Risk Management when faced with Child Abuse Allegations

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David has presented at conferences in the United Kingdom, South Africa, Belgium, New Zealand and throughout Australia, and published numerous papers on topics as varied as student rights, teachers' liability, tort law reform, investigations, teachers and confidentiality, bullying, outdoor education, multiculturalism in education, discrimination and child protection. He regularly presents in-school seminars for both teachers and administrators on education law matters. He also consults to schools and their boards on governance issues.

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What is this paper about?

Child protection has featured highly on the agenda of New South Wales educators since the 1997 Wood Royal Commission into the Police Force. The Commission's findings led to a raft of new legislation in New South Wales which established an unprecedented statutory child protection regime. The initial focus of everyone affected was on understanding the new regime and complying with its form filling requirements. There have been many judicial decisions trying to make sense of it all.[1]

I have argued in the past[2] and say again that this statutory regime did not lay new responsibilities on schools to take reasonable steps to protect their students from abuse or to investigate allegations of improper conduct against staff. These responsibilities were there all along.[3] The High Court of Australia restated the basic principle most recently and very simply in *Trustees of the Roman Catholic Church for the Diocese of Canberra and Goulburn (as St Anthony's Primary School) v Hadba*[4] when the majority said that a school owes a duty to its students to take reasonable precautions for their safety while they are at school.

In *Gogay v Hertfordshire County Council*[5], the English Court of Appeal stated quite plainly that a residential care authority had not only a statutory duty under the *Children Act* to investigate when it had reasonable grounds

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[1] For example, *"K" v NSW Ombudsman and Anor* [2000] NSWSC 771 in relation to the changes to the *Ombudsman Act 1974*; *Commission for Children & Young People v "A"* [2003] NSWIR Comm 6 in relation to the *Child Protection (Prohibited Employment) Act 1998.*

[2] David Ford, *Investigating the Investigators*, presented at ANZELA Annual Conference, Wellington, New Zealand, 2004 (available on the Education & Schools page of Emil Ford & Co - Lawyers website www.emilford.com.au)

[3] For example, in *AB v Victoria* (15 June 2000, Supreme Court of Victoria, Gillard J, unreported), a negligence action against a teacher who failed to report suspected child abuse succeeded before statutory mandatory reporting began in Victoria.

[4] [2005] HCA 31 (15 June 2005)

[5] (2000) IRLR 703

to suspect that a child was likely to suffer significant harm but also "an ordinary common law duty to take reasonable care of the children they are looking after".[6] Schools as employers also have a common law duty to take reasonable care to avoid exposing their employees to unnecessary risks of injury. Under occupational health and safety legislation, employers have an even more onerous duty to ensure the health, safety and welfare of employees and others at the place of work.[7]

The new legislation sought to ensure that schools took all these existing responsibilities seriously; for example, by introducing the Ombudsman's role of monitoring investigations against school employees.

Now that most educational institutions have put in place procedures to ensure that they comply with their statutory obligations, it is timely to consider how they are to fulfil their duty of care to their students and their employees when allegations of child abuse[8] are made against a current employee.

Risks to whom?

Children

When such allegations are made, one of the first things that a school principal should do is assess the risk that the alleged offender may be to the child involved and to other children (not just students at the school).

While it is clear that a school has a duty to care for its students, it may not have a similar duty to children who are not students. The law does not impose a duty on everyone to everyone else. Rather, to fall within the class of people to whom a duty of care is owed, such people must be "neighbours" - those who might reasonably be affected by my actions or inactions. There are notions of foreseeability and proximity to satisfy.[9] While a school may, to some extent, have a duty to care for the siblings of its students, it probably does not have a duty to other children generally nor, indeed, even to students at a school at which a current employee formerly taught. Each case has to be determined by examining its facts.

