Case Note

Lister & Others v Hesley Hall Limited [2001] 2 All ER 769; [2001] UKHL 22 (3 May 2001)

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Introduction

The sexual abuse of any child is an abhorrent reality for today's society, but when the abuser is a teacher or carer of the child abused, the matter appears more heinous. Clearly the criminal law plays a significant role in bringing the perpetrators of such abuse to justice. Whether the victim can ever be adequately financially compensated under principles of tort law is a question to which it is almost impossible to provide an adequate response. But an important question does arise: can an education authority as an employer be vicariously liable for intentional acts of sexual abuse committed by a teacher employee against a pupil?

There have been many cases in Australia where a student injured in the course of the school day or while on a school-sanctioned excursion has successfully sued for financial compensation on the basis of the negligent supervision of a teacher. In such cases, it has been the education authority employer who has been responsible for the payment of compensation to the student because the negligence was held to have been committed by the employee teacher in the course of employment. In May 2001 the House of Lords handed down a decision of some significance for employers of teachers and of carers who might intentionally sexually abuse those under their care. The case of *Lister & Others v Hesley Hall Limited* [2001] 2 All ER 769 (*Lister*) has established that the principle of vicarious liability can be applied in cases involving the deliberate and intentional sexual abuse by an employee against a child under his care.

Background

The Principle of Vicarious Liability under English Law

The principle of vicarious liability states that an employer is liable for the torts committed by an employee in the course of employment.[1] As Lord Steyn indicates in his judgment in *Lister*, whether an employee's wrongful act falls 'within the course of employment' has traditionally been determined in English courts by applying the so-called *Salmond* test: a wrongful act of an employee is deemed to be done by a 'servant' in the course of employment 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" (p. 772).

Whether an act of sexual abuse by an employee could be said to have occurred in the course of employment was addressed by the English Court of Appeal in *Trotman v North Yorkshire County Council* [1999] LGR 584 (*Trotman*). A deputy headmaster with the specific responsibility of caring for a handicapped teenager on a holiday in Spain sexually assaulted him while sharing a bedroom with him. The issue for the Court of Appeal was whether the sexual assault by the deputy headmaster fell within the second *Salmond* principle: was it an improper mode of carrying out an authorised act on behalf of his employer for which the employer could be held vicariously liable, or was it, rather, an independent act of the employee outside the course of employment for which the employer would not be vicariously liable. The Court of Appeal concluded that the deputy headmaster's role as an employee was to care for the boy while on the holiday. While the sharing of a bedroom with the boy provided the deputy headmaster with the opportunity to sexually assault him, the sexual assault could not be regarded as a way of carrying out his role. In essence, the acts of sexual assault were independent acts of self-indulgence, in no way connected to the role the warden was employed to perform. Thus the acts were far removed from being an unauthorised mode of carrying out the teacher's duties. The employer of the deputy headmaster was therefore not vicariously liable for the tort of its employee.

The Background to the *Lister* Appeal

The respondent was a commercial enterprise, owning and operating a school and boarding annex that catered for children with emotional and behavioural difficulties. The boarding annex, Axeholme House, usually accommodated about eighteen boys, and the respondent employed a husband and wife as warden and housekeeper to take care of the boys in residence.

Between 1979 and 1982, the appellants, aged between 12 and 15 years, were residents of Axeholme House and were, unbeknown to the respondent, systematically sexually abused by the warden. In 1982 the warden and his wife left the employ of the respondent. In the 1990s the warden was charged with criminal offences and, after a trial, was sentenced to imprisonment for multiple offences involving sexual abuse. In 1997 the appellants brought claims for compensation for personal injury against the respondent as employer of the warden.

In the case at first instance, the appellants had put forward their claims for compensation on two grounds:

- The employers were negligent in their care, selection and control of the warden;
- The employers were vicariously liable for the torts committed by the warden.

The trial court dismissed the claim in negligence against the employers. However, the court felt compelled to conclude that because the second claim was based on vicarious liability, the employers could not be found vicariously liable for the torts of the warden in the light of the *Salmond* principles as interpreted and applied by the Court of Appeal in *Trotman*. The trial court nonetheless concluded that the employers were vicariously liable for the warden's failure to report

to his employers his own malevolent intentions before the acts of sexual abuse took place and the harmful consequences to the appellants after the acts of abuse had taken place.

The employers appealed to the Court of Appeal against the finding that they were vicariously liable for the warden's failure to report his wrongful intentions and conduct to them as employer. The plaintiffs did not cross-appeal the decision that the employers were not negligent. As a number of Lords in *Lister* pointed out, in the light of *Trotman* it was simply not possible for the plaintiffs to attempt to argue in the Court of Appeal that the employers should be vicariously liable for the warden's acts of sexual abuse themselves. Thus, the plaintiffs were left to argue in support of the somewhat clumsy argument that the employers should be vicariously liable for the failure of the warden to report his own wrongful intentions and conduct to his employer. The Court of Appeal dismissed the argument, holding that if the wrongful conduct was outside the course of employment, a failure to report that wrongful conduct could not fall within the course of employment. The Court allowed the appeal of the employers, and the plaintiffs were given leave to appeal to the House of Lords.

