

LIABILITY FOR INSTITUTIONAL CHILD SEXUAL ASSAULT: WHERE DOES *LEPORE* LEAVE AUSTRALIA?

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[The High Court of Australia in Lepore was asked to decide whether an educational authority could be held liable for the sexual assault of a pupil by a teacher. Two possible bases of liability were argued: that sexual assaults by a teacher are a breach of the authority's non-delegable duty of care, or that vicarious liability is the more appropriate method of locating liability. A majority of the Court advocated the latter approach. This article explores what the High Court said about institutional child sexual assault and argues that this decision does not bode well for victims in future cases. In a number of ways the High Court reveals a lack of appreciation of the role of power in child sexual assault, a narrow focus on frameworks of 'intimacy' and residential care situations, and a failure to consider the child's point of view. This lack of understanding is contrasted with recent decisions in Canada and England that have held that an organisation can be vicariously liable for the sexual assaults of a child in the care of the organisation by an employee. In so doing, these courts delivered nuanced judgments which demonstrated a more thorough understanding of the nature of child sexual assault.]

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I INTRODUCTION

In recent years the highest courts in England and Canada have been asked to decide whether an educational authority can be held vicariously liable for sexual

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assaults perpetrated by an employee against a child under its care.¹ These courts have answered ‘yes’ to this important question and delivered some nuanced judgments about the nature of institutional child sexual assault. More recently, the High Court of Australia has also partly addressed this question. *New South Wales v Lepore*² commenced as three separate actions in which the injured parties claimed that the respective states had breached non-delegable duties of care owed to them. Vicarious liability was not argued in any of these cases at trial or at the first appeal.³ It was not until the cases were dealt with together in the High Court that the applicability of vicarious liability was considered. By majority, the Court rejected the New South Wales Court of Appeal’s articulation of a non-delegable duty of care,⁴ and decided instead that these appeals should be dealt with on the basis of vicarious liability.⁵

Ultimately, whether and to what extent the operators of a range of different institutions, such as residential schools, day schools, or recreational clubs, will be found vicariously liable for assaults perpetrated by their employees has been left open in Australia. A new trial was ordered for Lepore (to be restricted to the issue of vicarious liability),⁶ and both Samin’s and Rich’s appeals were dismissed (although both plaintiffs have leave to replead their cases on the basis of vicarious liability). A number of comments made by the judges of the High Court, however, do not suggest very promising outcomes for victims in future cases. I argue that, unlike the Supreme Court of Canada in the leading decision of *Bazley v Curry*,⁷ the High Court in *Lepore* shows a general lack of appreciation of the context and nature of sexual assault in schools.⁸ This is most evident in the lack of acknowledgment of the role of power exercised by a teacher over a pupil, the narrow focus on child sexual assault within the frameworks of intimacy and pseudo-parental care situations and the failure to consider the issue from the child’s point of view.

¹ *Lister v Hesley Hall Ltd* [2002] 1 AC 215 (‘*Lister*’); *Bazley v Curry* [1999] 2 SCR 534 (‘*Bazley*’); *Jacobi v Griffiths* [1999] 2 SCR 570 (‘*Jacobi*’).

² (2003) 195 ALR 412 (‘*Lepore*’). This decision considered the actions of *New South Wales v Lepore*, *Samin v Queensland* and *Rich v Queensland*.

³ It would appear that the prime reason for this in *Lepore*’s case was the decision in *Deatons Pty Ltd v Flew* (1949) 79 CLR 370 (‘*Deatons*’); *Lepore* (2003) 195 ALR 412, 418 (Gleeson CJ), 483–4 (Kirby J). See below n 101 for a discussion of *Deatons*.

⁴ The majority was composed of Gleeson CJ, Gaudron and Callinan JJ (who all delivered individual judgments), and Gummow and Hayne JJ (who delivered a joint judgment).

⁵ Vicarious liability was the basis of the judgments of Gleeson CJ, Gaudron, Gummow and Hayne JJ. Kirby J also preferred to consider the cases in terms of vicarious liability; however, his reason for not considering the applicability of a non-delegable duty was that, unlike the leading school and pupil non-delegable duty case of *Commonwealth v Introvigne* (1982) 150 CLR 258 (‘*Introvigne*’), the present cases allowed for vicarious liability: *Lepore* (2003) 195 ALR 412, 486.

⁶ Lepore intends to exercise his right to a new trial: interview with Milicevic Solicitors (instructing solicitors) (Telephone interview, 16 December 2003).

⁷ [1999] 2 SCR 534.

⁸ Interestingly, some of the judges appeared to display an understanding of child sexual assault in certain parts of their judgment, yet at others they displayed a lack of understanding, or failed to apply that understanding. See, for example, the discussion of the decisions of Gleeson CJ and Gaudron J regarding residential institutions, and Gummow and Hayne JJ regarding the use of power and authority by teachers: below Part IV.

Part II of this article provides a brief background to institutional child sexual assault and civil claims. Part III discusses *Lepore* and the approach of the High Court, and Part IV outlines the ways in which the High Court demonstrated a limited understanding in this judgment of child sexual assault within institutional settings.

II CHILD SEXUAL ASSAULT AND CIVIL CLAIMS

In recent years, Australia, Canada and the United Kingdom have seen an increase in the use of the tort system for claims brought on the basis of child sexual assault and adult sexual assault.⁹ These civil actions have often been described as ‘new’ actions,¹⁰ but the basis of such claims in assault and battery has always been recognised and the fact of sexual assault itself is hardly ‘new’.¹¹ It must be made clear that this ‘story’ is neither ‘new’ nor ‘old’. It is not ‘new’ in the sense that in a number of community sectors, particularly those with some responsibility, it was known but ‘hushed up’. It is not ‘old’ in two senses. First, the pain and harm resulting from these assaults lives with victims, and has repercussions for institutions involved, for many years to come. Second, sexual assaults continue to take place. How the Australian community and the legal system deal with complaints about child sexual assault, whether the assault occurred recently or long ago, is a current and pressing problem for us all.

This article focuses on institutional¹² child sexual assault,¹³ which has recently come to the fore in Australia and other countries.¹⁴ While recent reports, cases

⁹ See Bruce Feldthusen, ‘Foreword’ in Elizabeth Grace and Susan Vella, *Civil Liability for Sexual Abuse and Violence in Canada* (2000) ix, ix, where Feldthusen notes that Australia, New Zealand and Great Britain were beginning to see the use of civil remedies for ‘sexual wrongdoing’ in the years preceding 2000, and that Canada led the way in this area. In terms of this increase in respect of Canada, see Bruce Feldthusen, Olena Hankivsky and Lorraine Greaves, ‘Therapeutic Consequences of Civil Actions for Damages and Compensation Claims by Victims of Sexual Abuse’ (2000) 12 *Canadian Journal of Women and the Law* 66, 67.

¹⁰ See Bruce Feldthusen, ‘The Civil Action for Sexual Battery: Therapeutic Jurisprudence?’ (1993) 25 *Ottawa Law Review* 203, 205–7; Joanna Manning, ‘The Reasonable Sexual Abuse Victim: “A Grotesque Invention of the Law?”’ (2000) 8 *Torts Law Journal* 6, 6 fn 2, where the author also notes the reference to these actions as ‘new’.

¹¹ Feldthusen, ‘The Civil Action for Sexual Battery’, above n 10, 205–7. See also Catharine MacKinnon, *Feminism Unmodified: Discourses on Life and Law* (1987) 103, where MacKinnon explains that ‘[s]exual harassment, the event is not new to women. It is the law of injuries that it is new to’.

¹² Although this article has as its focus sexual assault of children within institutional settings, this is not intended to ignore the fact that most cases of child sexual assault take place within the family, extended family or by friends known to the family: see Australian Institute of Health and Welfare, *Child Protection Australia 2001–02* (2003) 21–2. However because of the focus on child abuse in families, there is very little data or research about child abuse in institutional settings, at least until recently.

¹³ It is important to note that this is only one form of abusive behaviour that some children experience in institutions. Abusive behaviour may also include emotional abuse, physical abuse and systems abuse: Leneen Forde, Jane Thomason and Hans Heilpern, Commission of Inquiry into Abuse of Children in Queensland Institutions, *Report of the Commission of Inquiry into Abuse of Children in Queensland Institutions* (1999) 277–9 (‘Forde Inquiry’).

¹⁴ In Australia, see the Senate Community Affairs References Committee, Parliament of Australia, ‘Inquiry into Children in Institutional Care’ (due to report 30 July 2004) <http://www.aph.gov.au/senate/committee/clac_ctte/inst_care/index.htm>. See also Peter O’Callaghan and Freda Briggs, *Report of the Board of Inquiry into Past Handling of Complaints of Sexual Abuse in the Anglican Church Diocese of Brisbane* (2003) Queensland Parliament

and out-of-court settlements have highlighted some instances of physical and sexual abuse in various institutions, we do not know the full extent of the problem. For example, it was estimated that one in six witnesses who gave evidence to the Human Rights and Equal Opportunity Commission inquiry into the Stolen Generations reported that they had suffered sexual abuse.¹⁵ In relation to three residential schools in Victoria operated by St John of God Brothers (an order of the Catholic Church), a settlement package amounting to \$3.6 million was reached for 24 victims who experienced abuse between 1968 and 1994.¹⁶ Similarly, the Forde Foundation,¹⁷ an organisation concerned with residential institutions in Queensland, has stated that it has no way of

estimating the scale of any unsafe, improper or unlawful care or treatment in such institutions or places. However, the number of people presenting to the Foundation, suggest that the instances of abuse were substantial. Further, during specific periods of particular institutions, abuse or the threat of abuse was present daily.¹⁸

The full extent of institutional child abuse is unknown for a wide range of reasons: in particular, shame and fear may mean many victims do not report the assaults until many years later; they may fear that they will not be believed and may also blame themselves.¹⁹ An additional factor is the manner in which some organisations have dealt with such allegations — for example, through the use of out-of-court settlements that contain confidentiality clauses.

<<http://www.parliament.qld.gov.au/AnglicanReport.pdf>>; *Forde Inquiry*, above n 13; Human Rights and Equal Opportunity Commission ('HREOC'), *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families* (1997) 194–5. In Canada, see Law Commission of Canada, *Restoring Dignity: Responding to Child Abuse in Canadian Institutions* (2000). In Ireland, see the continuing work of the Commission to Inquire into Child Abuse (see <<http://www.childabusecommission.ie>>) and the creation of the Residential Schools Redress Board under the *Residential Institutions Redress Act 2002* (Ireland). In the United States, considerable media attention has focused on abuse by clergy of the Catholic Church and the resulting litigation and settlements: see various media reports and other information collected by *The Boston Globe: The Boston Globe, Spotlight Investigation: Abuse in the Catholic Church* <<http://www.boston.com/globe/spotlight/abuse/>>.

¹⁵ HREOC, above n 14, 194. HREOC also reported that a similar proportion of people made reports of sexual abuse to the Western Australia Aboriginal Legal Service: at 194.

¹⁶ Richard Yallop, 'Record Payout to Abuse Victims', *The Australian* (Sydney), 13 June 2002, 3. Muriel Porter estimates that at least 50 Catholic priests (approximately 1.5 per cent of all priests) have been convicted of sexual offences in Australia since 1993, and that this is only the 'tip of the iceberg': Muriel Porter, *Sex, Power and the Clergy* (2003) 1. In Melbourne, where there were 327 priests in 2002, there have been 22 offenders identified in internal diocesan reports since 1996. Porter thus estimated that offending Catholic priests comprise around 3.5 per cent of the total clergy. What these figures do not reveal is the number of multiple victims per offender.

¹⁷ Established following the *Forde Inquiry*, above n 13.

¹⁸ Submission to the Inquiry into Children in Institutional Care of the Senate Community Affairs References Committee, Parliament of Australia, Canberra, 1 September 2003, Submission No 159, 3 (Board of Advice of the Forde Foundation) <http://www.aph.gov.au/senate/committee/clac_ctte/inst_care/submissions/sub159.doc>.

¹⁹ Sexual assault of children has a number of negative consequences that inhibit or prevent reporting: see David Wolfe et al, *Child Abuse in Community Institutions and Organizations: Improving Public and Professional Understanding* (2002) 7–8 Law Commission of Canada <<http://www.lcc.gc.ca/en/themes/mr/ica/jaffe/jaffe.pdf>>; Ben Mathews, 'Limitation Periods and Child Sexual Abuse Cases: Law, Psychology, Time and Justice' (2003) 11 *Torts Law Journal* 218, 218–19; Annette Marfording, 'Access to Justice for Survivors of Child Sexual Abuse' (1997) 5 *Torts Law Journal* 221, 222–5.

To date, most attention in this area has focused on residential settings.²⁰ However, what amounts to an ‘institution’ is much broader than this and includes day schools, churches and various recreational or club settings.²¹ In these settings we also find situations in which a person is placed in a position of trust and exercises power over children. This important point highlights questions about when and where a court might hold an institution or organisation vicariously liable and whether such a decision is based on a realistic understanding of the nature of sexual assault of a child within an ‘institutional’ setting.