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[6] Per Hale LJ at paragraph 29
[7] *Occupational Health and Safety Act 2000 (NSW)*, s 8
[8] I have used the generic "child abuse" although those in NSW have now become accustomed to "reportable conduct".
[9] *Jaensch v Coffey* (1984) 155 CLR 549

The teacher against whom the allegation is made

The extent of the duty to the employee against whom the allegation is made is more problematic. While there is no doubt that employers have a duty to provide a safe place of work, this duty does not extend to taking care for the employee when investigating allegations against him or her.

Consideration of this issue begins with the High Court of Australia in *Sullivan v Moody*[10]. In that case, two fathers, each of whom had been accused of sexual assault on their children, sued the medical practitioners who had examined their children and reported to the Department of Community Welfare that the boys appeared to have been sexually abused. Further investigations were carried out by officers of the Department who reached the same conclusion. They referred the matter to the police and the police charged the two fathers with sexual offences. Those charges were ultimately dropped. The fathers asserted that they had suffered shock, distress and psychiatric harm. The fathers asserted that the medical practitioners had acted negligently in their examination and diagnosis. The State of South Australia, as employer of the officers in the Department of Community Welfare, was said to be liable for the negligent investigation and reporting of those officers.

In a joint judgment, the High Court said[11]:

> *The statutory scheme that formed the background of the activities of the present respondents* [the officers of the Department] *was, relevantly, a scheme for the protection of children. It required the respondents to treat the interests of the children as paramount. Their professional or statutory responsibilities involved investigating and reporting upon allegations that the children had suffered, and were under threat of, serious harm. It would be inconsistent with the proper and effective discharge of those responsibilities that they should be subjected to a legal duty, breach of which would sound in damages, to take care to protect persons who were suspected of being the sources of that harm. The duty for which the appellants* [the fathers] *contend cannot be reconciled satisfactorily, either with the nature of the functions being exercised by the respondents, or with their statutory obligation to treat the interests of the children as*

[10] [2001] 75 ALJR 1570
[11] At paragraph 62

> *paramount. As to the former, the functions of examination, and reporting, require, for their effective discharge, an investigation into the facts without apprehension as to possible adverse consequences for people in the position of the appellants or legal liability to such persons. As to the latter, the interests of the children, and those suspected of causing their harm, are diverse, and irreconcilable.*

The NSW Court of Appeal relied on *Sullivan v Moody* in *The State of New South Wales v Paige*[12]. Mr Paige was the principal of a Sydney High School from 1992 to 1998. In 1992, he received complaints from students regarding sexual misconduct of a teacher at the school occurring before Mr Paige's appointment. Mr Paige notified the NSW Department of Education of some complaints, but dealt with the complaints by a direct approach to the teacher and arranged to have him transferred from the school. In February 1997, after the Wood Royal Commission had raised doubts about the adequacy of the Department's treatment of complaints of sexual misconduct by teachers, the Director-General of the Department issued a statement requesting a re-notification of sexual misconduct cases that had not been adequately investigated. Mr Paige re-notified the complaints and notified some other complaints for the first time.

Mr Paige's conduct was investigated under procedures set out in the *Teaching Services Act 1980*. He was then charged with a breach of his duties for non-compliance with departmental procedures in the way he had handled the complaints.

Mr Paige suffered psychiatric harm and lost income. In the District Court, the trial judge found that the Department had breached its duty of care to Mr Paige and awarded damages.

In the Court of Appeal, Spigelman CJ delivered the main judgment. His Honour noted that the duty of care allegedly owed by the Department to Mr Paige was novel. It was outside the accepted duty of employers to provide a safe system of work. This was because the requirement to provide a "safe system of work" was concerned with the conduct of tasks for which an employee was engaged; that is, not to matters concerning the incidents of the contract of employment, such as the disciplinary procedures under consideration in *Paige*.

[12] (2002) NSWCA 235

Paige was concerned with how statutory powers, relevantly in the Regulations under the Teaching Services Act, were exercised. The court had to grapple with issues of compatibility and coherence between the law of tort and the Act and its Regulations.

