁷ Save for Tasmania and the ACT, all domestic Australian jurisdictions now have child protection regimes that require all persons who are employed to work with children, or who volunteer to work with children, are first subject to a police background check or that they first sign a statutory declaration confirming that they have no relevant criminal convictions. The legislation creating these requirements are: *Children and Young Persons (Care and Protection Act) 1998*

that these new statutory child protection regimes will be seen as creating codes of conduct in each jurisdiction for all organisations which work with children whether they do their work through employees or volunteers. If the organisations can show that they have complied with the legislation, then they will be able to present a prima facie 'no fault' case to defend themselves against direct abuse claims founded in negligence. If they have not complied, their non-compliance will be prima facie evidence of negligence, and might also make it easier to satisfy a court that such organisations should be indirectly but vicariously liable for the intentional torts of their employees and volunteers since the absence of fault will not cause anxiety.

The reason why non-compliance with child protection legislation might make it easier to convince a court that an institution should be vicariously liable for even the intentional tort of an employee is subtle. While no court and certainly not the High Court of Australia, has ever said that a plaintiff must prove fault to succeed in a vicarious liability case, the language of Binnie J for the Supreme Court of Canada in *Jacobi's* case and of Lord Steyn when discussing that decision in *Lister*, suggest that a perception of fault may now be a subliminal factor for judges working out whether it is fair to impose vicarious liability in Canada and the UK. For while there is nothing extraordinary in Binnie J's indication that the difference between direct liability in negligence and indirect vicarious liability is the same as that which exists between 'fault' and 'no-fault' liability,¹¹⁸ his judgment that it would not have been fair to impose "vicarious no-fault liability" on

(NSW); *Care and Protection of Children Act* 2007 (NT) ; *Child Protection Act* 1999 (Qld); *Children's Protection Act* 1993 (SA); *Working with Children Act* 2005 (Vic); and *Working with Children (Criminal Record Checking) Act* 2004 (WA).

¹¹⁸ *Jacobi v Griffiths* [1999] 2 SCR 570, [64][67].

the employer in *Jacobi*¹¹⁹ raises legitimate questions about why fairness dictated the imposition of vicarious liability in *Bazley*. McLachlin J did not think there was a lot of objective difference between the authority given by the two employers in the two cases. For Binnie J and his colleagues in the majority in *Jacobi*, the difference between the two cases was about how much risk the respective employers had introduced into the community¹²⁰ – which suggests it is fair to impose vicarious liability on an employer if he was less careful or at fault in some way. The connection between fault and fairness is perhaps more obvious in Lord Steyn’s judgment in *Lister* when he said

Enunciating a principle of "close connection" the Supreme Court unanimously held liability established in *Bazley's* case and by a 4 to 3 majority came to the opposite conclusion in *Jacobi's* case. The Supreme Court judgments examine in detail the circumstances in which, though an employer is not “at fault,” it may still be “fair” that it should bear responsibility for the tortious conduct of its employees.¹²¹

The judgments are consistent in maintaining the difference between direct and vicarious liability, or fault and no-fault liability. But the introduction of the enterprise risk test into scope of authority cases invokes notions of fairness, which may belie the traditional fault, no-fault dichotomy. For while it may still be fair for a court to impose vicarious liability when there was no fault, the notion that an employer’s introduction of a risk into the market place is sufficient reason to hold them vicariously liable for a resulting tort or crime, implies that the employer’s decisions were indeed a factor in the imposition of liability.

¹¹⁹ Ibid [66].

¹²⁰ Ibid [67].

¹²¹ *Lister v Hesley Hall Ltd* [2002] 1 AC 215, [10].

The provisions of the applicable child protection statutes in Australia are also likely to define for Courts the scope of the duties of care that will apply in future child sexual abuse cases. While non-compliance with the codes as a species of fault may also lead to vicarious liability for employing organisations, it is likely that the High Court's reluctance to impose vicarious liability in the case of intentional torts and crimes will harden when there has been compliance with the relevant code. Some practical analysis may assist understanding.