While this article focuses on the difficulties faced by victims of institutional child sexual assault (or other systemic injuries)²² in terms of attributing responsibility in a civil claim for damages, it is important to recognise that the question of who is legally responsible is only one of many legal difficulties encountered. There are many other hurdles and barriers that must be overcome, such as limitation periods,²³ the lack of evidence or witnesses due to the passage of time,²⁴ the difficulties inherent in dealing with intentional torts (especially sexual assault)²⁵ and the inadequacy of the quantum of damages that might be awarded

²⁰ This is true both in Australia and overseas. In Australia, see Senate Community Affairs References Committee, above n 14; HREOC, above n 14; *Forde Inquiry*, above n 13. In Canada, see Law Commission of Canada, above n 14. In Ireland, see Commission to Inquire into Child Abuse, above n 14. In Wales, in relation to the Waterhouse Inquiry, see Department of Health, United Kingdom, *Learning the Lessons: The Government's Response to Lost in Care: The Report of the Tribunal of Inquiry into the Abuse of Children in Care in the Former County Council Areas of Gwynedd and Clwyd since 1974* (2000) <<http://www.publications.doh.gov.uk/pdfs/lostincare.pdf>>.

²¹ The need for a broad definition of ‘institution’ is discussed in Wolfe et al, above n 19, 3–5.

²² This article discusses a small part of a larger project being conducted by Professor Reg Graycar and the author, supported by the Australian Research Council, examining the way in which systemic injuries (for example, institutional child sexual assault, the Stolen Generations and sterilisation of people with disabilities) are dealt with in the Australian tort system. The research will canvass alternative methods of redress and reparations.

²³ See, eg, *Cubillo v Commonwealth* (2000) 103 FCR 1, 409–45; aff'd (2001) 112 FCR 455, 560–72, which ultimately failed on the basis of the expiration of the limitation period. See also the discussion of limitation periods regarding child sexual assault (especially intra-familial) in Manning, above n 10; Mathews, above n 19; Janet Mosher, ‘Challenging Limitation Periods: Civil Claims by Adult Survivors of Incest’ (1994) 44 *University of Toronto Law Journal* 169; Ann Marie Hagan, ‘Tolling the Statute of Limitations for Adult Survivors of Childhood Sexual Abuse’ (1991) 76 *Iowa Law Review* 355.

²⁴ See *Williams v Minister, Aboriginal Land Rights Act 1983* [2000] Aust Torts Reports ¶81-578, 64 139–41; *Cubillo v Commonwealth* (2000) 103 FCR 1, 443–4; aff'd (2001) 112 FCR 455, 532–3, 572; Jennifer Clarke, ‘*Cubillo v Commonwealth*’ (2001) 25 *Melbourne University Law Review* 218, 286–93.

²⁵ The decision of Callinan J in *Lepore* (2003) 195 ALR 412, 499 provides a clear example of this. It is also evident in Gummow and Hayne JJ’s decision, where although their Honours recognised that an employer may be held vicariously liable for intentional (even criminal) acts of their employees, the discussion of child sexual assault by a teacher illustrates the difficulty they had in considering it ‘within the course of employment’: at 473–4. Cf Kirby J’s approach, which recognises that there is still resistance to the imposition of vicarious liability for intentional torts despite strong precedent to the contrary: at 492. For another example of difficulties some judges have in understanding sexual assault and its impact on victims, see comments made by Lord Griffiths in *Stubbings v Webb* [1993] AC 498, 506:

The plaintiff’s case was that although she knew she had been raped by one defendant and had been persistently sexually abused by the other she did not realise that she had suffered sufficiently serious injury to justify starting proceedings for damages until she realised that there might be a causal link between psychiatric problems she had suffered in adult life and her sexual abuse as a child. ... I have the greatest difficulty in accepting that a woman who knows that she has been raped does not know that she has suffered a significant injury.

if a case succeeds. In some of these areas plaintiffs must also contend with stereotypical notions of race and gender.²⁶

III *LEPORE: THE PROCEEDINGS*

A Lepore

Angelo Lepore claimed that in 1978 a teacher at a New South Wales public school physically and sexually assaulted him. At that time, he was seven or eight years old. Lepore alleged that these assaults were tied to, and exercised within, the context of the teacher disciplining him and other students.²⁷ Lepore alleged that whenever he misbehaved he was sent to a storeroom behind the teacher's desk where he was

told to strip and put his hands on his head. The teacher 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 happened approximately 10 times. Sometimes the appellant was smacked on the bare bottom with a ruler. ... The appellant was initially too scared to tell his mother, having been told by the teacher that no one would believe him.²⁸

Lepore also alleged that the teacher on one occasion forced him to fondle the teacher 'on the outside of his clothing in the area of his penis.'²⁹

In 1978 the teacher pleaded guilty to four charges of assault perpetrated against Lepore and other children. In relation to a charge of 'assault female',³⁰ the teacher was placed on a good behaviour bond for two years and was not to accept employment as a teacher of children under sixth class. For each of the remaining three assault charges the teacher was convicted and fined \$100.³¹ The

This case concerned a claim regarding child sexual assault by the woman's father and brother, and the corresponding limitation period.

²⁶ See the following articles for discussion of the gendered nature of damages awards: Lucinda Finley, 'Female Trouble: The Implications of Tort Reform for Women' (1997) 64 *Tennessee Law Review* 847; Reg Graycar, 'Hoovering as a Hobby and Other Stories: Gendered Assessments of Personal Injury Damages' (1997) 31 *University of British Columbia Law Review* 17; Jamie Cassels, 'Damages for Lost Earning Capacity: Women and Children Last!' (1992) 71 *Canadian Bar Review* 445; Martha Chamallas, 'The Architecture of Bias: Deep Structures in Tort Law' (1998) 146 *University of Pennsylvania Law Review* 463. For a discussion of the impact of both race and gender on damages awarded in the context of the Canadian Indian Residential School system, see Diane Rowe, *Race, Culture and Gender Considerations: Contingent Factors and Damage Awards for Sexual Assault and Abuse* (2001) White, Ottenheimer & Baker, Barristers & Solicitors <<http://www.wob.nf.ca/News/2001/race,%20culture,%20gender.htm>>. See also Lorena Fontaine, 'Canadian Residential Schools: The Legacy of Cultural Harm' (2002) 5(17) *Indigenous Law Bulletin* 4.

²⁷ However, given the problems associated with the fact-finding process in this case, there are questions about whether the alleged assaults are characterised as excessive chastisement, or whether they are of such a sexual nature that they cannot be considered within the course of employment: see *Lepore* (2003) 195 ALR 412, 435 (Gleeson CJ).

²⁸ *Lepore v New South Wales* (2001) 52 NSWLR 420, 423 (Mason P).

²⁹ *Ibid* 422 (Mason P) (citations omitted).

³⁰ At that time there was an aggravated common assault offence of 'assault female' under s 494 of the *Crimes Act 1900* (NSW). This was repealed by the *Crimes (Amendment) Act 1988* (NSW) sch 4(4).

³¹ *Ibid* 424 (Mason P).

magistrate that sentenced the teacher for these offences ‘expressed bemusement as to the offences charged not being more serious than common assault.’³²

Lepore sued the teacher and the State of New South Wales.³³ The case was complicated by the manner in which it was handled at trial. The trial judge separated the questions of liability and damages, with the latter to be heard by another judge at a later date. This unusual division of key, interrelated issues was the subject of negative comment by the High Court,³⁴ and by Heydon JA in the New South Wales Court of Appeal.³⁵ The case was also complicated by the lack of clarity about what precisely was being argued by Lepore.³⁶ Before the District Court, the argument focused on the allegation that the State had breached its non-delegable duty of care by failing to institute a proper system for supervision of the teacher. However in the Court of Appeal it was argued that the teacher’s intentional infliction of harm meant that the State had breached its non-delegable duty of care. The Court of Appeal noted that this was a significant change, but did not identify any disadvantage to the State in allowing this latter argument to proceed.³⁷

The District Court decided that the State had not breached its duty to the plaintiff.³⁸ On appeal, Mason P and Davies AJA held that the State of New South Wales did owe the appellant a non-delegable duty of care and that this duty had been breached. Their Honours ordered that the new trial be restricted to the issue of damages. The duty their Honours identified applied to protecting pupils from both negligent and intentional wrongs.³⁹ Heydon JA dissented, considering it absurd to characterise the intentional sexual assault of a pupil by a teacher as a failure to take reasonable care.⁴⁰ His Honour went into considerable detail about the lack of a clear ratio decidendi in *Commonwealth v Introvigne*,⁴¹ the case that is widely cited as authority for the proposition that school authorities owe a non-delegable duty of care to pupils. Ultimately, Heydon JA would have ordered a new trial with liability and damages to be heard together. This decision was primarily based on the extent to which the trial was carried out in an unorthodox manner.⁴²

³² Ibid. The magistrate, however, noted the desirability of not requiring young children to give evidence in court, which may have been a reason for proceeding with lesser charges (and a guilty plea) than more serious charges that may have been contested: at 424.

³³ Before the trial commenced, the teacher’s legal representative withdrew his appearance and the teacher indicated that he would ‘play no formal part in the proceedings’: ibid 422 (Mason P).

³⁴ *Lepore* (2003) 195 ALR 412, 416, 435 (Gleeson CJ), 447 (Gaudron J), 457, 458, 460 (Gummow and Hayne JJ), 497 (Kirby J), 500–1 (Callinan J).

³⁵ *Lepore v New South Wales* (2001) 42 NSWLR 420, 438–9.

³⁶ Ibid 423 (Mason P).

³⁷ Ibid 428 (Mason P).

³⁸ Ibid 425 (Mason P).

³⁹ Ibid 431 (Mason P), 449 (Davies AJA).

⁴⁰ Ibid 443.

⁴¹ (1982) 150 CLR 258.

⁴² *Lepore v New South Wales* (2001) 52 NSWLR 420, 445.

B *Samin and Rich*

Vivian Samin and Sheree Rich attended a Queensland state school at Yalleroi between 1963 and 1965. This was a one-teacher rural school. Samin and Rich alleged that they were assaulted by their teacher, William D'Arcy, when they were aged about seven and 10 respectively. The allegations included sexual assaults that 'in at least one instance amounted to a rape'.⁴³

D'Arcy has been found guilty on numerous counts of child sexual assault against girls and boys who were his pupils in a number of Queensland schools.⁴⁴ He is currently serving jail terms for some of these offences.⁴⁵

Rich and Samin commenced actions against the State of Queensland, the Minister for Education and D'Arcy. Both the State and the Minister for Education were named as defendants 'as a matter of caution',⁴⁶ as it was unclear who had legal responsibility for the school at the time.

Like *Lepore*, Samin and Rich did not claim that the State or the Minister were vicariously liable for D'Arcy's assaults. They argued, relying on the New South Wales decision,⁴⁷ that the State and/or the Minister were in breach of a non-delegable duty of care owed to the plaintiffs as pupils attending a state school. Samin and Rich alleged that this duty was breached when D'Arcy assaulted them.⁴⁸ In the District Court, the State applied to have the plaintiffs' statements of claim struck out on the basis that they did not disclose a cause of action in their current form. The District Court refused to do so.⁴⁹ The Queensland Court of Appeal unanimously reversed the District Court decision. The Justices of the Court of Appeal referred to the New South Wales Court of Appeal's decision in *Lepore v New South Wales*⁵⁰ and stated that they preferred the dissenting judgment of Heydon JA.⁵¹ The Court did, however, grant Samin and Rich leave to replead their cases.⁵²

C *Before the High Court*

The three cases were considered together before the High Court. The Court was required to determine on what basis, if any, the education authorities might be held liable where there was no allegation that they were at fault in relation to

⁴³ *Rich v Queensland* [2001] Aust Torts Reports ¶81-626, 67 389 (McPherson JA).

⁴⁴ These assaults included rape as well as indecent dealing, some of which took place in front of other children: see Greg Roberts, 'Former MP "Raped Schoolgirl in Front of Class"', *The Sydney Morning Herald* (Sydney), 24 October 2000, 2; Greg Roberts, 'Court Told of Sex Abuse in Schoolroom', *The Age* (Melbourne), 24 October 2000, 2. Gleeson CJ pointed out that at this stage it is not clear whether any of the assaults claimed by Rich and Samin took place in front of other pupils: *Lepore* (2003) 195 ALR 412, 418.

⁴⁵ In 2001, D'Arcy was sentenced to 10 years in prison for 18 child sex offences that took place in rural Queensland schools during 1962-65: see *R v D'Arcy* (2001) 122 A Crim R 268.

⁴⁶ *Rich v Queensland* [2001] Aust Torts Reports ¶81-626, 67 388 (McPherson JA).

⁴⁷ *Lepore v New South Wales* (2001) 52 NSWLR 420.

⁴⁸ *Rich v Queensland* [2001] Aust Torts Reports ¶81-626, 67 389 (McPherson JA).

⁴⁹ *Ibid* 67 388.

⁵⁰ (2001) 52 NSWLR 420.

⁵¹ *Rich v Queensland* [2001] Aust Torts Reports ¶81-626, 67 392 (McPherson JA), 67 395 (Thomas JA), 67 398 (Williams JA).