Spigelman CJ said:

> *As a general rule, in my opinion, it is undesirable to inhibit an investigation into the exercise of a statutory power which protects public interests by imposing the chilling effect of a risk of civil liability.*[13]

Spigelman CJ concluded that there was an element of incompatibility between the statutory duties on the Department under the *Teaching Services Act* and the alleged duty on the Department to conduct its investigation reasonably, mindful of the risk of inflicting mental trauma. This, the Chief Justice said, lent weight to a conclusion that this new class of duty of care should not be established.[14] He was convinced of this when he considered that to recognise the proposed duty in tort would lead to incoherence with the law applicable to termination of employment; that is, the law of contract as modified by statute. It is not appropriate to spend time here on the Chief Justice's reasoning in this area. However, I note that he was significantly influenced by the decision of the House of Lords in *Johnson v Unisys*[15]. That decision has since been seriously criticised in many quarters, including the House of Lords itself in *McCabe v Cornwall County Council*[16].

This is not to say that Spigelman CJ would come to a different conclusion today, particularly as he was also mindful of the incoherence of the alleged new duty of care with the administrative law in relation to procedural fairness.

Spigelman CJ concluded that there was no duty of care by the Department to Mr Paige. Mason P and Giles JA both agreed with the Chief Justice on this point.[17]

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[13] At paragraph 115
[14] At paragraph 131
[15] [2001] 2WLR 1076
[16] [2004] UKHL 35
[17] Out of interest, Mr Paige did succeed on his alternate claim for breach of contract and was awarded damages in excess of $200,000.00.

The issue came before the NSW Supreme Court again in *Heptonstall v Gaskin*[18], where the plaintiff was an employee of the NSW Department of Education. He was arrested and charged with six counts of aggravated assault. It was alleged that he had, on a number of occasions, inappropriately touched two 10 year old pupils during gymnastic classes. The same day that he was arrested, the Assistant Director-General of Education directed him not to attend his school and appointed a case manager to investigate the allegations. Six months later, the Office of the Director of Public Prosecutions advised him that the charges would be withdrawn. They were withdrawn and dismissed. Nevertheless, the Department of Education continued its investigations into the allegations made against Mr Heptonstall. Some two years later, it was found that the allegations had not been proven and all charges were then dismissed against him.

Mr Heptonstall sued the Department seeking damages for its negligence which were particularised, oversimplifying the matter, as a failure to investigate the allegations against him properly. The Department sought to strike out Mr Heptonstall's Statement of Claim on the basis that it disclosed no reasonable cause of action. The Supreme Court struck out the claim on the basis that there was no duty of care to the employee in this situation. The statutory scheme for investigating, charging and conducting disciplinary proceedings against teachers was considered to be protective in nature rather than penal. The main concern of the scheme was the welfare of students. The duty of care which Mr Heptonstall asserted could not be reconciled satisfactorily with the duties of those whose task it was to investigate, recommend charges and take part in the subsequent disciplinary proceedings. Whealy J said:

> *These functions require, if the task is to be carried out properly, a thorough and careful investigation into the circumstances without apprehension as to possible adverse consequences for the person who is the subject of the disciplinary proceedings…. The interests of the children, that is the alleged victims of the disgraceful conduct, would require the most thorough and exhaustive investigation while ever there remained any suspicion that the inappropriate conduct had occurred. On the other hand, the interests of the teacher suspected of the inappropriate behaviour, in the circumstances*

[18] [2004] NSWSC 80 (26 March 2004)

> *where it is was by no means clear that the conduct had occurred, would head in the opposite direction.*[19]
>
> *The proper investigation of a charge against a teacher in circumstances where sexual misconduct is alleged may require extensive and exhaustive enquiries. It would be contrary to the nature of disciplinary proceedings of this kind that there should exist an obligation, sounding in damages for breach, if the investigation were not able to be completed rapidly and without delay. The duty of care expressed in those terms … is in my view inconsistent and incompatible with the obligations cast on those whose duties it is to investigate, recommend and prosecute charges for serious breaches of discipline.*[20]

The school and the investigation

When allegations of child abuse are made against teachers, the principal should also assess potential risks to the school and to the investigation. However, these risks are not the subject of consideration in this paper.