Suppose that a church employee or volunteer sexually abuses a child to whom he was introduced in the course of his employment. Suppose further that the church had fully complied with the statutory child protection rules applicable in that state. When the sexual abuse victim brings her claim before the court, the church will be able to answer a direct claim of negligence by pointing out that it fully complied with the applicable law including in most cases, requiring the prospective employee to undergo a criminal records check.¹²² The church will also express strong support for the relevant child protection laws behind its compliance and ask what else it could reasonably have done to prevent the tragic abuse that had taken place. It is submitted that these same arguments by the church would also likely defeat a claim that the church was vicariously responsible for an employee's tort and crime if the High Court were ever persuaded to apply the enterprise risk doctrine now applied in Canada and the UK. Perhaps courts in Australia would then respond as did the Supreme Court of Canada in *Jacobi v Griffiths* that such an

imposition of no-fault liability...would tell non-profit recreational organizations dealing with children that even if they take all of the precautions that could reasonably be expected of them [*and that the law*

¹²² Above n 117.

required], and despite the lack of any other direct fault for the tort that occurs, they will still be held financially responsible for what, in the negligence sense of foreseeability, are unforeseen and unforeseeable criminal assaults by their employees (*italics added by the author*).¹²³

If however, the church has not complied with the relevant statutory child protection regime, such cases will likely be argued and won in terms of negligence and breach of statutory duty, though perhaps alternative and indirect vicarious liability claims may still be pled in the alternative.

The position in Tasmania and the ACT, where no statutory child protection regimes yet exist, is more difficult to assess. In those jurisdictions, where there is no state or territory support in place to enable criminal records checks before child care workers and volunteers are engaged, it is submitted that the institutions would do well to undertake similar checks voluntarily since the 'gravitational pull' of the other statutory regimes is likely to raise the duty of care bar even in their jurisdictions.¹²⁴ It should be noted however that privacy law presents a hurdle for institutions that try and do private criminal records checks. Absent statutory justification, they will not have official access to the most useful records.

None of this however provides hope of remedy for the victims of historic sexual abuse perpetrated long before the advent of child protection codes.

¹²³ *Jacobi v Griffiths* [1999] 2 SCR 570, [75]. See also above n 99 and supporting text.

¹²⁴ For a discussion of the 'gravitational pull' of statutes in Australian jurisdictions without equivalent statutes, see Thompson AK, *Religious Confession Privilege and the Common Law*, Martinus Nijhoff, 2011, 207210. The idea that statutes exercise gravitational pull on the common law in other jurisdictions was suggested by Mason P, as he then was, in *Akins v Abigroup Ltd* (1998) 43 NSWLR 539, 547548 and was also discussed by Beazley JA and James J in *R v Young* (1999) 46 NSWLR 681, [205][326].

G VICARIOUS LIABILITY FOR INTENTIONAL TORTS IN AUSTRALIA IN THE FUTURE?

Plaintiffs in child sexual abuse cases have tried various approaches to convince Australian courts that someone other than the immediate perpetrator should be responsible to compensate them for the injuries that they have suffered. The decision in the *Lepore* case effectively eliminated the idea that such recovery could be founded in the notion that employers owed children a non-delegable duty of care for even the intentional torts of their employees – though Gaudron J did leave open the possibility that schools could owe such a non-delegable duty of care.¹²⁵ Similarly, it seems clear that the ongoing majority of the High Court will not accept the proposition that an employer should be vicariously liable for the intentional torts of its employees or agents since intentional torts and crimes cannot reasonably be seen as falling within the scope of employment.¹²⁶ What of the other jurisprudential theories that have been raised as possible justifications for recovery from deep pocketed institutions which have the ability to spread such losses through society?

Though Gaudron J inferred that an employer could conceivably owe vulnerable children an absolute duty to take care of them,¹²⁷ she considered that the occasional cases which had found employers vicariously liable for the intentional torts of their employees could all be explained by the equitable concept of estoppel.¹²⁸ Can estoppel be used to prevent employers denying liability where those employers have sent their

¹²⁵ See above n 2526 and supporting text.

¹²⁶ See above n 3552 and supporting text.

¹²⁷ *New South Wales v Lepore* (2003) 212 CLR 511, [99][105].

¹²⁸ *Ibid* [108][113], [130][131].

employees into the world as agents to perform tasks that either provided the opportunity for the abuse or licensed it in some way? Is this really any different than the vicarious liability arguments that the High Court has already rejected in the case of intentional torts? What about the idea, accepted in Canadian courts, that employers owe a fiduciary duty to children since they are vulnerable and trusting?¹²⁹ Does this additional equitable idea have the power to convince Australian courts of the justice served by compensating child sexual abuse victims when other logic has failed? Is it the reason why the plaintiff succeeded against the solicitors' firm in *Lloyd v Grace Smith*¹³⁰ in 1912? Or is there anything analogous to the notion of bailment, which has been used¹³¹ to explain why the employer was held vicariously liable for the theft of a client's fur coat in *Morris*¹³² in 1966 in the UK, that could be usefully argued in the future in Australia?