⁵² *Ibid* 67 394 (McPherson JA).

the hiring or supervision of the teacher, or in responding to any complaints about sexual misconduct or the general operation of the schools. Two possibilities were argued before the Court: first, that the State had breached the non-delegable duty of care it owes to pupils; and second, that the education authority should be held vicariously liable for the assaults by the respective teachers.⁵³

Only McHugh J was in favour of deciding these appeals on the basis of breach of a non-delegable duty of care.⁵⁴ At the other end of the spectrum, Callinan J found that the states should not be held liable on either basis.⁵⁵ The remaining judges preferred to consider the appeals on the basis of vicarious liability, however they differed significantly in their approaches. Only Gleeson CJ and Kirby J favoured the approach of the Supreme Court of Canada and the House of Lords, although the extent to which this approach was applied, particularly by Gleeson CJ, is questionable.⁵⁶ Gummow and Hayne JJ, while perhaps providing the clearest articulation of the nature and the harm of child sexual assault,⁵⁷ nonetheless drew back from the possibility that vicarious liability might be imposed in such situations, relying on traditional articulations of the course of employment test.⁵⁸ Gaudron J focused on an approach to vicarious liability based on estoppel.⁵⁹ These differing approaches are discussed below.

1 *Consideration of a Non-Delegable Duty of Care*

While non-delegable duties have been recognised in tort law since the late 1800s,⁶⁰ they still tend to be confusing and little understood, particularly regarding the content of the duty and the circumstances in which it is applied. Unfortunately *Lepore* has done little to clarify the issue; the one clear characteristic of non-delegable duties is that they will only be recognised and identified as breached in a very limited range of circumstances.⁶¹

Discussion of the principle of a non-delegable duty of care creates some uncertainty in terms of language and the content of the duty. The reference to ‘non-delegable’ does not mean that an employer cannot delegate the function, but rather that through the process of delegation the employer does not abdicate the primary responsibility for that function.⁶² It is often described as a personal or

⁵³ There are other possibilities: see, eg, *Lepore* (2003) 195 ALR 412, 415, where Gleeson CJ canvassed direct liability, but noted that it is not in issue in the present case as no fault on the part of the respective states is alleged.

⁵⁴ *Ibid* 447–8, 455–6.

⁵⁵ *Ibid* 498–500.

⁵⁶ *Ibid* 432 (Gleeson CJ), 492 (Kirby J).

⁵⁷ This is particularly evident in their discussion of a teacher’s power and the abuse of power associated with child sexual assault: *ibid* 467. See below Part IV.

⁵⁸ *Ibid* 473–4.

⁵⁹ *Ibid* 446.

⁶⁰ See *Pickard v Smith* (1861) 10 CB NS 672; 142 ER 535; *Bower v Peate* (1876) 1 QB 321; *Dalton v Henry Angus & Co* (1881) 6 App Cas 740; *Hughes v Percival* (1883) 8 App Cas 443.

⁶¹ See Prue Vines, ‘New South Wales v Lepore; Samin v Queensland; Rich v Queensland: Schools’ Responsibility for Teachers’ Sexual Assault: Non-Delegable Duty and Vicarious Liability’ (2003) 27 *Melbourne University Law Review* 612, 623–5 for a discussion of the general reining in of non-delegable duties and negligence by the High Court in recent times.

⁶² Therefore we find in the leading Australian case concerning schools, *Introvigne* (1982) 150 CLR 258, that the Commonwealth could not escape primary liability by stating that it had delegated

direct duty. It is a stringent form of liability, generally described as a duty to ensure that reasonable care is taken.⁶³ As Mason J explained in *Kondis v State Transport Authority*:

the special duty arises because the person on whom it is imposed has undertaken the care, supervision or control of the person or property of another or is so placed in relation to that person or his property as to assume a particular responsibility for his or its safety, in circumstances where the person affected might reasonably expect that due care will be exercised.⁶⁴

A non-delegable duty of care has been recognised in relationships of: employer and employee;⁶⁵ hospital and patient;⁶⁶ school authority and pupil;⁶⁷ and occupier and invitee or neighbour.⁶⁸ The feature that is emphasised in these relationships is the special vulnerability or dependence of the plaintiff with respect to the person who owes the duty.⁶⁹

Only McHugh J would have decided the present appeals on the basis of recognising that a non-delegable duty of care had been breached:

In my opinion a state education authority owes a duty to a pupil to take reasonable care to prevent harm to the pupil. The duty cannot be delegated. If, as is invariably the case, the state delegates the *performance* of the duty to a teacher, the state is liable if the teacher fails to take reasonable care to prevent harm to the pupil. The state is liable even if the teacher intentionally harms the pupil. The state cannot avoid liability by establishing that the teacher intentionally caused the harm even if the conduct of the teacher constitutes a criminal offence. It is the state's duty to protect the pupil, and the conduct of the teacher constitutes a breach of the state's own duty.⁷⁰

In reaching his decision McHugh J drew on a number of non-delegable duty cases involving schools, where

the duty arises because the school authority has control of the pupil whose immaturity is likely to lead to harm to the pupil unless the authority exercises reasonable care in supervising him or her and because the authority has assumed responsibility for the child's protection.⁷¹

the function of operating and supervising the children at a school in the Australian Capital Territory operated by the New South Wales Department of Education: at 271–3 (Mason J).

⁶³ See *Kondis v State Transport Authority* (1984) 154 CLR 672, 686 (Mason J) ('*Kondis*'); *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520, 550 (Mason CJ, Deane, Dawson, Dawson, Toohey and Gaudron JJ) ('*Burnie Port Authority*').

⁶⁴ (1984) 154 CLR 672, 687.

⁶⁵ See, eg, *ibid*.

⁶⁶ See, eg, *Albrighton v Royal Prince Alfred Hospital* (1980) 2 NSWLR 542; *Ellis v Wallsend District Hospital* (1989) 17 NSWLR 553.

⁶⁷ See, eg, *Introvigne* (1982) 150 CLR 258.

⁶⁸ Particularly with regard to dangerous activities on the occupier's land: see, eg, *Burnie Port Authority* (1994) 179 CLR 520.

⁶⁹ See *Introvigne* (1982) 150 CLR 258, 271 (Mason CJ); *Kondis* (1984) 154 CLR 672, 686–7 (Mason J); *Burnie Port Authority* (1994) 179 CLR 520, 551 (Mason CJ, Deane, Dawson, Toohey and Gaudron JJ).

⁷⁰ *Lepore* (2003) 195 ALR 412, 447 (emphasis in original). See also at 455.

⁷¹ *Ibid* 449. His Honour referred to *Ramsay v Larsen* (1964) 111 CLR 16; *Richards v Victoria* [1969] VR 136; *Geyer v Downs* (1977) 138 CLR 91; *Victoria v Bryar* [1970] ALR 809; *Car-marshenshire County Council v Lewis* [1955] AC 549; *Watson v Haines* [1987] Aust Torts Re-

In comparison to the vicarious liability approach adopted in Canada and England,⁷² McHugh J stated that recognising a non-delegable duty of care is a much ‘simpler’ method of ascertaining liability in the area of institutional child sexual assault.⁷³ Interestingly, in a Canadian text on this burgeoning area of law, non-delegable duties have been identified as a ‘future trend’ for the law.⁷⁴ McHugh J anticipated the concern that his approach would impose a liability on schools that is extremely broad.⁷⁵ His Honour asserted that this has been the case since the decision in *Introvigne* and identified a range of measures that schools can implement to assist in the prevention of sexual assaults by teachers. His Honour suggested introducing systems to: ‘weed out or give early warning signs of potential offenders’; inspect classrooms without prior warning; prohibit teachers seeing students alone, particularly outside class time; and to encourage ‘teachers and pupils to complain ... about any signs of aberrant or unusual behaviour’.⁷⁶ In the end, however, recognising that no system to eliminate the abuse of children will be perfect, and weighing the burden of imposing liability on school authorities against the serious consequence of child sexual assault for the victims, McHugh J did not see the imposition of this type of liability as ‘unjust’.⁷⁷

There are two points of agreement among the judges of the High Court. First, they all agreed, in principle, that school authorities owe a non-delegable duty of care to school pupils.⁷⁸ Second, while a non-delegable duty of care is recognised, it is not a duty to prevent *all* harm, but rather a duty to ensure that reasonable care is taken to prevent harm.⁷⁹ In this way, the Court rejected the articulation of the duty by Mason P in the New South Wales Court of Appeal’s decision in *Lepore v New South Wales*. Gaudron J went slightly further and expressed the view that it is a duty to ensure that the school environment is ‘free from a foreseeable risk of harm’, or a duty to take reasonable care.⁸⁰ In this regard,

ports ¶80-094. This is a clear difference in approach from the other judges of the Court who limit their reference to *Introvigne* (1982) 150 CLR 258.

⁷² *Bazley* [1999] 2 SCR 534; *Lister* [2002] 1 AC 215.

⁷³ *Lepore* (2003) 195 ALR 412, 456.

⁷⁴ Elizabeth Grace and Susan Vella, *Civil Liability for Sexual Abuse and Violence in Canada* (2000) 29.

⁷⁵ The ‘floodgates’ fear was raised at the time that the High Court was considering *Lepore*: Benjamin Haslem, ‘Child Sex Cases May Open Up Floodgates’, *The Australian* (Melbourne), 29 August 2002, 3. The concern about the potential implications of this case was also illustrated in the presence of the interveners of Western Australia and South Australia. Floodgates arguments were raised after the decision in *Bazley* [1999] 2 SCR 534: see Julius Melnitzer, ‘Institutional Employers Beware: A Supreme Court Ruling Leaves Caregiving Institutions Vicariously Liable for Their Staff’s Criminal Behaviour’, *Law Times* (Ontario), 29 November 1999, 14–15, cited in Nathalie des Rosiers, ‘From Precedent to Prevention — Vicarious Liability for Sexual Abuse’ (2000) 8 *Tort Law Review* 27, 31. See similar fears in respect of *Lister* [2002] 1 AC 215, cited in Paula Giliker, ‘Rough Justice in an Unjust World’ (2002) 65 *Modern Law Review* 269, 276.

⁷⁶ *Lepore* (2003) 195 ALR 412, 456. McHugh J noted that preventative measures are not limited to those that he enumerated.

⁷⁷ *Ibid* 456.

⁷⁸ *Ibid* 438 (Gaudron J), 453 (McHugh J), 478–80 (Gummow and Hayne JJ), 484 (Kirby J), 498 (Callinan J). While Gleeson CJ did not state this plainly, it is evident in his discussion: at 416, 421–3.

⁷⁹ *Ibid* 424–5 (Gleeson CJ), 439–40 (Gaudron J), 479 (Gummow and Hayne JJ). Kirby and Callinan JJ did not directly address this point, although their comments would suggest that they were also in agreement with this approach: at 486, 498.

⁸⁰ *Ibid* 439.

Gaudron J expressed the view that if the schools concerned were *residential* institutions, then the risk of harm would be foreseeable and a non-delegable duty of care would be applicable.⁸¹

A somewhat less direct third area of agreement for a majority of the Court is the reticence that emerges from the judgments about extending such a potentially broad area of liability. Gleeson CJ and Kirby J both made explicit comments about the broad-ranging scope of a non-delegable duty of care and in this way expressed caution about expanding its reach.⁸² It is possible to read the same reticence into Gummow and Hayne JJ's judgment, in which they commented briefly that there are questions about the 'doctrinal strength' of some of the leading cases on non-delegable duties,⁸³ which seem to be more about correcting 'perceived injustices or other shortcomings associated with the doctrine of common employment, the rules respecting vicarious liability and the rule in *Rylands v Fletcher*.'⁸⁴ For these reasons, Gummow and Hayne JJ stated that there needs to be 'considerable caution in developing any new species of this genus of liability.'⁸⁵

The judges diverged in opinion when they considered whether a non-delegable duty of care is breached in cases involving an employee and whether a non-delegable duty of care is applicable to intentional torts. As noted above, McHugh J saw no reason to limit the recognition of a non-delegable duty of care to cases involving negligence. Kirby J, whilst reserving his opinion on this point, suggested that his view of intentional wrongdoing in relation to non-delegable duties would be the same as that for vicarious liability and intentional torts, where his Honour clearly found that vicarious liability does apply.⁸⁶ In contrast, Gleeson CJ, Gummow, Hayne and Callinan JJ all noted that non-delegable duties have only been recognised in cases involving negligence. Gleeson CJ stated that intentional criminal acts are of quite a different nature from negligent inflictions of harm and that '[i]ntentional wrongdoing, especially intentional criminality, introduces a factor of legal relevance beyond a mere failure to take care.'⁸⁷ He referred to an example of a hospital employee with 'homicidal propensities' attacking a patient. He stated that where the hospital was not at fault:

the common law should not determine the question of the hospital's liability to the patient on the footing that the staff member had neglected to take reasonable care of the patient. It should face up to the fact that the staff member had

⁸¹ Ibid 445. See below Part IV(A) for a discussion of the issue of distinguishing 'residential institutions' from other institutions providing care to children and young people.

⁸² Ibid 424 (Gleeson CJ), 485–6 (Kirby J).

⁸³ *Introvigne* (1982) 150 CLR 258; *Kondis* (1984) 154 CLR 762; *Burnie Port Authority* (1994) 179 CLR 520.

⁸⁴ *Lepore* (2003) 195 ALR 412, 475 (Gummow and Hayne JJ). The rule in *Rylands v Fletcher* (1868) LR 3 HL 330 stated that if an occupier of a piece of land brought onto that land a dangerous substance (being a non-natural use of the land), then the occupier would be strictly liable for any damage caused if the substance escaped. In Australia this rule has been absorbed in the ordinary principles of negligence: see *Burnie Port Authority* (1994) 179 CLR 520.

⁸⁵ Ibid 475.