The Legal Background to Risk Management

Tort Law

Schools are quite familiar with their duty of care to their students. I have dealt with this subject on other occasions.[21] In the context of this paper, Gleeson CJ put it nicely in *Lepore*:

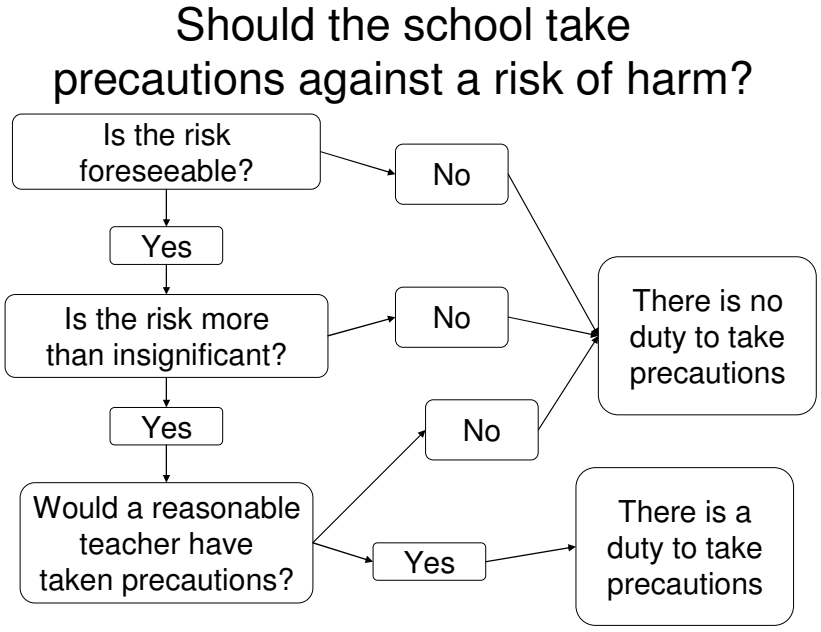
> *The legal responsibilities of* [a school] *include a duty to take reasonable care for the safety of pupils. There may be cases in which sexual abuse is related to a failure to take such care. A school authority may have been negligent in employing a particular person, or in failing to make adequate arrangements for supervision of staff, or* ***in failing to respond appropriately to complaints of previous misconduct****, or in some other respect that can be identified as a cause of the harm to the pupil. The relationship between school authority and pupil is one of the exceptional relationships which give rise to a duty in one party to take reasonable care to protect the other from the wrongful behaviour of third parties even if such*

[19] At paragraph 54
[20] At paragraph 56
[21] For example, *Tort Reform: does it affect teachers and schools?* UNSW School Law Alert 29 July 2004 (paper available at www.emilford.com.au)

> *behaviour is criminal. Breach of that duty, and consequent harm, will result in liability for damages for negligence.* (my emphasis)[22]

When a student is injured, the law asks, with the benefit of hindsight, several questions to help determine if the school or its teachers have failed to take precautions that a reasonable person in their shoes would have taken. If they have not, they will be in breach of their duty of care.

The same questions ought, therefore, to be asked when considering in advance what precautions should be taken to eliminate or minimise risks to students. These questions are set out in the following chart:



An example of where there was a failure to take reasonable precautions against the relevant risks after an allegation of abuse had been made is found in the situation dealt with in the Toowoomba Preparatory School case.[23] In mid-1990, a female student, who was a boarder in Year 7, was sexually assaulted by her boarding master, Kevin Guy, in some 30 incidents, involving her being undressed and fondled, digitally raped and having to fondle him.