A Is there any room for argument left under the non-delegable duty care jurisprudence?

Gaudron J's point in apparently leaving the non-delegable duty of care argument open to plaintiffs in school cases, was that the plaintiffs in the three cases reported as *Lepore*, had not established the particular non-delegable duty of care their schools owed to them. She said that the non-delegable duties established to exist in *The Commonwealth v Introvigne*¹³³ were stated by Murphy J to be "[t]o take all reasonable care to provide

¹²⁹ For example, see *Jacobi v Griffiths* [1999] 2 SCR 570, [60] and [87].

¹³⁰ *Lloyd v Grace, Smith & Co* [1912] AC 716.

¹³¹ See for example, Gleeson CJ's judgment in *New South Wales v Lepore* (2003) 212 CLR 511, [48].

¹³² *Morris v CW Martin & Sons Ltd* [1966] 1 QB 716.

¹³³ *Commonwealth v Introvigne* (1982) 150 CLR 258.

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."¹³⁴ It is difficult to see from her judgment how and why the schools in *Lepore*, *Rich* and *Samin* did not breach those broadly expressed duties since it was accepted that each of these three plaintiffs were assaulted by their teacher. Gaudron J did say that non-delegable duties of care were not absolute; that because they were 'duties of care', the risks that materialised had to have been foreseeable¹³⁵ - which suggests that she considered the risk of the truck of the flagpole falling in *Introvigne* was more foreseeable than the risk of the teachers abusing the students in *Lepore*, *Rich* and *Samin*. However she does not explain why and we are left to speculate that she believed that if teachers were on duty in the playground as part of their normal supervision, they could have stopped the flagpole incident.¹³⁶ But Gaudron J did not think that anyone could have stopped the sexual abuse incidents because they were torts committed by a teacher, and far outside the scope of a teacher's employment.

If this speculative analysis of Gaudron J's underlying reasoning is correct, then we are back to the same core issues which have perplexed the High Court in vicarious liability argument. Namely, that it is very difficult to impose vicarious liability when there is no foreseeable risk and thus no fault. So it is probably not surprising that the 'non-delegable duty of care' argument has not been tried again since *Lepore*, and it is fair to conclude that it is unlikely to succeed.

¹³⁴ *New South Wales v Lepore* (2003) 212 CLR 511, [102] quoting Murphy J in *The Commonwealth v Introvigne* (1982) 150 CLR 258, 274275.

¹³⁵ *New South Wales v Lepore* (2003) 212 CLR 511, [103].

¹³⁶ This was the ratio for the decision in *Commonwealth v Introvigne* (1982) 150 CLR 258. Gleeson CJ's analysis of the *Introvigne* decision in *Lepore*, [24][31] is to similar effect.

B *Fiduciary Duty*

The High Court of Australia has stated on a number of occasions that the categories of fiduciary duty are not closed¹³⁷ However, the unanimity of the Court in *Breen v Williams*¹³⁸ in rejecting Canadian jurisprudence in relation to fiduciary duty, makes it unlikely that sexual abuse plaintiffs in Australia are soon going to be able to establish that they are owed fiduciary duties by the institutions which engaged their abusers.

In that case, though there were four separate judgments, all agreed that “the Canadian notion [of fiduciary duty does not] accord with the law of fiduciary duty as understood in this country.”¹³⁹ Julie Breen's wish to have access to her medical records without first signing an indemnity, did not put that case on all fours with the claim that the child victims of sexual abuse are the subjects of a relationship analogous to agency and are also vulnerable in such a way that fiduciary principles should apply.¹⁴⁰ And Julie Breen's claim that her Doctor Cholmondoley Williams, was under a

¹³⁷ For example in *Hospital Products v United States Surgical Corporation* (1984) 156 CLR 141 per Gibbs CJ at 68 and per Mason J at 96; *Breen v Williams* (1996) 186 CLR 71 per Gaudron and McHugh JJ, [24].

¹³⁸ *Breen v Williams* (1996) 186 CLR 71.

