Conferred Authority Strict Liability and Institutional Child Sexual Abuse

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Abstract

The High Court of Australia struggled in *New South Wales v Lepore* to find a convincing basis upon which to hold an institution strictly liable for the sexual abuse of a child within its care by an employee. This article argues that such a basis can be found in Gummow and Hayne JJ's observation in *Lepore* that strict liability for the intentional wrongdoing of another person is generally limited to situations where the intentional wrongdoing is done 'in the apparent execution of authority'. This feature of authority not only explains the strict liability imposed in cases of institutional child sexual abuse, but does so in a way that addresses the four key concerns that prevented Gummow and Hayne JJ from holding the State of Queensland strictly liable for such sexual abuse in the associated cases of *Samin* and *Rich*.

I Introduction

The Australian Royal Commission into Institutional Responses to Child Sexual Abuse was appointed on 11 January 2013, some ten years after the highly unsatisfactory decision of *New South Wales* v *Lepore*,[1] in which the High Court of Australia failed to adequately identify the circumstances, if any, in which an institution might be held strictly liable for the sexual abuse of a child within its care by an employee. In anticipation of the cases that are likely to follow the Royal Commission, this article re-examines the decision in *Lepore* and considers the grounds upon which such strict liability might be imposed.

Six separate judgments were delivered by the judges of the High Court of Australia in *Lepore*. Of the seven judges who heard the three appeals before the Court, four were of the view that it was possible, though under different conditions, to hold an institution strictly liable for the sexual abuse of a child within its care by an employee.

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1 (2003) 212 CLR 511 ('*Lepore*').

Two of the judges considered that an institution might be held vicariously liable for such sexual abuse. Justice Kirby adopted the general approach of the Supreme Court of Canada in *Bazley v Curry*[2] and the House of Lords in *Lister v Hesley Hall Ltd*[3] in holding that vicarious liability might be imposed whenever there was a sufficiently 'close connection' between the sexual abuse and the employment.[4] Chief Justice Gleeson agreed that it was possible for an institution to be held vicariously liable for the sexual abuse of a child within its care by an employee but, unlike Kirby J, thought that the circumstances in which such liability might be imposed were much more limited. Specifically, Gleeson CJ held that an institution could only be vicariously liable for such sexual abuse where the employee was 'invested with a high degree of power and intimacy'[5] in respect of the child. In Gleeson CJ's view, this requirement was not satisfied on the facts of any of the three appeals before the High Court in *Lepore*.[6]

In contrast, McHugh J held that the sexual abuse of a child by an employee of an institution charged with the child's care amounted to a breach of the so-called 'non-delegable duty of care' owed by the institution to the child. Such liability was strict in that it could be imposed regardless of any fault by the institution. Although five of the other judges[7] acknowledged that the duty of care owed by an institution to a child within its care could be considered 'non-delegable', specifically the duty of care owed by a school to a student,[8] none of those judges were prepared to find that strict liability for breach of the 'non-delegable duty of care' could extend to intentional wrongdoing by the employee, such as sexual abuse.

The final judge to recognise the possibility that an institution could be held strictly liable for the sexual abuse of a child within its care by an employee was Gaudron J. Somewhat unorthodoxly, she suggested that such liability could be justified on the basis of estoppel.[9]

Although a majority of the judges of the High Court of Australia recognised that in some circumstances an institution could be held strictly liable for the sexual abuse of a child within its care by an employee, there was no agreement as to the basis upon which such liability might be imposed. As a result, Australia remains one of the few common law countries in which doubt persists as to whether an institution can be held strictly liable for such sexual abuse.[10] This article re-examines the difficulties experienced by the High Court in *Lepore* in recognising a convincing basis for imposing strict liability on an institution for the sexual abuse of a child within its care by an employee. The focus, in this regard,

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2 (1999) 174 DLR (4th) ('*Bazley*').