Mr Guy had been employed as a boarding master in 1987 to look after both girl and boy boarders. From early on, there were suspicions concerning his

[22] *New South Wales v Lepore; Samin v Queensland; Rich v Queensland* [2003] HCA 4 (6 February 2003) at paragraph 2
[23] *S v The Corporation of the Synod of the Diocese of Brisbane* [2001] QSC 473, Wilson J (unreported)

sexual interests in a number of the girls. He was known to have been observing girls as they took showers and was reported for having kissed one girl. It was more worrying when, one night, the girl who sued was reported missing from her dormitory. She was found alone with Mr Guy in a darkened common room at 10.30 p.m. Her parents were not informed.

In November 1990, Mr Guy was charged with indecently dealing with a female student. He offered to resign but this was not accepted by the school council. Rather, he was placed on leave until March of the following year. Mr Guy committed suicide in December 1990 before having to appear in court to defend the allegations against him.

The girl's claim for damages against the school was heard before a jury. The jury was asked to consider the plaintiff's claim that the headmaster knew, or should have known, of the boarding master's inappropriate behaviour to female students. Such knowledge would be based on the fact that Mr Guy's behaviour to female students was "openly displayed from 1987" and that the headmaster's personal observations or appreciation of what he saw was inadequate. Further, the jury had to consider the adequacy of the headmaster's response to a student's complaint regarding Mr Guy having kissed her and touched the inside of her thigh as well as concerns expressed by two nurses at the school about his behaviour. The jury was directed to decide whether Mr Guy had acted inappropriately to the female students (defined as behaviour "sufficiently untoward to be a warning sign") and thus whether the headmaster should have known about it and, if he did, the adequacy of his response. Consideration was also given to suggestions that the responses of some other staff might also have been inadequate.

In a statement that is a very important reminder for every school administrator, Wilson J pointed out, in relation to the school's duty to care, that the law required the School to have adequate systems in place to "ensure that reasonable care was taken of the boarders". However, the judge rightly reminded the jury that the school did not have "an absolute obligation to guarantee the safety and well-being" of the little girl.

The jury found that the School had failed to take reasonable care of the girl and that the School's employees (the headmaster and others) also had failed to take reasonable care of the girl. Exemplary, as well as compensatory, damages of over $800,000 were awarded.

Child Protection (Prohibited Employment) Act 1998

Further guidance in relation to risk management can be found in section 9(5) of the *Child Protection (Prohibited Employment) Act 1998* which states that the following factors, at least, are to be taken into account when considering whether a person poses a risk to the safety of children:

> *(a) the seriousness of the offences with respect to which the person is a prohibited person,*
>
> *(a1) the period of time since those offences were committed,*
>
> *(b) the age of the person at the time those offences were committed,*
>
> *(c) the age of each victim of the offences at the time they were committed,*
>
> *(d) the difference in age between the prohibited person and each such victim,*
>
> *(d1) the prohibited person's present age,*
>
> *(e) the seriousness of the prohibited person's total criminal record.*

When these factors are being considered in the statutory context, it is because a person who has committed a serious sex offence (as defined by the Act) is a prohibited person and is seeking a declaration under section 9(1) of the Act for permission to work in child-related employment. In other words, the factors are being considered against a background of someone who has committed a serious sex offence. This, of course, is not usually the case where an allegation of child abuse is made against a current teacher. Nevertheless, the factors can be a helpful guide to a principal when considering risk. Likewise, some of the case law arising out of section 9 of the Act can also be helpful.

In *EQ v Commission for Children & Young People*[24], EQ pleaded guilty to a charge of sexual intercourse without consent with a person under 16 years of age back in 1985. The police facts sheet indicated that EQ had been living with the family of the five year old victim on and off for over a decade. While minding the children of that family, when their mother was away for the weekend, she took the child into a bedroom, played with him and undressed him. She then lay on her back placing his penis in her vagina. She was 31 at the time. She was sentenced to six years imprisonment with a non-

[24] [2003] NSWADT 123

parole period of two years six months. In 2003, EQ's application for a declaration that she did not pose a risk to the safety of children was unsuccessful.