¹³⁹ Ibid [15] (Brennan CJ), but see also [24] (Dawson and Toohey JJ); [36] and [40]-[42] (Gaudron and McHugh JJ), [71] (Gummow J).

¹⁴⁰ Brennan CJ stated that the two principal sources of a fiduciary duty were agency and a “relationship of ascendancy or influence by one party over another, or dependence or trust on the part of that other”: *Breen v Williams* (1996) 186 CLR 71, [14]. Others on the Court in *Breen* referred to the vulnerability of one party in a relationship which necessarily involved dominance or special knowledge and responsibility as a primary factor in invoking the fiduciary principles of equity. See [20] (Dawson and Toohey JJ); [24] (Gaudron and McHugh JJ); [59] and [62] (Gummow J).

duty to act in her 'best interests',¹⁴¹ asserted a direct fiduciary relationship rather than that he was responsible for breach of any kind of vicarious duty as will most often arise in an institutional sexual abuse claim.

However, a sexual abuse claim alleging the existence of a fiduciary relationship with equitable duties applying, came before the full Federal Court two years after the *Breen* case in *Paramasivam v Flynn*¹⁴² and was dismissed in accordance with the findings of the *Breen* decision. Paramasivan alleged that he had been sexually assaulted by his guardian Flynn over a period of many years. He alleged that the guardianship relationship was fiduciary in nature. The court agreed that the relationship of guardian and ward could give rise to fiduciary duties where, for example, the guardian unduly influenced the financial transactions of the ward. The breach of such duties could entitle the ward to compensation for any resulting economic loss.¹⁴³ However, Anglo-Australian law had not accepted that the breaches of trust and confidence which were alleged in this case were economic in nature.¹⁴⁴ Their honours continued:

Here, the conduct complained of is in within the purview of the law of tort..., which has worked out and elaborated principles according to which various kinds of loss and damage, resulting from intentional or negligent wrongful conduct, is to be compensated. That is not a field on which there is any obvious need for equity to enter and there is no obvious advantage to be gained from equity's entry upon it. And such an extension would, in our

¹⁴¹ Ibid [9] (Brennan CJ); [26], [27] and [30] (Dawson and Toohey JJ); [11][16], [18][19], [28], [30][31], [41], [51][52] and [71] (Gaudron and McHugh JJ). Gummow J did not use this phrase from the plaintiff in his judgment.

¹⁴² *Paramasivam v Flynn* (1998) 160 ALR 203.

¹⁴³ Ibid [67].

¹⁴⁴ Ibid [68][69].

view, involve a leap not easily to be justified in terms of conventional legal reasoning.¹⁴⁵

Their honours noted that in *Breen*, several of the judges had accepted that fiduciary duties could stand alongside duties arising in both contract and tort.¹⁴⁶ But they noted, even in the Canadian jurisprudence, that "[f]iduciary duties should not be super imposed on these common law duties simply to improve the nature or extent of the remedy."¹⁴⁷ For those reasons

a fiduciary claim, such as that made by the plaintiff in this case, is most unlikely to be upheld by Australian courts...To say, truly, that categories are not closed does not justify so radical a departure from underlying principle. Those propositions, in our view, lie at the heart of the High Court authorities to which we have referred, particularly, perhaps, *Breen*.¹⁴⁸

Various commentators since have opined that there may still be room for such arguments.¹⁴⁹ It is submitted that Richard Joyce was most accurate

¹⁴⁵ Ibid [70].

¹⁴⁶ Ibid [75][78].

¹⁴⁷ Ibid [77], quoting Sopinka J in *Norberg v Wynrib* [1992] 2 SCR 226 at 312; (1992) 92 DLR (4th) 449, 481.

¹⁴⁸ Ibid [79].

¹⁴⁹ For example, Lisa Zhou has observed that the "inadequacy of Australian fiduciary jurisprudence" and in particular the "lack of protection of non-economic interests...systematically disadvantages sexual abuse victims", "Fiduciary Law, Non-Economic Interests and Amicus Curiae", [2008] *Melbourne University Law Review* 36. In a note about the Cubillo decision by O'Loughlin J once again denying recovery for non-economic torts under fiduciary principles, Robert Van Krieken notes Father Frank Brennan's belief that the failure to provide a remedy for wrongs committed against the stolen generation is a "betrayal of national, moral and political commitment": 'Is assimilation justiciable? Lorna Cubillo & Peter Gunner v Commonwealth' [2001] *Sydney Law Review* 10.