⁸⁶ *Lepore* (2003) 195 ALR 412, 486.

⁸⁷ Ibid 423. Callinan J agreed with Gleeson CJ on this point: at 498. This echoes the approach of Heydon JA in *Lepore v New South Wales* (2001) 52 NSWLR 420, 443.

criminally assaulted the patient, and address the problem of the circumstances in which an employer may be vicariously liable for the criminal acts of an employee.⁸⁸

Gleeson CJ also warned of the potentially broad scope of a non-delegable duty if it was recognised for intentional torts, given that, unlike vicarious liability — which is limited by the course of employment test⁸⁹ — a non-delegable duty of care does not have similar restricting criteria.⁹⁰

Three of the judges considered that if vicarious liability is available then the problem should be approached through that channel. Gummow and Hayne JJ argued that to recognise a non-delegable duty of care for intentional torts would leave no space for vicarious liability to operate.⁹¹ The irony here is that their rendition of vicarious liability leaves no scope for sexual assaults by teachers to be considered as being within the course of their employment. In contrast, while Kirby J also saw the recognition of a non-delegable duty of care as being appropriate only in those cases or situations and relationships where vicarious liability is not applicable, his Honour's understanding of vicarious liability nonetheless left room for the sexual assault of pupils to fall within this form of liability.⁹²

2 *Vicarious Liability Is the 'Orthodox Method'*

Gleeson CJ, Gaudron, Gummow, Hayne and Kirby JJ all considered that vicarious liability is the more appropriate way to view the issue of responsibility for institutional child sexual assault.⁹³ However, the judges parted company on how the traditional course of employment test should be approached.

Vicarious liability is the liability of an employer for the tort of an employee where the tort took place within the course or scope of employment. In order to determine whether an action is within the course of employment, Australian courts have invariably relied on what is known as the Salmond test:

A master is not responsible for a wrongful act done by his servant unless it is done in the course of his employment. It is deemed to be so done if it is either (a) a wrongful act authorised by the master, or (b) a wrongful and unauthorised *mode* of doing some act authorised by the master.⁹⁴

While this test is relatively easy to apply in the context of negligence, it is problematic in the area of intentional torts.⁹⁵ In addition, because vicarious

⁸⁸ *Lepore* (2003) 195 ALR 412, 423.

⁸⁹ See below Part III(C)(2).

⁹⁰ *Lepore* (2003) 195 ALR 412, 423.

⁹¹ *Ibid* 480.

⁹² *Ibid* 486. Kirby J stated that in the present appeals, unlike the situation in *Introvigne*, the existence of an employment relationship meant that these appeals should be determined in the context of vicarious liability: at 486.

⁹³ In fact Gleeson CJ refers to it as the 'orthodox method': *ibid* 425.

⁹⁴ John Salmond, *Law of Torts* (1907) 83, cited by Kirby J in *Lepore* (2003) 195 ALR 412, 490 (emphasis in original). This is the first edition of Salmond's famous text and there continue to be new editions published regularly. The latest edition is R F V Heuston and R A Buckley, *Salmond and Heuston on the Law of Torts* (21st ed, 1996).

⁹⁵ See comments in *Bazley* [1999] 2 SCR 534, 544 (McLachlin J); *Lister* [2002] 1 AC 215, 226 (Lord Steyn); *Lepore* (2003) 195 ALR 412, 491 (Kirby J). See Giliker, above n 75, 270–1.

liability is no-fault, it has tended to be a concept which has ‘troubled the law of tort.’⁹⁶ It is worth noting that some members of the High Court also commented on the unsatisfactory nature of the justifications and theoretical bases for the imposition of vicarious liability, noting the lack of clarity in this area.⁹⁷ This is particularly the case when we look at intentional torts and is arguably even more problematic in the case of sexual assault. However, despite highlighting this judicial dissatisfaction, the decision in *Lepore* has not assisted in clarifying the implementation of vicarious liability. In fact, it has left it open to considerable confusion.⁹⁸

Over time, the courts have grappled with intentional torts in the context of vicarious liability and located such liability in a number of cases, although there is ‘intermittent resistance’ to this.⁹⁹ For example, the High Court referred to *Lloyd v Grace Smith & Co*,¹⁰⁰ *Deatons Pty Ltd v Flew*¹⁰¹ and *Morris v C W Martin & Sons Ltd*.¹⁰² The first and third of these cases were decisions where vicarious liability was imposed notwithstanding the intentional and criminal nature of the tort. Despite these longstanding decisions, Gaudron and Callinan JJ both pointed out that these cases could have been decided on other bases and even suggested that this is the way they should now be considered.¹⁰³ Kirby J referred to attempts to distinguish these cases as ‘feeble’.¹⁰⁴

Callinan J’s decision is based on the issue of whether vicarious liability can apply to intentional (criminal) acts. His Honour stated that there is a clear difference between negligent and criminal conduct, and that sexual assault by a

⁹⁶ Giliker, above n 75, 269. See also Bruce Feldthusen, ‘Vicarious Liability for Sexual Torts’ in Nicholas Mullany and Allen Linden (eds), *Torts Tomorrow: A Tribute to John Fleming* (1998) 221, 222.

⁹⁷ *Lepore* (2003) 195 ALR 412, 440 (Gaudron J), 487–8 (Kirby J). See also Giliker, above n 75, 269–70, 272–6.

⁹⁸ See Vines, above n 61, 616–18.

⁹⁹ *Lepore* (2003) 195 ALR 412, 492 (Kirby J).

¹⁰⁰ [1912] AC 716 (*Lloyd*). In this case, the managing clerk of a law firm robbed one of its clients, Emily Lloyd, by receiving the title deeds from the client and calling in a mortgage debt. The law firm was held vicariously liable for the actions of the managing clerk, despite his actions only being for his own benefit, as it was considered that the law firm had held the managing clerk out as possessing certain authority to undertake various actions. The fraudulent act was therefore considered to be ‘within the course of employment’.

¹⁰¹ (1949) 79 CLR 370. In this case, a barmaid threw a glass at a customer and injured him. The Court decided that this was an act that was only for the benefit of the barmaid and did not take place within the course of employment. The barmaid’s role was to serve drinks; it was not to keep order in the bar. The High Court in this case decided that the employer could not be held vicariously liable for the actions of the barmaid, who was pursuing her own vengeful act.

¹⁰² [1966] 1 QB 716 (*Morris*). This case concerned a plaintiff who had sent a fur coat to a furrier for cleaning. The furrier, with the consent of the plaintiff, then sent the fur on to some cleaners. The employee of the cleaners who was to clean the fur stole it. The employer was held liable for the actions of the employee. Salmon LJ pointed out that the result would have been different if another employee, not the employee charged with the cleaning, had stolen the fur, as that would not have been within the course of employment: at 741.

¹⁰³ *Lepore* (2003) 195 ALR 412, 441–3 (Gaudron J), 499 (Callinan J). Callinan J suggested that *Morris* could have been decided under the principles of bailment and *Lloyd* under the principles of contract. Gaudron J stated that the doctrine of ostensible authority, as a species of estoppel, more truly explains the decision of *Lloyd*.

¹⁰⁴ *Ibid* 491. Lord Steyn made a similar point in *Lister* [2002] 1 AC 215, 228.

teacher represents such a distinctive departure from anything that a teacher is employed to do that vicarious liability could never be found.¹⁰⁵

Gaudron J also found it difficult to state that a deliberate criminal act has occurred in the course of employment, describing this as a ‘misuse of language’.¹⁰⁶ However, in stark contrast to Callinan J, instead of dismissing the possibility of liability outright, she explored estoppel as another approach to vicarious liability. It was Gaudron J’s view that

[t]he only principled basis upon which vicarious liability can be imposed for the deliberate criminal acts of another ... 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.¹⁰⁷

She went on to explain that a person is normally so estopped where there is a ‘close connection between what was done and what that person was engaged to do’.¹⁰⁸ So, while Gaudron J’s approach is more unusual, it draws on the language of ‘close connection’ used by the Supreme Court of Canada and the House of Lords.¹⁰⁹ Using this approach, Gaudron J concluded that in a new trial, Lepore may be able to argue that there was a close connection between the wrongdoing and the employment and therefore that the use of the school storeroom as the site of the wrongful conduct may mean that the State is estopped from claiming that the teacher was not acting as its servant, agent or representative.¹¹⁰ Gaudron J did not provide any indication of the nature of Samin and Rich’s claims if considered in terms of this estoppel test, although perhaps they may be able to make this argument given that the assaults took place at the school.

The remaining judges grappled with the Salmond test and the approach of the Canadian and English courts.¹¹¹ This is considered in the next section.

3 *Canadian and English Approaches to Vicarious Liability*

With the exception of McHugh and Callinan JJ,¹¹² each of the judges discussed in some detail the recent decisions of the Supreme Court of Canada¹¹³ and the House of Lords.¹¹⁴

¹⁰⁵ *Lepore* (2003) 195 ALR 412, 499. Callinan J made very brief reference to the recent House of Lords decision of *Lister* [2002] 1 AC 215, and no reference to the Supreme Court of Canada cases of *Bazley* [1999] 2 SCR 534 or *Jacobi* [1999] 2 SCR 570. As his Honour’s judgment is very brief it is worth simply noting that he dismissed the ‘close connection’ approach from these cases, stating that in most employment situations it would be impossible to demonstrate that there was no connection: *Lepore* (2003) 195 ALR 412, 500. As a result, decisions would vary considerably depending upon the jury or the judge deciding the case. This, in his view, would lead to the law being ‘thrown into a state of uncertainty’: at 500. His Honour therefore concluded that he could not adopt such a test.

¹⁰⁶ *Lepore* (2003) 195 ALR 412, 443.

¹⁰⁷ *Ibid* 446.

¹⁰⁸ *Ibid*.

¹⁰⁹ See below Part III(C)(3).

¹¹⁰ *Lepore* (2003) 195 ALR 412, 447.

¹¹¹ Although Gleeson CJ, Gummow and Hayne JJ made reference to a small number of decisions from the United States of America, these references were made in passing and do not form a substantial part of the analysis in the same way as the Canadian and English decisions: *ibid* 431–2 (Gleeson CJ), 469 fn 235 (Gummow and Hayne JJ).

The Canadian decision of *Bazley*¹¹⁵ was the first of the key Commonwealth cases involving vicarious liability for child sexual assault. It was also referred to by Lord Steyn in *Lister v Hesley Hall Ltd* as a ‘starting point’ for future consideration of these problems ‘in the common law world’.¹¹⁶ *Bazley* was concerned with sexual assaults perpetrated by an employee against a child in the care of a residential institution for emotionally troubled children, which was operated by a non-profit organisation. The employee had parent-like duties, including duties characterised as ‘intimate’,¹¹⁷ such as assisting children when bathing and putting them to bed. McLachlin J, writing a unanimous decision for the Supreme Court of Canada, identified three principles that should guide a court in determining the applicability of vicarious liability in cases involving an employee’s ‘unauthorized, intentional wrong’ where precedent does not provide a clear answer. They were:

- (1) [Courts] should openly confront the question of whether liability should lie against the employer, rather than obscuring the decision beneath semantic discussions of ‘scope of employment’ and ‘mode of conduct’.
- (2) The fundamental question is whether the wrongful act is sufficiently related to conduct authorized by the employer to justify the imposition of vicarious liability. Vicarious liability is generally appropriate where there is a significant connection between the creation or enhancement of a risk and the wrong that accrues therefrom, even if unrelated to the employer’s desires.
...
- (3) In determining the sufficiency of the connection between the employer’s creation or enhancement of the risk and the wrong complained of, subsidiary factors may be considered. These may vary with the nature of the case. When related to intentional torts, the relevant factors may include, but are not limited to, the following:
 - (a) the opportunity that the enterprise afforded the employee to abuse his or her power;
 - (b) the extent to which the wrongful act may have furthered the employer’s aims (and hence be more likely to have been committed by the employee);
 - (c) the extent to which the wrongful act was related to friction, confrontation or intimacy inherent in the employer’s enterprise;

¹¹² Since McHugh J decided the case on the basis of breach of a non-delegable duty of care, such discussion was unnecessary. Callinan J only made brief reference to *Lister*: *ibid* 499; see above n 105.

¹¹³ *Bazley* [1999] 2 SCR 534; *Jacobi* [1999] 2 SCR 570.

¹¹⁴ *Lister* [2002] 1 AC 215.

¹¹⁵ [1999] 2 SCR 534.

¹¹⁶ [2002] 1 AC 215, 230. Lord Millett also commented that *Bazley* and *Jacobi* ‘provide many helpful insights into this branch of the law and from which I have derived much assistance’: at 245.

¹¹⁷ See below Part IV(A) for a discussion of some of the difficulties associated with the focus on ‘intimate’ functions. It should be briefly noted that these difficulties arise from how the notion of intimacy as a defining criterion has been adopted by some of the judges of the High Court, rather than the more expansive view adopted by McLachlin J in *Bazley*.

