Sexual abuse in the course of employment

A paper by Emil Ford Lawyers 2016

EMIL FORD
Lawyers

Level 5, 580 George Street Sydney NSW 2000

T +61 2 9267 9800
F +61 2 9283 2553
E lawyers@emilford.com.au

Sexual abuse in the course of employment

A school is liable for the actions of a teacher, or any other employee, when those actions are in the course of the teacher's employment because the school is taken to have ostensibly authorised the teacher's actions. This is called vicarious liability and it is a non-controversial issue when a teacher performs his or her duties negligently. However, can a school be liable for the intentional, even criminal, conduct of a teacher? In particular, can a school be vicariously liable if a teacher sexually abuses a student?

Generally, an employer is not vicariously liable for the criminal conduct of an employee because criminal conduct is usually outside of the course of employment. However, in *Lepore*[1], the High Court of Australia left open the possibility that schools could be vicariously liable for the sexual abuse of a student by a teacher. In separate judgments, most of the Justices of the High Court said vicarious liability for sexual abuse was possible but proposed very different tests to determine whether a school would be vicariously liable. It has remained unclear in what circumstances a school may be vicariously liable and which test would apply.

In *A, DC v Prince Alfred College Inc*[2], the Full Court of the Supreme Court of South Australia ruled that the College was vicariously liable for a boarding housemaster sexually abusing a boarder. This is a significant development in the common law and one of which schools, especially those with boarding houses, ought to be aware.

In this case, there was no dispute about whether the abuse occurred. The housemaster had been convicted of the sexual assaults and was in prison. The issues were whether the College was liable for the abuse and, if so, on what basis did that liability arise.

In finding the College vicariously liable, Chief Justice Kourakis and Justice Peek endorsed the test proposed by Chief Justice Gleeson in *Lepore*:

> *If there is sufficient connection between what a particular teacher is employed to do, and sexual misconduct, for such misconduct fairly to be regarded as in the course of the teacher's employment, it must be because the nature of the teacher's responsibilities, and of the relationship with pupils created by those responsibilities, justifies that conclusion. It is not enough to say that teaching involves care. So it does; but it is necessary to be more precise about the nature and extent of care in question. Teaching may simply involve care for the academic development and progress of a student. In these circumstances, it may be that…the school context provides a mere opportunity for the commission of an assault. However, where the teacher-student relationship is invested with a high degree of power and intimacy, the use of that power and intimacy to commit sexual abuse may provide a sufficient connection between the sexual assault and the employment to make it just to treat such contact as occurring in the course of employment. The degree of power and intimacy in a teacher-student relationship must be assessed by reference to factors such as the age of students, their particular vulnerability if any, the tasks allocated to teachers, and the number of adults concurrently responsible for the care of students. Furthermore, the nature*

[1] *New South Wales v Lepore* (2003) 212 CLR 511
[2] *A, DC v Prince Alfred College Inc* [2015] SASCFC 161

and circumstances of the sexual misconduct will usually be a material consideration.[3]

Justice Peek summarised the factors relevant to the College having vicarious liability for the sexual abuse. These factors included:

- The age and vulnerability of the victim.
- The housemaster's position and living arrangements in the boarding house.
- The housemaster being the only adult apparently responsible for the care of junior boarders, including supervision of showering and settling at bedtime.
- The close intimate relationship of a quasi-parental nature that was fostered by the natural affinity of boarders to, and the trust of parents of, housemasters.
- The vulnerability of the victim due to the intimacy, power and subservience of the relationship.
- The sexual abuse exploited the victim's vulnerability and was committed under the cover of the housemaster's duties.
- The housemaster's employment and the sexual abuse were so closely connected as to make it just to impose vicarious liability.
- The housemaster's role gave him the power and status to draw the victim further into his sexually abusive orbit by ostensibly respectable means connected with his employment.
- The sexual abuse was inextricably interwoven with the housemaster's carrying out of his duties.
- The College actively held itself out to be protective of boarders.
- The College relied on an intimate relationship of trust in the boarding house rather than one of supervision for commercial reasons and the relationship of trust increased the risk of sexual abuse.

Justice Peek concluded that this was "'one of those wrongful acts done for the servant's own benefit for which the master is liable when they are acts…which are committed under the cover of authority the servant is held out as possessing or of the position in which he is placed as a representative of his master'."[4]

Chief Justice Kourakis agreed with Justice Peek's statements of principle regarding vicarious liability but ruled that the College was only vicariously liable for the housemaster's actions when he was sitting on the victim's bed. This may significantly limit the application of the judgment.

This case does not resolve the issue of sexual abuse and vicarious liability but it is a significant development in Australian common law. It should be a warning to all schools with boarding houses that they have to do more than trust their staff members. If a school increases the risk of sexual abuse or creates an environment where the risk of abuse is enhanced, the school may be vicariously liable for the abuse.

---

[3] *New South Wales v Lepore* (2003) 212 CLR 511 at [74]

[4] *A, DC v Prince Alfred College Inc* [2015] SASCFC 161 per Peek J citing *Deatons Pty Ltd v Flew* (1949) 79 CLR 370, 381 (Dixon J, as he then was)

If you would like to explore in more detail your school's potential liability in these areas, please contact David Ford (David.Ford@emilford.com.au) or Nathan Croot (Nathan.Croot@emilford.com.au) at Emil Ford Lawyers.