In her application under the Act, EQ denied having committed the offence or having acted in an improper or indecent manner towards the child. She attributed her guilty plea to pressure from the police.

The Tribunal noted the age difference between EQ and the child. It also noted that EQ had a lengthy criminal record commencing in 1970 when she was 14 years old. Between 1970 and 1986, she was regularly convicted for a range of offences against property, primarily stealing and receiving. She had been convicted as recently as 1994 for making and using a false instrument and stealing, for which she was sentenced to 100 hours community service.

There was expert psychiatric evidence before the Tribunal which viewed EQ's risk for future anti-social behaviour to be significant. The evidence was that her risk of sexually re-offending was higher than that of the general female population, although the psychiatrist conceded that the level of risk EQ posed to children at the time of the application would be difficult to quantify. He was of the view that it was unlikely that EQ would prey on children. Any re-offending would, according to the psychiatrist, be opportunistic.

The Tribunal said that the key issue to be determined was whether EQ posed a real and material risk to children. In *R v Commission for Children & Young People*, Haylen J said that section 9(4) was focussed on:

> *… not a mere theoretical or possible risk arising from the fact of a previous conviction, but it is a reference to an unacceptable risk, a real risk, a likelihood of harm or a recognisable potential having regard to the need to jointly protect children and employees and to preserve reasonable civil rights.*[25]

Young J agreed with this analysis of the meaning of risk in *Commission for Children & Young People v V*.[26] Young J held that the meaning of risk in section 9(4) was that "in the circumstances, there is a real and appreciable risk in the sense of a risk that is greater than the risk of any adult preying on a child."[27]

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[25] [2002] NSWIR Comm 101 at paragraph 104
[26] [2002] NSWSC 949 at paragraph 22
[27] At paragraph 42

Family Law

The issue of the risk of abuse of a child by an adult has also been examined by the Family Court of Australia and the High Court of Australia in family law matters. Typically, a mother makes an allegation that the father has sexually abused their children. In such a circumstance, the court must consider the risk the father is to the children when considering what contact the father should have with the children and, in particular, whether that contact ought to be supervised so as to minimise the risk of further abuse.

The High Court considered the issue in *M and M*.[28] Interestingly, the High Court made it clear that it was "a mistake to think that the Family Court [was] under the same duty to resolve in a definitive way the disputed allegation of sexual abuse as a court exercising criminal jurisdiction would be if it were trying the father for a criminal offence."[29] Likewise, school principals, when they are seeking to manage the risk soon after an allegation is made, are not seeking to determine guilt or innocence. To the extent that they ever do this, it will be in the course of an investigation into the allegations and in the findings that are made. Just as the Family Court is concerned to make orders in relation to contact which will, in its opinion, best promote and protect the interests of the child, so too schools, in assessing risk, are making decisions designed to promote and protect the interests of their students.

The High Court said that the Family Court must determine whether on the evidence there is a risk of sexual abuse occurring if contact is granted. The Family Court must then assess the magnitude of that risk.[30] This means that the Family Court must assess the likelihood of events which, if they occur, will have a detrimental impact on the child's welfare. Schools are in the same position. They must assess the likelihood of events which, if they occur, will have a detrimental impact on the welfare of their students. As the High Court said, "The existence and magnitude of the risk of sexual abuse … is a fundamental matter to be taken into account in deciding [such] issues."[31] In family law contact cases, the magnitude of the risk may be less if contact can be supervised. This again is relevant to schools as they may be able to reduce the magnitude of the risk by ensuring that contact between teachers and students is always supervised and never one on one.