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- (d) the extent of power conferred on the employee in relation to the victim;
- (e) the vulnerability of potential victims to wrongful exercise of the employee's power.¹¹⁸

McLachlin J then specifically addressed the issue of institutional child sexual assault. While a portion of the decision focused on the types of functions that the employee was employed to do (such as intimate functions), it is important to note that McLachlin J's decision moved beyond this consideration. Her Honour stated that

the test for vicarious liability for an employee's sexual abuse of a client should focus on whether the employer's enterprise and empowerment of the employee materially increased the risk of the sexual assault and hence the harm. 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.¹¹⁹

Significantly, her Honour also discussed whether the employment role had placed the employee in a position of power and trust that could be abused in relation to a child.¹²⁰ McLachlin J concluded that

[b]ecause 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.¹²¹

The House of Lords decision in *Lister*¹²² concerned sexual abuse by the warden of a residential facility established to care for children with emotional or behavioural difficulties. The employee was responsible for a range of parent-like duties such as making sure the boys went to bed at night and attended school the next day, administering pocket money, conducting trips on the weekend and activities at night, and general discipline.¹²³ It was intended that the residential facility would provide a 'home'-like environment. The employee committed a number of sexual offences against pupils in his care after initiating a period of 'grooming' — a process of forming friendships or trusting relationships with children, often accompanied by the provision of gifts or other benefits, so that the child trusts or becomes dependent on the offender.¹²⁴ This often results in the

¹¹⁸ *Bazley* [1999] 2 SCR 534, 559–60 (emphasis omitted).

¹¹⁹ *Ibid* 563.

¹²⁰ *Ibid* 562.

¹²¹ *Ibid* 563.

¹²² *Lister* [2002] 1 AC 215.

¹²³ *Ibid* 220 (Lord Steyn).

¹²⁴ The 'grooming' conducted by the offender in *Lister* included gifts, trips alone, leniency, allowing the boys to watch violent and pornographic videos: *ibid*. Gummow and Hayne JJ are the only judges of the High Court who mentioned the process of 'grooming' that is often undertaken before the perpetration of sexual assault: *Lepore* (2003) 195 ALR 412, 467.

child feeling guilty or responsible for the abuse taking place. The employee was subsequently imprisoned for these offences.

In reaching its decision that Hesley Hall Ltd, which managed and owned the residential facility, was vicariously liable for the employee's conduct, the House of Lords specifically overruled the earlier decision of the Court of Appeal in *S T v North Yorkshire County Council*.¹²⁵ Like the Supreme Court of Canada in *Bazley*, the House of Lords commenced with an articulation of the Salmond test and pointed to an often overlooked prong of that test, which provides that 'a master ... is liable even for acts which he has not authorised, provided they are *so connected* with acts he has authorised, that they may rightly *be regarded* as modes — although improper modes — of doing them.'¹²⁶ Lord Steyn noted that this articulation is the 'germ of the close connection test adumbrated by the Canadian Supreme Court in *Bazley*'.¹²⁷ Like McLachlin J, Lord Steyn was critical of overly semantic renditions of the Salmond test that result in narrow conceptions of what an employee is employed to do.¹²⁸ In this way, Lord Steyn preferred a broad approach that concentrates on the 'relative closeness of the connection between the nature of the employment and the particular tort.'¹²⁹

While there are many similarities between the decisions of the Supreme Court of Canada and the House of Lords, they were reached on slightly different bases. The Canadian Supreme Court is much more frank about the driving role of policy and adopted an approach that spoke in terms of the enhancement of risk. The English approach is more closely aligned with the Salmond test, focusing on the close connection between the wrong and the employee's scope of employment. However, both the House of Lords and the Supreme Court of Canada emphasised the need to move away from restrictive and semantic discussions of

¹²⁵ [1999] IRLR 98 (*Trotman*). The plaintiff suffered from a mental disability and epilepsy and attended a special school operated by the Council. A school excursion to Spain was organised by the school for a number of the pupils. While on the excursion it was necessary for the plaintiff to be supervised at night because of his epilepsy. Therefore it was arranged that the plaintiff would share a room with the Deputy Headmaster. It was alleged that the Deputy Headmaster sexually assaulted the plaintiff on a number of nights. The school authority was held not to be vicariously liable for the assaults on the basis that it was considered 'impossible' to consider the offender's actions as an improper or unauthorised mode of doing what he was employed to do. Rather, the assaults were viewed as an 'independent act of self-indulgence or self-gratification': at 102 (Chadwick LJ). In overruling this decision, Lord Steyn agreed with McLachlin J in *Bazley* that the decision in *Trotman* failed to appreciate that part of the Deputy Headmaster's duties was to care for and supervise vulnerable students while on holiday: *Lister* [2002] 1 AC 215, 229.

¹²⁶ *Lister* [2002] 1 AC 215, 223–4 (Lord Steyn), quoting Salmond (emphasis added by Lord Steyn). This was also seen as critical by Lord Clyde (at 232) and Lord Millett (at 245). Similarly, in the High Court case *Bugge v Brown* (1919) 26 CLR 110, the employer was found liable for the fire caused by the employee despite the employee disobeying the employer's instructions that, rather than light a fire, he should make use of a house in another area to cook his lunch. Isaacs J noted that the fact that the act is prohibited by the criminal law does not provide an answer to the question of the employer's liability: at 117.

¹²⁷ *Lister* [2002] 1 AC 215, 224 (citations omitted). It is important to note that Lord Hobhouse did not endorse the Canadian approach to the issue of vicarious liability, but preferred to maintain the close connection approach to the Salmond test: at 242. It is interesting to note that in parts of Lord Hobhouse's decision he adopts the hallmarks of the language of non-delegable duties: at 239.

¹²⁸ Lord Millett stated that '[a]n excessively literal application of the Salmond test must also be discarded': *ibid* 246.

¹²⁹ *Ibid* 229. Lord Clyde made similar observations at 234–5, 237.

the Salmond test and to approach the issue of vicarious liability in a realistic way. Both also emphasised the need to draw attention to the element of the closeness of connection between the tort and the employment context.

4 *The Reception of the Canadian and English Cases in the High Court*

Gleeson CJ and Kirby J both found the decisions of the Supreme Court of Canada and the House of Lords persuasive. Kirby J noted that the Canadian and English courts did not see themselves as making new law, but rather as simply applying traditional common law approaches in the ‘context of a significant new problem [the increased reporting of physical and sexual assaults against children in a variety of institutional settings] which called forth a fresh examination of past decisional authority.’¹³⁰ Kirby J recognised that this ‘problem is not confined to the United Kingdom and Canada. It exists also in Australia.’¹³¹

Kirby J adopted the approaches of the Supreme Court of Canada and House of Lords in a straightforward fashion, holding that the appropriate test is a ‘sufficiently close connection’ determined via the risk analysis expounded in *Bazley*.¹³² Kirby J is perhaps the most explicit of the judges in outlining the lack of clarity surrounding vicarious liability and draws explicitly on policy, much like the Supreme Court of Canada, to ground his view:

When a final court is called upon to respond to a new problem for society (such as civil liability for widespread complaints of sexual abuse of school pupils) it is inevitable that, as in the past, the common law will give an answer exhibiting a mixture of principle and pragmatism. The principle of vicarious liability, and its application, have not grown from a single, logical legal rule but from judicial perceptions of individual justice and social requirements that vary over time. In any re-expression of the common law in Australia, it is normal now to have regard to considerations of legal principle and policy, as well as any relevant legal authority. This is all the more relevant in these appeals where the focus is vicarious liability, the justification for which has long been accepted as ultimately based on legal policy.¹³³

In relation to how the Salmond test should be approached in cases like these, Kirby J, like the House of Lords, referred to the often ignored part of that test which points to a ‘connection’ between the unauthorised act and the employment situation, and agreed ‘that the phrase should be interpreted broadly, viewing the activities of employment in general terms rather than concentrating only on the particular actions or omissions of the employee in question.’¹³⁴

With respect to Lepore’s case, Kirby J concluded that, given the unsatisfactory nature of the original trial, there should be a new trial restricted to vicarious liability for both the sexual and physical assaults.¹³⁵ In relation to Samin and Rich, Kirby J agreed that the Queensland Court of Appeal was correct in dismissing the claims based on breach of a non-delegable duty of care, but noted

¹³⁰ *Lepore* (2003) 195 ALR 412, 482 (citations omitted).

¹³¹ *Ibid.*

¹³² *Ibid* 492.

¹³³ *Ibid* 488 (Kirby J) (citations omitted).

¹³⁴ *Ibid* 492 (citations omitted).

¹³⁵ *Ibid* 497.

that they have leave to replead their cases on the basis of vicarious liability. If they do so, the plaintiffs will need to show ‘the connection between the particular employing enterprise and the acts alleged to constitute wrongdoing’.¹³⁶

Gleeson CJ’s approach is slightly confusing. He favourably described the approaches taken by the Supreme Court of Canada and the House of Lords, and endorsed the ‘close connection’ approach to the Salmond test (the House of Lords approach), which he stated would involve consideration of whether the ‘enterprise materially increases the risk of the employee’s offending’ (the Supreme Court of Canada approach).¹³⁷ However, he does not seem to take these approaches fully on board. While Gleeson CJ advocated a broad approach to the Salmond test, he seemed unduly focused on the ‘intimate’ or intensive nature of the functions of the employee as the defining criterion for vicarious liability.¹³⁸ This contrasts with the wider approach taken by the Supreme Court of Canada in *Bazley*, which requires the court to assess a range of issues, of which the intimate nature of the employee’s functions is but one.

For Gleeson CJ’s approach to vicarious liability, it is difficult to see where such a claim might be successful except in the case of a residential institution. It is possible to suggest that Gleeson CJ would follow the approach of the majority of the Supreme Court of Canada in *Jacobi v Griffiths*,¹³⁹ the companion case to *Bazley*. *Jacobi* concerned sexual assaults perpetrated by an employee of a recreational club against two children who attended the club. In that case the majority drew a distinction between the intensity of care offered by a recreational club, and that provided by the residential institution in *Bazley*, in respect of the particular role of the employee, and decided that the employer should not be held vicariously liable.¹⁴⁰

The confusion in Gleeson CJ’s approach is further evident in the way he employed the language of *Bazley* and *Lister* in reaching his decision that Samin and Rich should be able to replead their cases on the basis of vicarious liability, yet later returned to the use of ‘course of employment’ in relation to Lepore.¹⁴¹

By contrast, Gummow and Hayne JJ did not favour the enhancement of risk approach articulated in *Bazley*. They considered that this type of analysis may ‘distract attention from the underlying task of identifying what the employee was engaged to do’¹⁴² and that this may lead to considerations of opportunity for

¹³⁶ Ibid 498.

¹³⁷ Ibid 432.

¹³⁸ Ibid 429–30.

¹³⁹ The manner in which Gleeson CJ discussed *Jacobi* [1999] 2 SCR 570 implies that this would be the way in which he would decide a similar recreational club case: *Lepore* (2003) 195 ALR 412, 431.

¹⁴⁰ *Jacobi* [1999] 2 SCR 570, 595 (Binnie J). See below Part IV(A) for a more detailed discussion of this case, particularly in relation to this distinction between residential and other forms of care of children.

¹⁴¹ *Lepore* (2003) 195 ALR 412, 435. Gleeson CJ adopted this approach to Lepore’s case as a result of his conclusion that if Lepore is claiming sexual abuse, then it is not possible to find vicarious liability as there was ‘nothing about the duties and responsibilities of the teacher that involved him in a relationship with his pupils of such a kind as would justify a conclusion that such activity was in the course of employment’: at 435. However, if Lepore is merely claiming excessive chastisement then it is a more straightforward course of employment case.

¹⁴² Ibid 467.

wrongdoing rather than focusing on the employment relationship and obligations. Gummow and Hayne JJ identified three limitations of the risk approach: that it does not recognise that it is intentional wrong conduct that is complained about; that it is conduct in direct contradiction to what the employee is employed to do; and that criminal sanctions have failed to operate as a deterrent against the intentional wrongdoing.¹⁴³ For Gummow and Hayne JJ, the risk must be considered within the course of employment if liability is to be imposed:

If a basis for imposing vicarious liability on an employer is that the employer should be liable as the person who creates the enterprise or the circumstances out of which the risk and damage emerges, it is an essential step in establishing vicarious liability to show that the risk and damage occurred in the course of employment. As we have said, that requirement is not an artificial limitation imposed for reasons extraneous to the principle which supports the finding of liability; it is an integral part of the definition of the liability.¹⁴⁴

Their Honours therefore formed the view that the manner in which the risk of the enterprise has been characterised by the Supreme Court of Canada possesses the danger of being essentially a ‘but for’ test.¹⁴⁵

In this way Gummow and Hayne JJ endorsed the approach to vicarious liability articulated in *Deatons*.¹⁴⁶ In their Honours’ view, drawing on the work of the 19th century legal scholar Pollock,¹⁴⁷ the notion of the ‘course of employment’ is

¹⁴³ Ibid 468.

¹⁴⁴ Ibid 469.

¹⁴⁵ Ibid. Gummow and Hayne JJ did not respond to McLachlin J’s claim in *Jacobi* [1999] 2 SCR 570 that this is not a ‘but for’ test and is, in fact, ‘more nuanced’. McLachlin J stated that the question to be considered is whether ‘the Club’s operation throw[s] into the community a very real risk that something like Griffiths’s molestations would occur, and hence, should it be held liable to compensate for the realized losses accruing from that risk?’: at 581. To answer this, McLachlin J went through the five factors that were articulated in *Bazley* [1999] 2 SCR 534, 559 (see above n 118 and accompanying text) and applied these in *Jacobi*. Her Honour considered the ‘opportunity that the enterprise afforded Griffiths’, which included mentoring, and also whether the acts furthered the employer’s aims. While McLachlin J noted that clearly the assaults were not within the aims of the club, the ‘securing of a position of trust, power and intimacy in order to effectively mentor the children was squarely within the organization’s objectives.’ She also considered the intimacy inherent in the nurturing role promoted by the organization, the ‘extent of power conferred on the employee in relation to the victim’, and the vulnerability of the victims: *Jacobi* [1999] 2 SCR 570, 582–5. This is clearly more involved than a ‘but for’ approach. See also *Bazley* [1999] 2 SCR 534, 558.

