

Indemnity for employees actions

President Roosevelt had a sign on his door which read “The buck stops here.” One would assume that it had to travel a long way before stopping at his office, but at least if one accepted the sign at face value, final responsibility was clearly defined.

Unfortunately the law and in particular the law pertaining to an employers liability for the actions of an employee come with no such sign. In an attempt to demystify this area of the law this bulletin will examine the key principles of ‘**vicarious liability**’ and **non-delegable duty** which together form the legal framework that imparts this liability on employers. It will also examine some recent cases and analyse the ramifications they may have for employers as a whole.

Vicarious Liability

Vicarious liability is the legal principal that imposes on an employer a potential liability for the actions of an employee. There are various theories as to why the law developed in this direction, one famous or perhaps infamous one was reached by Dr Batty who said ... “the real reason [for finding vicarious liability] is that damages are taken from a deep pocket”.

Irrespective of its origins vicarious liability has always been characterised by its fluidity, a point made by the High Court when it said it is above all a subject fashioned by judges at different times, holding different ideas about its justification and social purposes. For some time the courts maintained some certainty by applying the test espoused by the English courts namely, was the act .. “so closely connected with (his) employment that it would be fair and just to hold the employers vicariously liable.” However as will be seen when we examine some recent cases, this test is very much in the judicial spot light.

Having reviewed the theory behind the development of vicarious liability, we will now examine how vicarious liability works in practice, using a school yard claim as a point of reference.

In a typical claim of this type the following sequence of events occur. The injured party will allege negligence based on inadequate supervision by the teachers on duty. The claim will not normally be made against the individual teachers but against the school and ultimately the Diocese as the teacher’s employer. The claim will be referred to the insurer who will consider the following.

- Was an active policy in place at the time
- Does the policy wording ‘cover’ the occurrence that caused the injury

- Is the employer (School & Diocese) entitled to indemnity?

In the majority of cases the answer to all questions is yes and indemnity will be extended to the school and the relevant employees. However, as previously noted the operation of vicarious liability is not automatic. The application of vicarious liability continues, at least for the moment, to be embodied in the statement made by the English courts and has evolved to become whether the act or omission occurred ‘**within the scope of employment.**’ This is assessed by considering the connection between the employee’s wrongful act and their employment. In considering if an act or omission falls within the scope of employment the courts will often consider if the employee at the time could be deemed to have been on “a frolic of (his) own”

The following are examples of actions that would have been deemed outside the scope of employment.

- An act or omission was criminal in nature
- An act or omission was purely for personal gain
- An act or omission was intentionally misleading

If it is determined that the act or omission was outside the scope of employment, the employee may well find that they have to defend the matter personally. However, the employer will still be indemnified in relation to any apportionment of damages awarded directly against them.

Non-Delegable Duty

Non- delegable duty is an extreme but not absolute level of duty that applies to among others school authorities. It is a duty as its name implies that a school authority cannot delegate to another individual or body, irrespective of whether that individual or body professes an expertise in any given area.

The High Court has explained non-delegable duty as an exceptional relationship between a school authority and pupil which gives rise to a duty in one party to take reasonable care to protect the other from the wrongful behaviour of third parties.” The key to non- delegable duty traditionally has been the phrase ‘reasonable care’. A school authority did not have a duty to protect students from all injury, only to take reasonable care to protect them. If it could be proven that the school authority had taken reasonable care, it would be deemed to have discharged its duty of care and would not be found liable for the actions of an employee, under the principle of non-delegable duty.

Recent Developments Relating to Vicarious Liability/Non Delegable Duty

Several high profile cases dealing with the extent to which an employer is accountable for the actions of an employee have been reviewed by the High Court of Australia, the most notable of these being the *State of NSW v Lepore & Rich v Queensland & Samin v Queensland*.

In *Lepore*, the State of NSW as the operator of a school was sued as the employer of a teacher whom a student accused of sexual misconduct. Despite the State proving they were never notified of the activities of the teacher, had no reason to believe such activities were occurring and the teacher pleading guilty to criminal charges, the Court of Appeal found the State liable for the actions of the teacher. *Lepore* was not pleaded on the basis of vicarious liability before the Court of Appeal but on the principal of non delegable duty.

The matters of *Samin and Rich* went to the Court of Appeal of Queensland. They were also pleaded on the basis of non delegable duty only and were claims by students who alleged that they were sexually abused by a teacher. In both cases the Court of Appeal declined to follow the reasoning of *Lepore* and both claims failed.

Summary

Traditionally, assuming a teacher had been negligent or committed assaults, which amounted to a criminal act, there were two basis upon which the school authority might be found liable:

1. The school authority has a non-delegable duty of care to its pupils. The duty is breached where, for instance, the school authority knew or ought to have known about the tendency of a teacher to assault, or where a teacher had previously acted suspiciously or there had been complaints about a teacher's conduct, which had not been addressed or sufficiently addressed by the school authority. In such circumstances the court will regard the school authority itself as negligent and obliged to pay damages.
2. Where a teacher has acted in the course of their employment (discussed below) the school would be found vicariously liable for the acts of the teacher.

What The High Court Said

In terms of what would constitute a breach of a school's non-delegable duty and the application of the doctrine of vicarious liability, there was a diversity of opinion among the Justices of the High Court.

However whilst no clear formula was provided the majority of the court accepted that:

- a) In certain situations a school authority may be found vicariously liable for the criminal actions (including sexual assault) committed by an employee

- b) It cannot be said that a criminal act can never be attributed to an employer through the doctrine of vicarious liability
- c) It cannot be said that the fact that an employee has committed a criminal act can, by that fact alone, render the employer liable on the basis that there has been a breach of its non-delegable duty of care
- d) A teacher assaulting a student as an adjunct to receiving punishment for misbehaviour, may be considered an act attracting liability on the part of the school authority under the doctrine of vicarious liability

Conclusion

The dissenting opinions of the High Court Justices on the matters of non-delegable duty and vicarious liability represent a two edged sword. On the one hand they have done little to bring any certainty to either principle however, on the other hand they have clearly signalled the range of circumstances in which a school authority may be held liable for the actions of an employee under either vicarious liability or non-delegable duty.

It is suggested that school authorities would do well to familiarise themselves with the range of circumstances in which vicarious liability and non-delegable duty may now expose them to a legal liability as a result of the actions of an employee and instigate a risk management plan to assist in identifying and dealing with areas of potential concern. Ideally a good risk management plan would set out clear guidelines and procedures and would cover at least the following issues.

Teacher Student Interaction.

- What is appropriate interaction
- What protocols are to be followed if a student needs to be spoken to in private
- What if any physical contact is acceptable
- What is acceptable discipline

Supervision

- Set out the expectations of the school
- Have a supervision roster in place
- Identify areas of high risk and adjust supervision accordingly
- Identify and ensure acceptable student/teacher ratios are maintained

Potential Hazards

- Inspect buildings and grounds and catalogue potential hazards
- Set up a regular system of inspection and maintenance of grounds and buildings
- Have a plan in place for identifying and rectifying any breach of Australian Standards

Prevention as always is better than a cure.

Please note that CCI Claims Management Lessons should not be used or relied upon as a substitute for detailed professional advice or as a basis for formulating decisions.

This publication should be read in conjunction with the policies and procedures of your organisation.