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[28] [1989] 63 ALJR 108
[29] [1989] 63 ALJR 108 at 110
[30] [1989] 63 ALJR 108 at 111
[31] [1989] 63 ALJR 108 at 111

The difficulty comes when one seeks to define with greater precision the magnitude of the risk which will justify a suspension, a removal from face to face teaching or some other action against the teacher for the sake of the safety of students. In the Family Court context, the degree of risk has been described variously as a "risk of serious harm"[32], "an element of risk" or "an appreciable risk"[33], "a real possibility"[34], a "real risk"[35], and an "unacceptable risk".[36] The High Court in *M and M* noted that this imposing array indicates that the courts are striving for a greater degree of definition than the subject is capable of yielding. The High Court said that:

> *the test is best expressed by saying that a court will not grant custody or access to a parent if that custody or access would expose the child to an unacceptable risk of sexual abuse.*[37]

Accordingly, adopting that principle, a school should not allow a teacher (who is under suspicion because of allegations made against him or her) contact with students if that contact would expose one or more of those students to an unacceptable risk of sexual abuse. While this is easily said, there are always practical difficulties in applying that principle.

In the Family Court, the court is often seeking to find a balance between the risk of detriment to the child from sexual abuse and the possibility of benefit to the child from parental contact. In other words, where the Court makes a finding of unacceptable risk, it is a finding that the risk of harm to the children in having contact with a parent outweighs the possible benefits to them from that contact. In the school situation, there is also a balancing of the risk of detriment to the students from sexual abuse as against the possibility of benefit to the students from ongoing tuition from their teacher (presumably as opposed to someone who is brought in temporarily to teach them).

In *N and S and the Separate Representative*[38], the comments of Fogarty J are particularly useful for those in schools. He said:

> *In asking whether the facts of the case do establish an unacceptable risk the court will often be required to ask such questions as: What is*

[32] *A v A* [1976] VR 298 at 300
[33] *M and M* [1987] FLC ¶91-830 at pp76,240-76,242
[34] *B and B* [1986] FLC ¶91-758 at p75,545
[35] *Leveque v Leveque* [1983] 54 BCLR 164 at 167
[36] *In Re G (a minor)* [1987] 1 WLR 1461 at 1469
[37] [1989] 63 ALJR 108 at 111
[38] [1996] FLC ¶92-655

> *the nature of the events alleged to have taken place? Who has made the allegations? To whom have the allegations been made? What level of detail do they involve? Over what period of time have the allegations been made? Over what period of time are the events alleged to have occurred? What are the effects exhibited by the child? What is the basis of the allegations? Are the allegations reasonably based? Are the allegations genuinely believed by the person making them? What expert evidence has been provided? Are there satisfactory explanations of the allegations apart from sexual abuse? What are the likely future effects on the child?*
>
> *This is not a catalogue of the correct questions, but a reminder that it is questions such as these which are required to be considered in deciding whether an unacceptable risk may be shown. The weight to be attached to the various answers to the relevant questions will inevitably vary from case to case. But it is essential that questions like these be asked.*[39]

Fogarty J also helpfully reminded us that there was no requirement upon the Family Court, just as there is no requirement upon schools, to ask whether the evidence satisfied a balance of probabilities finding in favour of abuse. Rather, there was a requirement to ask whether the evidence established an unacceptable risk.[40]

The Risk Management Process

With the benefit of this legal background, the school should now be ready to manage the risks arising upon the making of an allegation against a teacher. When a serious allegation is made, it is very easy for a principal to respond with "an immediate 'knee jerk' reaction".[41] However, as Hale LJ said: "the employee is entitled to something better than the 'knee jerk' reaction which occurred in this case."[42] It is important that proper consideration be given to appropriate measures to take by way of risk management when such allegations are made.

It may be helpful to see this as a four step process.

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[39] [1996] FLC ¶92-655 at p 82,714
[40] [1996] FLC ¶92-655 at p 82,715
[41] Per Hale LJ in *Gogay v Hertfordshire County Council* [2000] EWCA Civ 228 (26 July 2000) at paragraph 58
[42] At paragraph 59

Step 1 Risk Identification

First, one must identify the risks. In most case, it will be as simple as saying that what is alleged may be true and therefore there is a risk of the teacher doing the same thing again to the same child or to others.