¹⁴⁶ (1949) 79 CLR 370. It is disappointing that the High Court failed to question this decision in *Lepore*. While Gleeson CJ and Kirby J adopted more progressive approaches to vicarious liability, they distinguished *Deatons* on its facts: *Lepore* 195 ALR 412, 429, 432 (Gleeson CJ), 495 (Kirby J). *Deatons* is ripe for critique and overturning, and it is a pity that the Court did not note criticisms such as that proffered by Harold Luntz and David Hambly, *Torts: Cases and Commentary* (5th ed, 2002) 930, who suggest that this case may have been decided differently today given that we know much more about sexual harassment and hostile work environments. See also the discussion of *Deatons* in 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, 112–13. While White and Orr do not adopt a gender analysis of *Deatons*, they do charge the Court with ‘side-stepping the chance to put a case like *Deatons* in its historical place,’ where to ‘contemporary eyes’ the Court’s view of the role of bartenders in *Deatons* is ‘perverse’: at 112–13. Cf Reg Graycar, ‘Teaching Torts as if the World Really Existed: Reflections on Harold Luntz’s Contribution to Australian Classrooms’ (2003) 27 *Melbourne University Law Review* 677, 690–2.

¹⁴⁷ Sir Frederick Pollock, *Essays in Jurisprudence and Ethics* (1882).

of critical importance in determining vicarious liability.¹⁴⁸ Their Honours adopted what might be described as a more semantic and narrow approach to the Salmond test, and rejected the broad approach advocated by the House of Lords and Supreme Court of Canada. It appears that they were unable to get over the antithetical hurdle of an act of sexual abuse by a teacher against a pupil — they were unable to see how this might be characterised as an unauthorised mode of doing an authorised act.¹⁴⁹ However, this is arguably true of any intentional tort which is also a criminal act.

The interesting aspect of Gummow and Hayne JJ's approach is that they made a number of comments about sexual assault by a teacher being an abuse of power, yet they relied on this characterisation to deny liability rather than to found vicarious liability. Not only did Gummow and Hayne JJ make the issue of 'power' explicit, they also made reference to how 'guiding and leading' a child are 'central to the teacher's task' (features of both power and trust), and noted that teachers are 'given authority over' pupils which is wrongfully exercised by some teachers.¹⁵⁰

I argue that it is through this understanding of child sexual assault by a teacher that we are able to look beyond conceptions of such abuse as being so abhorrent that it lies outside the role of a teacher for the purposes of vicarious liability. In the end, however, Gummow and Hayne JJ concluded that this power was not exercised in the execution of any apparent authority that a teacher might have had in the course of employment.¹⁵¹ In their view, to have recognised otherwise would impose too great a potential liability on educational authorities. Gummow and Hayne JJ thus concluded that Lepore, Samin and Rich should not be able to plead their cases in vicarious liability, as sexual assault by a teacher is so far outside what the teacher has been employed to do that they would ultimately fail.¹⁵²

IV WHAT DOES *LEPORE* TELL US ABOUT THE COURT'S UNDERSTANDING OF INSTITUTIONAL CHILD SEXUAL ASSAULT?

Gleeson CJ, Gaudron and Kirby JJ (and we might assume from McHugh J's approach that he would also concur) stated that, depending upon the facts of the particular case, it may be possible for a court to find a school authority vicariously liable for the harm suffered by a child who is sexually assaulted by an employee. However, the decision in *Lepore* does not bode well for future litigation regarding intentional harms inflicted against children. The difficulty I have with the High Court's approach lies in the ways in which the various judges articulate their understanding of child sexual assault, in particular the ways in which they use and discuss notions such as 'intimacy', 'power', the roles of

¹⁴⁸ *Lepore* (2003) 195 ALR 412, 467–8.

¹⁴⁹ See below Part IV(C) for a discussion of the problems associated with casting child sexual assault perpetrated by a teacher within an antithetical framework.

¹⁵⁰ *Lepore* (2003) 195 ALR 412, 467.

¹⁵¹ *Ibid* 474.

¹⁵² *Ibid* 473–4.

teachers, the perspective of children and the distinctions drawn between residential and day care contexts.

A Notions of 'Intimacy' — The Emphasis on Residential Care

A common feature of the recent decisions in this area is an apparent willingness to recognise vicarious liability in the context of residential facilities, but not for day schools or other forms of care or activities involving children. It appears that the increased likelihood that the responsibilities of an employee in a residential school will involve tasks requiring some degree of 'intimacy' or pseudo-parental control is seen as critical. In this way, it is much easier to see the assaults as having taken place within the course of employment or closely connected to the employment enterprise. A clear example of this distinction emerges from the decisions of *Bazley* and *Jacobi*, which were handed down by the Supreme Court of Canada on the same day.

The decision in *Bazley* has already been discussed in detail above.¹⁵³ *Jacobi* concerned sexual assaults by an employee of a recreational club where most assaults took place away from the premises. In a 4:3 decision, the majority of the Court in *Jacobi* held that the club was not vicariously liable.¹⁵⁴ The differences between the two outcomes rest upon the perceived intensity of an employee's role (and the corresponding enhancement of risk) in a residential facility compared to that in day care or a recreational activity. Binnie J, delivering the majority judgment, decided that the nature of this recreational club did not possess the ingredients of power and intimacy that were evident in *Bazley*.¹⁵⁵ He noted that the offender, Griffiths, was employed as the program director for the club and, as such, his role was to develop rapport and friendships with the children who attended, supervising a range of activities. Binnie J emphasised that, unlike the situation in *Bazley*, this could not be characterised as a parent-like role, and highlighted the fact that children returned to their parents after participating in the activities at the club.¹⁵⁶ In contrast, McLachlin J, for the minority, emphasised the mentoring role that the perpetrator was employed to have in relation to the children. Her Honour saw this as a type of role that is 'highly charged with potential for ... abuse'.¹⁵⁷ McLachlin J specifically rejected the suggestion that vicarious liability will only be located where the employee has parent-like duties.¹⁵⁸

While the decision in *Bazley* also employed the term 'intimacy', I suggest that McLachlin J did not employ this term as some defining criterion in the same way that some of the judges of the High Court seem to use it.¹⁵⁹ Instead, her Honour

¹⁵³ See above Part III(C)(4).

¹⁵⁴ [1999] 2 SCR 570. Binnie J delivered the majority judgment (Cory, Iacobucci and Major JJ concurring). McLachlin J delivered the dissenting judgment (L'Heureux-Dubé and Bastarache JJ concurring).

¹⁵⁵ *Ibid* 595.

¹⁵⁶ *Ibid*.

¹⁵⁷ *Ibid* 582.

¹⁵⁸ *Ibid* 588.

¹⁵⁹ See especially Gleeson CJ and Gaudron J. See below nn 164–8 and accompanying text for a discussion of their judgments.

used the term to describe the way in which power, intimacy and trust are operationalised in a child care setting.¹⁶⁰ As discussed above, intimacy inherent in the employment relationship is only one of five factors to be considered in determining whether the employment enterprise enhanced the risk.¹⁶¹

The discussion in *Bazley* also demonstrates a much more nuanced and real understanding of the nature of child sexual assault than the High Court decision. McLachlin J noted that ‘the more an enterprise requires the exercise of power or authority for its successful operation, the more materially likely it is an abuse of that power relationship can be fairly ascribed to the employer.’¹⁶² As her Honour explained:

Employment that puts the employee in a position of intimacy and power over the child (ie a parent-like, role-model relationship) may enhance the risk of the employee feeling that he or she is able to take advantage of the child and the child submitting without effective complaint. The more the employer encourages the employee to stand in a position of respect and suggests that the child should emulate and obey the employee, the more the risk may be enhanced.¹⁶³

As I have already suggested, the different intensity of care between residential and day care facilities appears to have been a decisive factor in determining vicarious liability for Gleeson CJ. In his judgment, Gleeson CJ attempted to distinguish the different roles a teacher might assume, some of which involve ‘power and intimacy’ and some of which do not:

If there is sufficient connection between what a particular teacher is employed to do, and sexual misconduct, for such misconduct fairly to be regarded as in the course of the teacher’s employment, it must be because the nature of the teacher’s responsibilities, and of the relationship with pupils created by those responsibilities, justifies that conclusion. It is not enough to say that teaching involves care. So it does; but it is necessary to be more precise about the nature and extent of care in question. Teaching may simply involve care for the academic development and progress of a student. ... 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.¹⁶⁴

Gleeson CJ noted that while sexual abuse is clearly ‘inconsistent with the responsibilities of anyone involved with the instruction and care of children’, it is possible to draw a distinction between ‘opportunistic’ or ‘random’ acts and those where the duties of the person who commits the acts ‘involve intimate

¹⁶⁰ This different view of intimacy is evident in her Honour’s dissent in *Jacobi* [1999] 2 SCR 570, 583–4, where it is not employed to connote sexual or bodily intimacy, but rather the closeness of the relationship and the key roles of power and trust.

¹⁶¹ *Bazley* [1999] 2 SCR 534, 559–60 (McLachlin J). See above n 118 and accompanying text for a consideration of these five factors.

¹⁶² *Ibid* 562–3.

¹⁶³ *Ibid*.

¹⁶⁴ *Lepore* (2003) 195 ALR 412, 434.

contact with another' when determining whether or not the act of violence will be considered to have taken place in the course of employment.¹⁶⁵

In making this distinction, Gleeson CJ failed to address the lengthy 'grooming' process that is often engaged in by perpetrators to gain access to their victims, a process expressly recognised by Gummow and Hayne JJ.¹⁶⁶ Whilst Gleeson CJ employed the term 'power', he does not appear to have appreciated, in the same way as Gummow and Hayne JJ, that child sexual abuse is fundamentally about an abuse of power and trust rather than about intimate opportunities.

Gaudron J also drew attention to the fact that the leading cases of *Bazley* and *Lister* involved residential facilities. In the context of vicarious liability, her Honour merely stated that this 'should be noted',¹⁶⁷ while in the context of non-delegable duties Gaudron J singled out residential institutions as being an environment in which the risk of sexual abuse would be foreseeable.¹⁶⁸

Kirby J's judgment provides a useful contrast here. His Honour did not draw any distinction between residential schools and other institutions. His Honour's decision is replete with broader references to organisations that care for children, teachers, school pupils and public schools. Furthermore, Kirby J stated that his approach to vicarious liability would potentially be applicable to the clergy, scout leaders and day care workers.¹⁶⁹ Kirby J acknowledged that sexual assault of pupils is clearly a risk in a school setting and, with reference to the situation of Samin and Rich, that the risk may be exacerbated in a one-teacher rural school.¹⁷⁰ While Kirby J was not explicit about the role of power in the abuse of children, the potential scope of his Honour's decision indicates an understanding of child sexual abuse beyond 'intimate' contexts.

The notion of 'intimacy' and the creation of 'intimate environments' would appear to miss the point about the sexual abuse of children, which has little (if anything) to do with intimacy and much more to do with abuse of power. In the case of *Lepore* this was perhaps best recognised by Gummow and Hayne JJ, who pointed out that sexual assault by teachers is 'usually associated with the wrongful exercise of power over a child'.¹⁷¹

¹⁶⁵ Ibid 430.

¹⁶⁶ Ibid 467. See also above n 124 and accompanying text. 'Grooming' was also discussed in *Lister* [2002] 1 AC 215, 220 (Lord Steyn) and *Jacobi* [1999] 2 SCR 570, 586 (McLachlin J).

¹⁶⁷ *Lepore* (2003) 195 ALR 412, 443.

¹⁶⁸ Ibid 445. It is worth noting that Gaudron J also pointed out that she would consider that *Trotman* [1999] IRLR 98 (see above n 125) would similarly comprise a breach of a non-delegable duty of care as the authority allowed the employee to share a bedroom with a child 'entrusted to his care': *Lepore* (2003) 195 ALR 412, 445.

¹⁶⁹ *Lepore* (2003) 195 ALR 412, 494 (citations omitted). See also Kirby J's references to residential and other institutions in a broad sense: at 482, 488–9.

¹⁷⁰ Ibid 496.

¹⁷¹ Ibid 467.