The Decision of the House of Lords

The five Law Lords hearing the appeal agreed that the appeal of the plaintiffs should be allowed. Lords Steyn, Clyde and Millett gave separate judgments, while Lord Hutton agreed with the judgment of Lord Steyn. Lord Hobhouse of Woodborough gave a judgment in which he both agreed with the reasons of Lord Steyn and offered additional reasons of his own.

The central issues for the House of Lords were the interpretation and application of the *Salmond* principles in the context of intentional wrongdoing by an employee and in the light of the decision in *Trotman*. All five Law Lords essentially agreed that the usual interpretation of the *Salmond* principles had been too narrowly focussed and that *Trotman* should be overruled. In the light of these conclusions, the Law Lords did not consider, or left to be decided at a future time, the alternative argument that the employers could be held vicariously liable for the warden's breach of duty to report his own malevolent intentions and consequences of his wrongful actions.

The Interpretation and Application of the *Salmond* Principles

The House of Lords agreed that it would be "stretching language to breaking point" to describe the acts of sexual abuse on the plaintiffs by the warden as a wrongful and unauthorised mode of performing an act authorised by the employer. However, it was also noted that the *Salmond* principles should be seen not as a fundamental criterion establishing vicarious liability but simply as a rule of thumb or as a "practical test serving as a dividing line between cases where it is or is not just to impose vicarious liability" (p. 777, per Lord Steyn). A number of the Law Lords pointed to the often forgotten explanation of the *Salmond* principles that Salmond himself had offered: "a master…is liable even for acts which he has not authorised, provided they are so connected with acts which he has authorised, that they might rightly be regarded as modes – although improper modes – of doing them." To Lord Steyn, this often forgotten proposition was the germ of what he called the 'close connection' test, a test he saw as crucial in the proper application of the *Salmond* principles (p. 775). Likewise, Lord Millett was of the view that what

was important was not the terminology used in the *Salmond* principles but rather the "closeness of the connection between the act of the employee and the duties he is engaged to perform broadly defined"(p. 799).

Central to this 'close connection' test is the meaning and identification of the 'acts authorised by the employer', or the nature of the employee's employment. Lord Clyde, for example, argued that while each case must depend upon its own circumstances, a broad approach should be adopted when considering 'the scope of employment', and the context and circumstances in which the act complained of occurred should also be taken into account. In Lord Clyde's view, because the warden's employers had specifically entrusted to the warden the general duty to look after and care for the residents of the boarding annex and that it was within this context that the warden had sexually abused the plaintiffs, the employers should be held vicariously liable. Lord Millett adopted a similar approach. He pointed out that it was the employer who was responsible for the care and welfare of the plaintiffs and that it was the employer who had entrusted that responsibility to the warden, the very person the employer had engaged to discharge its responsibility to the plaintiffs. In such circumstances, he concluded, the employer should be vicariously liable. Lord Hobhouse of Woodborough likened the case to situations where a person assumes a special responsibility of care to persons in schools, prisons and hospitals and entrusts the carrying out of the duties arising from this special responsibility to an employee. In such cases, he argued, the person who entrusts this special responsibility to another is vicariously liable for a breach of these duties by the employee to whom this special responsibility is entrusted. He felt that in the case before the House the key was the assumption by the employer of a special responsibility to care for the residents of the boarding annex and the entrusting of that special responsibility to the warden whose contract of employment centred primarily on the carrying out of the special duty of care. The employer, he concluded, was therefore vicariously liable for the tortious actions of the warden. To Lord Steyn, the 'acts authorised by the employer' did not refer to the individual components or tasks making up the employee's employment but rather the employee's job or nature of employment broadly defined. The crucial element then was the connection between the 'acts' in this broad sense authorised by the employer and the improper modes of doing them. Lord Steyn argued:

> If this approach to the nature of employment is adopted, it is not necessary to ask the simplistic question whether in the cases under consideration the acts of sexual abuse were modes of doing authorised acts. It becomes possible to consider the question of vicarious liability on the basis that the employer undertook to care for the boys through the services of the warden and that there is a very close connection between the torts of the warden and his employment. After all they were committed in the time and on the premises of the employers while the warden was also busy caring for the children (p.778).

Lord Steyn concluded that the employers should be vicariously liable because the sexual abuse was "inextricably interwoven with the carrying out by the warden of his duties in Axeholme House" (p. 781).