when he stated, citing the decisions of O'Loughlin J in the *Cubillo* cases¹⁵⁰ and Rolfe J in *Johnson v Department of Community Services*:¹⁵¹

[I]t is clear that so long as the distinction between economic and non-economic interests continues to inform the operation of Australian fiduciary law, the likelihood for success of plaintiffs is low.¹⁵²

In any event, when fiduciary duties have been considered in sexual abuse cases, there is no certainty that they will yield remedies any different than those available simultaneously in contract or tort.¹⁵³

¹⁵⁰ *Cubillo (No 1)* (1999) 89 FCR 528 and *Cubillo* (2000) 174 ALR 97.

¹⁵¹ *Johnson v Department of Community Services* (2000) Aust Tort Reports 81-540.

¹⁵² Joyce R, 'Fiduciary Law and Non-Economic Interests' [2002] 28 *Monash University Law Review* (2) 239, 240.

¹⁵³ For example in *M(K) v M(H)* (1992) 96 DLR (4th) 289, 337, La Forest J for the majority suggested that in the absence of different policy considerations, the damages for breach of fiduciary duty would be the same as the equivalent damages in contract and tort. McLachlin J was not so sure the damages would be the same and Richard Joyce notes that the continuing separation of common law and equity in Australia, might yield a different result if the Canadian jurisprudence was ever followed in Australia ("Fiduciary Law and Non-Economic Interests" [2002] 28 *Monash University Law Review* (2) 239, 264). Note also that the NZ Court of Appeal in *S v Attorney-General* [2003] NZCA 149, [78] where Blanchard J wrote: Where a person, though under some fiduciary obligation, merely fails to exercise reasonable skill and care, there is no reason in principle for the law to treat that person any differently from those who breach duties of care imposed by contract or tort.

And in *W v Attorney-General* [2003] NZCA 150, [45], Blanchard J writing the only judgment added:

under this head [the allegation] is exactly the same as for the allegation of negligence, where in assessing damages the fact that the tort was deliberate and was committed on a child in the care of the perpetrator will be fully taken into account. Damages will be no greater in equity.

C *Can estoppel arguments provide sexual abuse plaintiffs with a remedy?*

White and Orr described Gaudron J's approach to finding a grand principle behind the vicarious liability cases as 'novel'.¹⁵⁴ However, they believed her "rationale seem[ed] forced".¹⁵⁵ Gaudron J proposed that employers were estopped from denying their liability for an employee's acts if those acts had a 'close connection' or were acting within the ostensible authority provided to the employee. White and Orr said that this interpretation could not account for the *Lloyd* and *Morris* decisions any better than Gummow and Hayne JJ,¹⁵⁶ and Kirby J had considered those interpretive efforts were 'feeble'.¹⁵⁷ This author is not sure that this partly shared analysis of Gaudron, Gummow, Hayne and even Kirby JJ should be so peremptorily dismissed. Indeed, it is doubtful that is really very novel since it is arguably the reason for the majority decision in the *Morris* case.¹⁵⁸

Kirby J was consistent in *Lepore* and *Sweeney* in stating that employers can be held vicariously liable for the intentional torts of their agents. For him, the *Lloyd* and *Morris* decisions were cases in point and did not need to be distinguished. Whether an employer should be vicariously liable for the

¹⁵⁴ Steven White and Graeme Orr, 'Precarious liability: The High Court in *Lepore*, *Samin* and *Rich* on school responsibility for assaults by teachers' (2003) 11 *Torts Law Journal* 101, 108.

¹⁵⁵ *Ibid.*

¹⁵⁶ *Ibid* referring to Gummow and Hayne JJ's joint judgment in *New South Wales v Lepore* (2003) 212 CLR 511, [225][239].

¹⁵⁷ *Ibid* referring to *New South Wales v Lepore* (2003) 212 CLR 511; [312] (Kirby J).