B *Appreciation of Context*

Gummow and Hayne JJ provided the clearest articulation of the nature of institutional child sexual assault and the misuse of power that this entails:

The teacher is given authority over the pupil; the pupil is, inevitably, vulnerable to abuse of that power. According to the nature of the duties to be undertaken by the teacher there may be greater or lesser opportunity for assault. ... [E]xperience dictates that sexual assaults on young people are not confined to assaults by those who are required to perform intimate tasks for, or with a child. Such assaults are usually associated with the wrongful exercise of power over a child which is power derived from the holding of some place of authority (as parent, carer, religious or other leader) and is often preceded by a period of cultivation or grooming of the child.¹⁷²

However, unlike the Supreme Court of Canada and, in particular, McLachlin J's dissent in *Jacobi*, Gummow and Hayne JJ used this analysis as one of the reasons for not finding vicarious liability on the basis that liability for schools would be simply too great a burden. Importantly, Gummow and Hayne JJ, while recognising very clearly the power issues involved, did not relate these issues to their use of the 'course of employment' concept, which they restricted to a narrow articulation in the nature of a statement of the duties a teacher is employed to do, without reference to the child's relationship to the teacher or the role of the teacher.¹⁷³ Questions must be asked about how Gummow and Hayne JJ can reconcile the recognition that 'central to the teacher's task [is the role] of guiding and leading the child ... through the journey of learning'¹⁷⁴ with their conclusion that the sexual assaults of Samin and Rich

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. [The teacher] 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.¹⁷⁵

It is interesting that despite the prominence given to *Bazley* in most of the judgments of the High Court, McLachlin J's comments about power appear to have been overlooked in preference for more selective attention to notions of intimacy and residential care. While McHugh and Kirby JJ did not discuss the issue of power at great length, they made reference to the fact that some teachers 'use their power and position to exploit children',¹⁷⁶ and commented about the vulnerability of children,¹⁷⁷ the risk of sexual assault by a teacher¹⁷⁸ and the

¹⁷² Ibid.

¹⁷³ Ibid 473.

¹⁷⁴ Ibid.

¹⁷⁵ Ibid 474 (emphasis in original).

¹⁷⁶ Ibid 456 (McHugh J).

¹⁷⁷ Ibid 449 (McHugh J), 496 (Kirby J).

viewpoint of children.¹⁷⁹ Such comments draw out other features of children and child sexual assault that should be considered in these cases, and are much more relevant than questions about intimate tasks exercised by teachers.

C *Castig Child Sexual Assault within an Antithetical Framework*

There is a tendency within the various decisions of the High Court to retain the conception of institutional child sexual assault as ‘antithetical’ to the role of a teacher. There are references to the extent to which such behaviour is ‘foreign’ to the role of a teacher,¹⁸⁰ and to this being ‘obviously inconsistent’¹⁸¹ with, ‘inimical’¹⁸² to, and the ‘antithesis’¹⁸³ of the role entrusted to a teacher. This language is suggestive of the popular conception of the teacher offender within a ‘rotten apple’ framework — that is, the teacher offender as a predatory paedophile.¹⁸⁴ Arguably, this is the classic way in which some things that occur frequently are treated as aberrational or beyond the experience of key players in the legal system.¹⁸⁵

While I agree that sexual assaults by teachers are antithetical to what they have been employed to do, the prominence of this argument (and its association with the distinction between residential and other care arrangements) requires us to ask why this view is so commonly held and to what ends it is invoked. In whose view is it antithetical? Is it that sexual assault of children in schools is antithetical to the role of the teacher? Or is it that sexual assault of children is inherently antithetical to our community’s sense of childhood? Isn’t the sexual abuse of children generally an antithesis? Doesn’t the fact that it is antithetical become a component of the harm suffered? Why doesn’t the fact that it is an abuse of a trust relationship enhance the damage? What purpose does such a characterisation serve? What I am saying here is that it may well be an ‘antithesis’, but surely we need to consider these issues before invocations of the antithetical nature of child sexual assault are used to defeat claims made by reference to vicarious liability.

¹⁷⁸ Ibid 496 (Kirby J).

¹⁷⁹ Ibid 490 (Kirby J).

¹⁸⁰ Ibid 434 (Gleeson CJ), 501 (Callinan J).

¹⁸¹ Ibid 430 (Gleeson CJ).

¹⁸² Ibid 501 (Callinan J). For other phrases of similar import, see at 433 (Gleeson CJ), 468, 474 (Gummow and Hayne JJ), 499 (Callinan J).

¹⁸³ Ibid 464 (Gummow and Hayne JJ). See also Gummow and Hayne JJ’s comments at 469. Callinan J also uses the term ‘antithesis’: at 500. Similarly, Kirby J noted that the teachers’ behaviour in *Samin’s* and *Rich’s* cases was described as being ‘the very antithesis’ of what teachers are employed to do, but went on to point out that the acts complained of ‘nonetheless’ took place on school premises during school hours: at 496.

¹⁸⁴ See also *ibid* 430, 432, 435 (Gleeson CJ), 474 (Gummow and Hayne JJ).

¹⁸⁵ For example, the use of expert evidence to explain the behaviour of women who kill their violent partners (‘battered woman syndrome’) was introduced to assist judges and juries to understand the behaviour and experiences of women suffering domestic violence. This ‘syndrome’ has been the subject of criticism, including that it was ‘constructed as being beyond the understanding of the lay juror’: Elizabeth Sheehy, Julie Stubbs and Julia Tolmie, ‘Defending Battered Women on Trial: The Battered Woman Syndrome and its Limitations’ (1992) 16 *Criminal Law Journal* 369, 384. As Sheehy, Stubbs and Tolmie suggest, such a construction is ‘ironic, given that domestic violence is so widespread in the community’: at 384.

Again, Kirby and McHugh JJ's judgments provide a useful contrast. These judgments are notable for the absence of such colourful and evocative language.¹⁸⁶ Instead of casting sexual abuse of children by teachers as completely aberrational,¹⁸⁷ which in many ways suggests that it is uncommon and that there is nothing that can be done to prevent its occurrence, Kirby and McHugh JJ approach the problem as a reality — an event that takes place regularly, however much we may wish that it did not, and needs to be redressed.¹⁸⁸ Far from accepting this type of behaviour, their Honours position the conduct in such a way that something can be done to remedy the harm.

In criticising the way in which institutional child abuse has been conceptualised in litigation and in some inquiries, Margaret Hall has proposed that we need to change the way in which this conceptualisation has taken place, something that she considers has commenced in *Bazley*.¹⁸⁹ As Hall argues, the way a problem is conceptualised 'determines our approach to both prevention and remedy.'¹⁹⁰ She notes that the traditional approach to institutional child abuse has been to conceptualise it as 'the proverbial bee to the honey pot' where

a pre-existing type or personality (bully, predator, paedophile) is drawn to child care institutions ... The focus of reform then becomes procedural, that is screening out the 'bees' ... [The incident of child sexual assault, in terms of the institution, is then seen as being] caused by random human error (pre-existing deviants infiltrating the system) and the solution (prevention) will depend upon improved screening and training and professionalization to filter out these deviants.¹⁹¹

Hall suggests instead that we should characterise institutions as 'crucibles' rather than 'honey pots'. She acknowledges that while the 'bee' concept may be true of some cases, in others the institution itself has created the environment in which abuse has been able to flourish.¹⁹² If we adopt an understanding of institutional

¹⁸⁶ Although Gaudron J's judgment also did not invoke such language, she did not discuss the issue of institutional child sexual assault at great length. Her Honour confined such comments to her discussion of *Bazley, Jacobi and Lister: Lepore* (2003) 195 ALR 412, 443–5.

¹⁸⁷ The Law Commission of Canada also states that the abuse 'of children in out-of-home care cannot be viewed simply as the acts of aberrant individuals who work with children. Rather, it must also be understood as resulting from a number of interrelated program and system factors': Law Commission of Canada, above n 14, 351.

¹⁸⁸ Some of the other judges also noted that sexual assault by a teacher is more common than we might have thought. However, the use of language which highlights the antithetical nature of these assaults has the tendency to emphasise the 'aberrational' rather than the 'common': *Lepore* (2003) 195 ALR 412, 467 (Gummow and Hayne JJ), 498 (Callinan J).

¹⁸⁹ Margaret Hall, 'After Waterhouse: Vicarious Liability and the Tort of Institutional Abuse' (2000) 22 *Journal of Social Welfare and Family Law* 159, 167–9.

¹⁹⁰ *Ibid* 160.

¹⁹¹ *Ibid* 162.

¹⁹² *Ibid*. An example of a residential school where sexual abuse by staff and pupils was able to flourish was the Jericho Hill School for the Deaf, British Columbia, Canada. The School has been the subject of a report detailing the extent and nature of the abuse which took place: Ombudsman of British Columbia, *Public Report No 32: Abuse of Deaf Students at Jericho Hill School* (1993) <http://www.ombud.gov.bc.ca/publications/reports/Public_Reports/PR32_Jericho_Hill_School.html>. As a result of these revelations the provincial government initiated a redress program: see Jane Morley, *The Jericho Individual Compensation Program (JICP): A Unique Response to Institutional Sexual Abuse* (2001) Government of British Columbia: Ministry of Attorney General <<http://www.ag.gov.bc.ca/dro/publications/reports/jericho>>

child sexual assault ‘as a series of disconnected crimes committed by cunning deviants conning their way into childcare institutions’, then the opportunity to implement a more thorough approach to prevention, such as ‘screening, openness, and actively resisting the development of a secret world’, is lost.¹⁹³

In the end, we are left with a sense that the majority of the judges on the High Court are unable to take on the challenge of deciding how tort law might recognise and redress harms not envisaged in its development. This problem encompasses issues beyond child sexual assault, such as the removal of children. There is a sense that for a majority of the Court, these acts are so abhorrent that the only person who can be held responsible is the individual perpetrator. Failing to recognise the potential applicability of vicarious liability, or for that matter breach of a non-delegable duty of care, for sexual assaults by teachers on this basis serves to further individualise the harm. Recognising vicarious liability in this area provides an important mechanism for seeing the systemic and institutionalised dimensions of these types of harms. This is perhaps most clearly demonstrated in *Bazley*, where the detailed discussion of the policy rationales for the imposition of vicarious liability provides a mechanism to view the harm beyond the individual perpetrator. McLachlin J, in using the concept of ‘enterprise risk’ explained above, described the notions of fairness and deterrence¹⁹⁴ in a way that captures dimensions of the harm beyond the individual.¹⁹⁵

D *Appreciation of the Child’s Point of View*

Viewing child sexual assault within an antithetical framework also raises questions about the child who is abused, and about how the child views the act of assault where it is inextricably linked to the role that the perpetrator has as a teacher. Nathalie des Rosiers has made a similar point when discussing the focus in *Bazley* on the issue of power in relation to the employee and the victim.¹⁹⁶ She points out that it is precisely the trust that school authorities encourage children (and others) to have in their teachers, and the power imbalance created by the school authority, that exacerbates the abuse:

From the victim’s perspective, the employment relationship is the very reason the victim did not protect himself or herself, did not run away, did not shout or did not know how to resist.¹⁹⁷

The approach adopted in *Bazley* specifically asks us to consider two critical points: the vulnerability of the potential victim; and, significantly, the power conferred on the employee in relation to the victim.¹⁹⁸ The decision of the High

compensation.pdf>. There is also ongoing litigation concerning sexual abuse which took place at Jericho Hill: see *Rumley v British Columbia* [2001] 3 SCR 184, in which the matter was allowed to proceed as a class action.

¹⁹³ Hall, above n 189, 163.

¹⁹⁴ Together with providing a ‘just and practical remedy’, fairness and deterrence are commonly cited as the policy rationales for the imposition of vicarious liability.

¹⁹⁵ See above n 119 and accompanying text.

¹⁹⁶ Des Rosiers, above n 75, 30.

¹⁹⁷ *Ibid.*

¹⁹⁸ *Bazley* [1999] 2 SCR 534, 560 (McLachlin J). See des Rosiers, above n 75, 29–30.

Court, however, gave little real attention to the victim's position, with the exception of McHugh and Kirby JJ who both made specific reference to the special vulnerability of children and the need to protect them from others.¹⁹⁹ The potential significance of taking into account the vulnerability of the victims is highlighted in McLachlin J's dissenting comments in *Jacobi*:

While the child's subjective assessment of the situation is not alone conclusive of the nature of the power the employee exercised, when analysing the degree of power a job carries, it is certainly appropriate to consider what a reasonable child would think of the employee's position in assessing whether the employer should be held vicariously liable for the employee's tort.²⁰⁰

As her Honour found on the facts:

While Griffiths was hardly a police officer or foster parent, power must be understood in context. Here, as a role model at a club that dealt with vulnerable children, there is little to negate the trial judge's conclusion that Griffith's position over the children was one of power.²⁰¹

Nathalie des Rosiers criticises the majority decision in *Jacobi* for failing 'to appreciate how sexual abuse operates from the victim's perspective.'²⁰² This criticism can also be levelled at the majority of the judges of the High Court. In fact, *Jacobi* is perhaps the most interesting of the Canadian cases because, unlike the unanimous decision in *Bazley*,²⁰³ it reveals the different ways courts might look at the employment context (whether via the enhancement of risk approach or the course of employment) and how that relates to child sexual assault. As des Rosiers explains in the context of the children in *Jacobi*:

While it is true that the children could have left the club whenever they wanted, children are often not in a position to recognise that they are abused. The trust that they were encouraged to bestow on Griffiths did not stop because he invited them to his house, or because he suddenly used them as sexual partners. It was important to realise that it is because of the employee–employer relationship that the children agreed to go, or did not know how to say no.²⁰⁴

One of the key attractions of using the concept of a non-delegable duty of care in this context is that this category of duty was developed precisely to respond to

¹⁹⁹ *Lepore* (2003) 195 ALR 412, 449 (McHugh J), 496 (Kirby J).