One of the associated issues that the case before the House of Lords raised was whether, in the light of the *Salmond* principles, vicarious liability could be applied to acts of intentional wrongdoing of an employee, particularly where the act was done for the employee's own benefit. The Lords were in general agreement that while the application of vicarious liability to intentional wrongdoing was troublesome, the law had reached the point where an employer could be held vicariously liable for the intentional wrongdoings of an employee committed in the course of employment. Lord Steyn, for example, drew on the views expressed in *Morris v C W Martin & Sons Ltd* [1966] 1 QB 716 (*Morris*), a decision, he noted, that had been regarded as "high authority on the principles of vicarious liability" (p. 777). *Morris* had established that an employer, as bailee of a mink stole, was vicariously liable for the conversion of the stole by the specific employee to whom the employer had entrusted the stole for cleaning. He accepted that matters of degree could arise but concluded that the present case fell on the side of vicarious liability. Lord Clyde likened the case before the House to the kind of employment where an employer "has been entrusted with the safekeeping or care of some thing or some person and he delegates that duty to an employee" (p. 786), as had occurred in *Morris*, and he proposed that cases concerning sexual harassment or sexual abuse committed by an employee should be approached in a similar way. Lord Millett also drew on *Morris*, noting that "where an employer undertakes the care of a client's property and entrusts the task to an employee who steals the property, the employer is vicariously liable" (p. 798). He offered an interesting analogy:

> If the boys in the present case had been sacks of potatoes and the defendant, having been engaged to take care of them, had entrusted their care to one of its employees, it would have been vicariously liable for any criminal damage done to them by the employee in question, though not by any other employee. Given that the employer's liability does not arise from the law of bailment, it is not immediately apparent that it should make any difference that the victims were boys, that the wrongdoing took the form of sexual abuse, and that it was committed for the personal gratification of the employee (p. 799).

The *Trotman* Decision

The House of Lords overruled the decision in *Trotman*. Lord Steyn, for example, felt that there was a 'terminological difficulty' at the heart of the reasoning of the Court of Appeal's judgment. Drawing upon a decision of the Supreme Court of Canada which had been decided after *Trotman* and where the reasoning of the Court of Appeal in *Trotman* had been criticised, Lord Steyn felt that the acts of sexual assault had been too narrowly described as being acts unrelated to the employee's duties of supervising and caring for vulnerable students during the trip to Spain. He concluded that the approach adopted by the Court of Appeal was a wrong approach and that the decision should be overruled:

> [The approach] resulted in the case being treated as one of the employment furnishing a mere opportunity to commit the sexual abuse. The reality was that the county council [as employers] were responsible for the care of the vulnerable

> children and employed the deputy headmaster to carry out that duty on its behalf. And the sexual abuse took place while the employee was engaged in duties at the very time and place demanded by his employment. The connection between the employment and the torts was very close (p. 781).

Drawing on the views expressed in the Canadian case cited by Lord Steyn, Lord Clyde also believed that *Trotman* was an unsound decision. In his view the Court of Appeal had applied the wrong test in focussing too narrowly on the question of whether the acts of the warden were an unauthorised mode of carrying out a teacher's duties. Lord Hobhouse of Woodborough agreed that the reasoning of the Court of Appeal in *Trotman* could not be supported.

Conclusion

As one reads *Lister* and the New South Wales Court of Appeal decision in *Lepore v State of New South Wales & Anor* [2001] NSWCA 112 (23 April 2001) [*Lepore*] side by side, one is struck by the irony of circumstance. *Lepore* was decided before *Lister*. In *Lepore*, the appellant had sued for financial compensation for acts of sexual and physical abuse committed by a teacher against the appellant when the appellant had been a primary school pupil at a state school. The approach taken by the appellant was to argue that the non-delegable duty owed by an education authority to ensure that reasonable care is taken for the physical well-being of pupils at school had been breached by the intentional misconduct of the employee teacher. At the beginning of the majority judgment in *Lepore*, Mason P acknowledges that courts are sometimes faced with new situations in which there is no direct authority and that the case before the Court of Appeal was such a case. The majority judgment concluded that the State owed the appellant a non-delegable duty of care and that there were no policy reasons why the scope of the non-delegable duty should not extend to protecting pupils from the intentional wrongdoing of teachers employed by the education authority to be in charge of the pupils. In drawing upon previous English decisions, just as the Law Lords had done in *Lister*, the view proffered by Mason P that "in a proper case, a non-delegable duty will overcome the limitations of the course of employment test and lead to liability being visited upon an employer for the intentional and dishonest acts of a delinquent employee" (p. 12) is apposite.

Endnote

1. Generally, see J Fleming, *The Law of Torts*, 9th edition, LBC Information Services, Sydney, 1998, pp. 409-438; D Gardiner and F McGlone, *Outline of Torts*, 2nd edition, Butterworths, Sydney, 1998, pp. 394-406.