Step 2 Risk Assessment

Second, one must determine whether precautions need to be taken. This is the point at which one asks the questions referred to above in the chart under ***Tort Law***. To answer those questions, one must also ask questions such as:

(a) what is the nature of the allegation?

(b) how old is the child?

(c) is the child a student at the school?

(d) have there been previous allegations against the teacher?

(e) what contact does the teacher normally have with the child and other students of the same age as the child?

One can add to this list the section 9(5) factors listed on page 10 and Fogarty J's questions quoted on pages 13 and 14.

It is perhaps oversimplifying but still worth remembering that all circumstances must be considered when assessing risk.

Step 3 Elimination

Thirdly, one must determine what precautions ought to be taken to eliminate or minimise the risk. There will be various alternatives to consider. Subject to proper consideration of relevant employment contracts and awards, these include:

(a) maintaining current duties but with an increased level of supervision;

(b) being transferred to a different role or location;[43]

(c) being suspended, with or without pay;[44]

(d) being dismissed (although this would be unusual soon after an allegation is made unless the teacher admits it at once).

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[43] As happened to Jeff Sinclair: *Sinclair v Department of Education & Training* Workers Compensation Commission (NSW), 23 March 2004; *Department of Education & Training v Sinclair* [2004] NSWWCCPD 90; [2005] *Department of Education & Training v Sinclair* [2005] NSWCA 465

[44] As happened in *Gogay*, *Heptonstall* and *EM v St Barbara's Parish School* [2005] SAIR Comm 10

Step 4 Ongoing Review

Finally, one must monitor the situation and the precautions that have been put in place. In other words, keep checking that the risks are being managed. The emphasis in this paper has been on managing the risk when an allegation is first made against a teacher. However, it is important to remember that this is not a once only exercise. The risks must continue to be managed during the course of the investigation. New information may be uncovered which will require new strategies. It is therefore important where the school is not investigating the allegation itself that the investigator be asked to advise the school if information comes to light which should be considered and which may lead to new risk management strategies being implemented.

When an investigation has been completed, a further risk assessment must be made. At this point, the school will have the benefit of findings. Clearly, if there has been a finding that abuse occurred, this is going to have a decisive impact on the action to be taken against the teacher. Depending on the seriousness of what has happened, dismissal is likely. However, where the finding is simply "not sustained", the position is more difficult. All the circumstances must be taken into account much as they were at the outset of the matter.

The end of the investigation provides opportunity for the school to examine its overall practices in relation to child protection. One should ask what lessons can be learned from what has happened. Should the school's child protection policy be revised? Should there be more staff training in relation to child protection? Are there situations which could be avoided by some simple changes to class rooms, offices or buildings? Should more be done by way of reference checking when employing new staff? All these questions and more should be considered once the investigation is over and the particular situation has been resolved.

The Ombudsman's Views

The NSW Ombudsman has some very helpful material on risk assessment once an allegation has been made against a teacher. This can be found at Part 5.14 of the document called *Child Protection in the workplace - Responding to allegations against employees* (June 2004).

So what must we do?

Wilson J, the judge in the Toowoomba Preparatory School Case, said to the jury:

> *You won't need to be reminded that sexual abuse of children is surely one of the most appalling examples of deviant behaviour, with the potential to wreck young lives. Allegations of that type of abuse must be taken seriously and thoroughly investigated. Complaints must be treated with respect and sensitivity, and genuine victims of sexual abuse usually need substantial support and assistance to deal with them.... But, equally, don't lose sight of the fact that allegations of sexual abuse are sometimes falsely made, with potentially catastrophic effects on reputations and careers. The school should have maintained a proper balance between these competing considerations until adequate investigations had been completed.*

Maintaining this balance is a huge challenge to all school administrators. Nevertheless, they must never lose sight of their duty to care for their students. The risks posed by a teacher against whom allegations of child abuse have been made can and must be managed.