²⁰⁰ *Jacobi* [1999] 2 SCR 570, 584–5. See the discussion in Greg Dickinson, 'Precedent or Public Policy? Supreme Court Divided on Rules for Vicarious Liability for Sexual Abuse by Employees of Non-Profit Organizations' (2000) 10 *Education and Law Journal* 137, 158.

²⁰¹ *Jacobi* [1999] 2 SCR 570, 585. McLachlin J noted that the trial judge accepted the female plaintiff's characterisation of Griffiths as being 'god-like' as evidence of the power that the organisation conferred on Griffiths (where the club had promoted itself as providing adult mentoring and a nurturing environment for vulnerable children): at 584. Cf the approach of the majority on the same point, where Binnie J stated that the trial judge 'went beyond reality' in characterising Griffiths's authority as 'god-like' and that even so, the state of affairs surrounding the incident was not 'willed into existence by the Club or ... foreseeably incidental to its enterprise': at 594.

²⁰² Des Rosiers, above n 75, 31.

²⁰³ *Bazley* 'was a relatively easy case' in which to locate liability: *ibid* 31. See also Feldthusen, 'Vicarious Liability for Sexual Torts', above n 96, 231, where Feldthusen comments: 'If vicarious liability had not been imposed [by the British Columbia Court of Appeal in *Bazley*]... it is difficult to imagine it being imposed for any intentional tort, ever.'

²⁰⁴ Des Rosiers, above n 75, 31–2.

special vulnerability. One of the key differences between non-delegable duty cases and vicarious liability cases is that the former have within their sights the special vulnerability of the class of persons the non-delegable duty is designed to protect, whereas vicarious liability cases, particularly given the way the High Court has approached this issue, have tended to leave the injured person out of the picture and instead focus on the employment relationship and how the wrongful act fits into that relationship. While this does not necessarily have to be the case, as both the judgments of the Supreme Court of Canada in *Bazley* and Kirby J in *Lepore* demonstrate,²⁰⁵ I suggest that those approaches that focus on narrow understandings of the course of employment almost inevitably fail to consider the child's point of view. The course of employment line of analysis tends to result in the discussion centring on the teacher and what the teacher was employed to do (in a manner analogous to assessing a statement of duties), rather than the employment relationship to the children in the teacher's (and school authority's) care. For example, Gummow and Hayne JJ, pointed out that:

Unlike the dishonest clerk in *Lloyd*, or the dishonest employee in *Morris*, the teacher has no actual or apparent authority to do any of the things that constitute the wrong. In *Lloyd*, the clerk had, and was held out as having, authority to act in conveying the property which Emily Lloyd had and which he took to his own use; in *Morris*, the employee had authority to receive the garment that he stole. When a teacher sexually assaults a pupil, the teacher has not the slightest semblance of proper authority to touch the pupil in that way.²⁰⁶

There is a critical question to ask here: authority apparent to whom? The judges, or the child? It might well be easier for a judge to see the exercise of apparent authority from Emily Lloyd's position,²⁰⁷ but what about the position of the child, so clearly articulated by des Rosiers in the extract above?

In addition, the breach of a non-delegable duty of care is a form of direct liability, whereas vicarious liability is indirect. As stated by McHugh J:

Vicarious liability arises for the purposes of tort law when the law makes a person — usually an employer — liable for another person's breach of duty. In a non-delegable duty case, however, the liability is direct — not vicarious. The wrongful act is a breach of the duty owed by the person who cannot delegate the duty.²⁰⁸

This may also be a key difference for plaintiffs in institutional child sexual assault cases, who do not merely sue the educational authority on the basis of 'deep pockets' (despite this being the continual way in which these actions are characterised), but because the claimants also see the educational authority as having some critical responsibility for the abuse taking place. In the present case, some of the High Court judges repeatedly made reference to the fact that the

²⁰⁵ *Bazley* [1999] 2 SCR 534, 560 (McLachlin J); Kirby J favoured vicarious liability and asserted that 'it is essential to examine the problem of liability from the point of view of the victims': *Lepore* (2003) 195 ALR 412, 490. See also McLachlin J's dissent in *Jacobi* [1999] 2 SCR 570, 584; Des Rosiers, above n 75, 31.

²⁰⁶ *Lepore* (2003) 195 ALR 412, 474.

²⁰⁷ For a brief outline of *Lloyd* [1912] AC 716, see above n 100.

²⁰⁸ *Lepore* (2003) 195 ALR 412, 448.

school authorities were not at fault and that they had done everything that was possible to prevent the abuse.²⁰⁹ I would suggest that this is probably not the way in which the plaintiffs view these defendants.

In the end, failing to impose vicarious liability in cases of sexual assault against children in some form of care means that the burden of the harm, as well as the burden of prevention, remains precisely where it has fallen — on the victim.²¹⁰

V SOME CONCLUDING COMMENTS

The recognition of a breach of a non-delegable duty of care (as favoured by McHugh J) in cases of child sexual assault by a teacher would have a number of advantages over attempts to use vicarious liability. In many ways a non-delegable duty of care more accurately captures the position of children vis-a-vis the teacher *and* the school authority, given its recognition of power disparities and the special vulnerability of children. These considerations have tended to be absent from the judgments of most of the members of the High Court, or where they have been recognised they have been assessed in ways to avoid the imposition of liability.

Given the dismissal of non-delegable duties in the present case by the judges of the High Court (with the exception of McHugh J) and the general reining in of these types of duties,²¹¹ it is realistic to consider the ways in which vicarious liability (as demonstrated by the Supreme Court of Canada and the House of Lords) can encompass these types of harms. I argue that we need to advocate a more realistic analysis of the power that is conferred on teachers through this employment relationship and a greater recognition of the role of that power in the incidence of child sexual assault. Does the employment relationship create or foster an environment in the school in which pupils fear teachers, rather than respect them? Does the school environment create a situation in which young people are encouraged in their views, able to question things and have a concept of their ‘rights’? Perhaps if we insert these questions into considerations about vicarious liability, we might move beyond notions of ‘intimacy’ that bear no relationship to the reality of child sexual assault. Asking these types of questions might enable the courts to assess the role of a teacher (or the scope of employment) in a way which also assesses the dependency of children in care situations and the way in which teachers can exercise power over children when performing their roles. The use or exercise of power by teachers can then be understood as precisely part of their employed role.

I am aware that some people may conclude from my views in this article that the preventative measures that are needed involve ensuring that no teacher is left alone with children, that no teacher should comfort a child who is upset, that doors should be left open and so on. I want to make it very clear that this is not what I am suggesting and that it is not these measures that serve to challenge

²⁰⁹ Ibid 419 (Gleeson CJ), 473 (Gummow and Hayne JJ).

²¹⁰ See Feldthusen, ‘Vicarious Liability for Sexual Torts’, above n 96, 227.

²¹¹ See Vines, above n 61, 623–5.

perpetrators of child abuse, who will always imagine ways to get around those sorts of things. What may assist is the creation of a school environment in which open expression is encouraged and valued, where ideas of hierarchy and power within the teacher–student context can be challenged and where decisive action is taken when a report is made.²¹² In the end, it comes down to how we respect the rights of children: how schools limit the power teachers have over children, or whether schools foster and encourage this imposition of power. As has been noted elsewhere, ‘[a]ll prevention strategies recognise that the way in which a child is viewed by an institution matters.’²¹³ These matters are at the heart of the issue of prevention, and hence detection.

As uncomfortable as it might make us feel, there needs to be recognition at the outset that sexual abuse of children takes place in our community, within the family, by people known and unknown to children, and that it takes place within our schools. Perhaps, when we recognise this as a not uncommon event rather than as an abhorrent aberration, we might come some way in focusing on the needs of victims. We might also come some way in addressing the community responsibility to denounce violence in a real way, rather than being denounced in a way that individualises the issue and the perpetrators.

The cases discussed from Australia, Canada and the United Kingdom are important, particularly given that over the last decade we have had considerably more discussion, exposition and litigation about these types of more complex harms, and we can expect more in the future. In some instances, civil actions for damages are being referred to as ‘new’ actions, but really they are ‘old’ torts now seeking redress.²¹⁴ The courts had not previously been asked, to any significant degree, to apply tort law to the harm of sexual abuse. Ultimately, courts have found the question of whether there is a legal remedy available for sexual assault within the tort regime a difficult one to answer. As a result of this difficulty, there are calls to explore alternative methods of addressing these types of systemic harms.²¹⁵ I agree that other more appropriate systems of redress and reparations should be implemented.

A number of redress schemes, most notably in Canada²¹⁶ and Ireland,²¹⁷ have been established to specifically address the harms of institutional child sexual

²¹² For a more detailed account of preventative approaches, see the Law Commission of Canada’s report, which emphasises the rights of children: Law Commission of Canada, above n 14, 352–68.

²¹³ Des Rosiers, above n 75, 30.

²¹⁴ Feldthusen, ‘The Civil Action for Sexual Battery’, above n 10, 205–7.

²¹⁵ In relation to the harms suffered by the stolen generations, see HREOC, above n 14, 308–13, where recommendations were made for a National Compensation Fund and regarding the processes of making awards; Amanda Cornwall, Public Interest Advocacy Centre, *Restoring Identity: Final Report of the Moving Forward Consultation Project* (2002).

²¹⁶ For some examples of redress programs that have been implemented in Canada, see Goldie Shea, *Redress Programs Relating to Institutional Child Abuse in Canada* (1999) Law Commission of Canada <http://www.lcc.gc.ca/en/themes/mr/ica/she/redress/redress_main.asp>. In December 2003, Canada finalised its alternative dispute resolution process for Indian residential school claims: see Indian Residential Schools Resolution Canada, *Alternative Dispute Resolution* (2003) <http://www.irsr-rqpi.gc.ca/english/dispute_resolution.html>.

²¹⁷ See the Residential Institutions Redress Board of Ireland established under the *Residential Institutions Redress Act 2002* (Ireland). For information about the Board, see <<http://www.rirb.ie>>.

assault.²¹⁸ Redress schemes, when properly designed and implemented (that is, with the active involvement of victims), provide a range of ways in which to address the harm suffered in a more comprehensive way than the tort system currently provides. For example, redress schemes may introduce features that have specific relevance to the institution, they may eliminate much of the trauma associated with a civil trial, they are less formal, they tend to be quicker in their resolution and they generally provide for apologies. In Canada and Ireland the introduction of redress schemes has generally followed successful litigation, or the pressure of large-scale impending litigation. This impetus has not yet been provided in Australia.²¹⁹ Successful litigation can generate a government response to a larger number of victims who have experienced similar harms. For example, in Canada, the decision in *Muir v Alberta*,²²⁰ in which Leilani Muir was awarded over CAD\$700 000 as a result of her unlawful sterilisation,²²¹ was followed by the filing of hundreds of similar claims and led to the Alberta Government establishing a compensation package. As a result, 635 claims were settled for a total of \$60 million between June 1996 and November 1999. The government also ‘expressed its profound regret to those who suffered as a result of being sterilised.’²²²

It is also important to recognise that a number of victims will seek to exercise their legal rights and ask the law to provide some response to the harms that they have suffered at the hands of another, even if a redress scheme is available.²²³ Without a proper understanding of the context of institutional child sexual assault and the abuse of power that this entails, the courts will always remain unable to address these claims effectively.

²¹⁸ It is worth noting that these schemes have overwhelmingly related to harms which have taken place in residential institutions.

²¹⁹ Yet we know that its potential exists by: the number of victims who have given evidence (oral and written) to the Inquiry into Children in Institutional Care of the current Senate Community Affairs References Committee, Parliament of Australia, Parramatta, 4 February 2004 (Steve Hutchins, Chair) <<http://www.aph.gov.au/hansard/senate/commtee/S7291.pdf>>; the number of people who gave evidence to, and the conclusions reached by HREOC, above n 14, 21, 194–5; the work of the *Forde Inquiry*, above n 13. Out-of-court settlements are also occasionally reported in the media: see, eg, St John of God Brothers settlement, above n 16.

²²⁰ (1996) 132 DLR (4th) 695.

²²¹ Reg Graycar and Jenny Morgan, *The Hidden Gender of Law* (2nd ed, 2002) 331. Leilani Muir sued the provincial government for her sterilisation under the *Sexual Sterilisation Act* RSA 1955, c 311, after she had been placed in a residential institution for ‘mental defectives’ where she had been labelled a ‘mentally defective moron’. This case is also notable for the fact that the provincial government did not rely on the statute of limitations that would have been a complete defence to Muir’s claim. This concession was seen by the court as ‘more than an apology: it is an amendment — a real effort to make things right’ and declined to award punitive damages: *Muir v Alberta* (1996) 132 DLR (4th) 695, 735.

²²² Graycar and Morgan, above n 221, citing Shea, above n 216.

²²³ For example, despite a redress package being implemented for harms suffered at the Jericho Hill School for the Deaf in British Columbia, a number of victims still brought legal actions: see Morley, above n 192, 17. This has led to a class action: see *Rumley v British Columbia* [2001] 3 SCR 184. It is also worth noting that the Alternative Dispute Resolution Process introduced in Canada to address claims arising from the Indian residential school system makes it clear that this alternative process is one of three options that a victim may choose to use to resolve their claim (the other two being pursuing a civil action or an out-of-court settlement arising in the context of civil proceedings): see Indian Residential Schools Resolution Canada, *Resolution Framework & ADR* (2003) <http://www.irsr-rqpi.gc.ca/english/dispute_resolution_framework.html>.