¹⁵⁸ That is, while Lord Denning MR said the employer was liable because of bailment principles, Salmon and Diplock LJ both decided the case on scope of employment/ostensible authority grounds and Salmon LJ specifically referred to the estoppel principle that Gaudron J picked up in her judgment in *Lepore*.

intentional torts of an employee for Kirby J, depended on the 'closeness of the connection'¹⁵⁹ of the acts in issue with the employment. This is the 'germ'¹⁶⁰ of an idea that he borrowed from the House of Lords' decision in *Lister*. He said, further borrowing from the Supreme Court of Canada in *Bazley* and *Jacobi*, that the connection will be close enough if the "employment [has] materially and significantly enhanced or exacerbated the risk of [the tort]" (underlining original).¹⁶¹ In *Sweeney*, Kirby J applied Dixon J's judgment from the *CML* case and said that Boylan Nominees should be held vicariously liable for the mechanic's acts because he was "integrated into their enterprise".¹⁶²

But what is the difference between stating with the Supreme Court of Canada and the House of Lords in England that there must be a 'sufficiently close connection' to hold an employer vicariously liable for an employee's intentional torts, and saying with Gaudron, Gummow and Hayne JJ (and Salmon and Diplock LJJ), that an employer should be vicariously liable for an employee's torts if they were performed within the scope of the employee's ostensible authority?

It is submitted that Gaudron J's ostensible authority/estoppel analysis may indeed provide a key to establishing a principle which unifies most of the vicarious liability cases in Australia. For it explains why *CML* was vicariously liable for the slander of its representative – *CML* had authorised this representative to "address to prospective proponents such observations

¹⁵⁹ *New South Wales v Lepore* (2003) 212 CLR 511, [315][320].

¹⁶⁰ *Ibid* [316].

¹⁶¹ *Ibid* [318].

¹⁶² *Sweeney v Boylan Nominees Pty Ltd* (2006) 227 ALR 46, [83].

as appeared to him appropriate.”¹⁶³ CML was thus justifiably estopped from denying that this representative had its authority to make the observations which were ultimately adjudged slanderous. Ostensible authority/estoppel analysis can explain why Grace, Smith & Co were vicariously liable for the fraud their clerk perpetrated on Emily Lloyd. Though the fraud committed was an intentional tort, it was committed by a solicitor’s clerk while functioning within the ostensible authority conferred by a professional firm. It was therefore equitably just that the firm should be estopped from denying it had indeed conferred authority upon this clerk.¹⁶⁴ Gaudron J’s principle can explain why CW Martin & Sons Ltd was vicariously liable for the theft of Mrs Morris’ fur – C W Martin & Sons Ltd had empowered the employee who stole the fur with its authority to take possession of the fur and to clean it. In equity, they were therefore justifiably estopped from denying that they had given their clerk the authority to possess the fur, even though they may not have envisaged the theft.¹⁶⁵ Gaudron J’s ostensible authority/estoppel principle can also explain why the Children’s Foundation and Hesley Hall Ltd were vicariously liable for the sexual abuse perpetrated by their residential carers in *Bazley* and *Lister*. The employers in those cases had given their carers ostensible authority to act as parents to the boys they ultimately abused and it would have been inequitable for those employers to deny such authority because crime and intentional torts are exceptions to liability under traditional ‘scope of authority’ doctrine. Gaudron J’s ostensible authority/estoppel analysis also explains why the school authorities were not vicariously liable for the sexual abuse of the school teachers in *Lepore*,

¹⁶³ *Colonial Mutual Life Assurance Society Ltd v Producers and Citizens Co-operative Assurance Co of Australia Ltd* (1931) 46 CLR 41, 50 (Dixon J).

¹⁶⁴ *Lloyd v Grace, Smith & Co* [1912] AC 716.

¹⁶⁵ *Morris v CW Martin & Sons Ltd* [1966] 1 QB 716.

Rich and *Samin* and why the Boys' and Girls' Club of Vernon was not vicariously responsible for Griffith's sexual abuse in *Jacobi*. Unlike the 'in loco parentis' carers in *Bazley* and *Lister*, neither these Australian school teachers nor the Program Director of the Vernon BC Boys' and Girls' club, had ostensible authority from their employers for anything like bedtime intimacy. Accordingly the employers in *Lepore* and *Jacobi* could deny responsibility for the unauthorised and criminal acts of their employees. However, Gaudron J's ostensible authority/estoppel principle does not explain why Boylan Nominees Pty Ltd was not responsible for the mechanic's negligence in the *Sweeney* case since he was acting within the scope of his ostensible authority when he failed to repair the fridge which ultimately injured Ms Sweeney. In each case except *Sweeney*, Gaudron J's simple question - was the tort complained of, done by the employee, agent or representative of the employer/principal while exercising the ostensible authority of that employer/principal? - yields the same answer as was given by the relevant courts in their decisions, despite different analysis. While the bailment analysis, that some judges have found necessary to explain the vicarious liability of CW Martin & Sons Ltd for the loss of Mrs Morris' fur coat,¹⁶⁶ has helped some judges distinguish that decision from other cases where the employer has not been found vicariously liable for the intentional tort of an employee, it is submitted that simple ostensible authority creating an estoppel is a better explanation since it can also explain the results the judges chose in the other cases. In any event, it is unlikely that simple

¹⁶⁶ The bailment analysis came from the judgment of Lord Denning MR in that case - *Morris v CW Martin & Sons Ltd* [1966] 1 QB 716 and was observed by all the High Court of Australia judges in *Lepore*: [48] and [52] (Gleeson CJ); [112] and [113] (Gaudron J); [147] (McHugh J); [236] (Gummow and Hayne JJ); and [312] (Kirby J). His brethren, Salmon and Diplock LJ decided the case on ostensible authority principles (coupled with estoppel in the case of Salmon LJ), as was pointed out by McHugh J at [147] of his *Lepore* judgment.

bailment analysis will be used very often to explain the vicarious liability of an employer in the future.

H CONCLUSION

So what does all this mean for a plaintiff who wants to hold an institution vicariously liable for sexual abuse perpetrated by an employee, agent, or representative in Australia in the 21st century?

It is going to be a difficult task. It is unlikely that it will help to say that the institution owed the victim a non-delegable duty of care, no matter how carefully one can particularise such a duty. Similarly, the suggestion that the institution is or ought to be liable for the acts of the employee because either the employee or the institution owed the victim a fiduciary duty, is an argument that is unlikely to make much headway in Australia in the near future.

Therefore unless a plaintiff can make the case that the abuse was perpetrated by the employee, agent or representative while acting within the ostensible authority the employer or principal had conferred, a vicarious liability argument is unlikely to succeed. The High Court simply does not accept that vicarious liability should be imposed in cases of intentional tort or crime because it is nearly impossible to argue that an intentional tort or crime could ever fall within the scope of employment. The only way that a plaintiff seems likely to be able to convince the High Court that vicarious liability should be imposed, is by showing that the employer generated not just the opportunity for the tort, but the possibility that it could happen by virtue of the ostensible authority with which the employer clothed its servant. For if the intentional tort then appears to have been something done with the employer's ostensible authority and thus also within the

scope of employment, the employer will be estopped from denying responsibility.

However it is doubtful that future sexual abuse plaintiffs will premise their litigation in arguments about vicarious liability at all. Much more likely, given the forward march of Australian State and Territory Child Protection legislation since the *Lepore* case was decided, is that these cases will be argued in direct negligence or breach of statutory duty. Since most Australian jurisdictions have now created Child Protection regimes that oblige institutions which interact directly with children, to undertake state supported criminal checks before employees or volunteers are engaged, then if a plaintiff can show that no background check was carried out, it will be hard for the employer to deny direct responsibility in negligence. Such proof is a two-edged sword. If an institutional employer can show that it did all that was statutorily required, then it is submitted it will be difficult for any plaintiff to convince a court either that an institution was directly negligent or that it should be held vicariously responsible for the intentional tort or crime of an employee or volunteer. In those future cases where vicarious responsibility is still pled, the Australian courts are likely to retreat to the traditional scope of employment doctrine as the majority of the Supreme Court of Canada did in *Jacobi v Griffiths* and say that ‘this’ intentional tort was not within the scope of ‘this employee’s employment’.

There is a bright side to all of this though. For the fact that future plaintiffs may find it difficult to succeed against institutions if they bring vicarious liability claims will be more than offset by the likelihood that they will succeed directly in negligence. If they can prove that an institution did not comply with a Child Protection regime, the plaintiff will find it much easier to prove direct negligence than it has been in the past – and much easier than to succeed with a vicarious liability argument where the sexual abuse

perpetrated was beyond the scope of employment. Arguably all this is as it should be. Society, and state and territory Parliaments, have now recognised the need to eradicate the scourge of child abuse by passing appropriate protection legislation including criminal enforcement penalties. That legislative change will hopefully do away with the need to press the Australian courts to follow the common law in Canada and England when their minds seem so set against it. It remains to be seen whether police background checks will be truly effective in keeping paedophiles out of the institutions that care for our children.