3 [2002] 1 AC 215 ('*Lister*').

4 Although the reasoning in *Bazley* and *Lister* differed, a majority of both courts agreed that the closeness of the connection between the employment and the wrongdoing was to be considered in determining whether an employee was acting within the course of employment for the purposes of vicarious liability.

5 *Lepore* (2003) 212 CLR 511, 546.

6 See Section II below.

7 Callinan J dissented on this point: *Lepore* (2003) 212 CLR 511, 626.

8 The Supreme Court of the United Kingdom recently adopted this position in *Woodland v Essex County Council* [2014] AC 537.

9 *Lepore* (2003) 212 CLR 511, 561.

10 Ibid 622 (Kirby J).

will be the joint judgment of Gummow and Hayne JJ. Having struggled to identify a principled basis for either vicarious liability or strict liability for breach of a 'non-delegable duty of care', both judges declined to extend either form of strict liability to cover such sexual abuse for fear of extending the circumstances in which one person might be held strictly liable for the intentional wrongdoing of another person more generally. What is particularly interesting about the judgment of Gummow and Hayne JJ is that in the course of reviewing the relevant cases, the judges inadvertently identified the potential key to addressing their concerns. Specifically, the judges noted that there was a common feature to the cases in which strict liability had been imposed on one person for the intentional wrongdoing of another; the feature of 'authority'.[11] It will be argued that this feature of 'authority' provides a convincing basis for the strict liability that might be imposed on an institution for the sexual abuse of a child within its care by an employee. Such liability will be referred to as 'conferred authority strict liability'.

II The Joint Judgment of Gummow and Hayne JJ

Justices Gummow and Hayne commenced their judgment by examining the facts of the three separate appeals before them. *Lepore* itself concerned the mistreatment of a seven-year-old boy at a primary school in New South Wales. Allegations had been made that the teacher had taken the boy into a store room and both physically assaulted the boy as a form of punishment and sexually abused the boy. The teacher had been charged with and convicted of common assault, but not sexual assault. No finding of fact had been made by the trial judge with respect to the allegations of sexual abuse. For this reason, Gummow and Hayne JJ, along with a majority of judges, ordered a new trial.

All comments made by Gummow and Hayne JJ about the possibility of holding an institution strictly liable for the sexual abuse of a child within its care by an employee were consequently made in the context of the other two appeals; *Rich v Queensland* and *Samin v Queensland*.[12] The cases concerned the sexual abuse of two young girls at a single teacher school in rural Queensland. The abuse occurred on school premises during school hours. The teacher had been convicted of sexual assault and was in jail at the time of the appeals. The trial judge found that the sexual abuse constituted a breach of the 'non-delegable duty of care' owed by the State of Queensland, as school authority, to the students. The judgment was overturned on appeal by the Queensland Court of Appeal. Although breach of the 'non-delegable duty of care' owed by the State of Queensland to the students was the basis of the students' appeals to the High Court, leave was granted to enable a draft statement of claim to be submitted pleading that the State of Queensland was also vicariously liable for the sexual abuse committed by the teacher. It was agreed that leave to amend the pleadings would be granted if the High Court recognised that vicarious liability was a possible basis for holding the State of Queensland strictly liable for the sexual abuse.

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11 Ibid 593.

12 (2003) 212 CLR 511('*Rich*' and '*Samin*').

Justices Gummow and Hayne first considered the claims with respect to vicarious liability. The judges acknowledged that 'a fully satisfactory rationale for the imposition of vicarious liability in the employment relationship has been slow to appear in the case law'.[13] Instead, vicarious liability had been explained in terms of a variety of policy concerns, such as 'deterrence', 'enterprise risk' and 'deep-pockets'.[14] Importantly for Gummow and Hayne JJ, such uncertainty had not affected the 'verbal formulae' for determining vicarious liability.[15] Apart from 'control' becoming one of a number of factors, rather than the sole factor, for determining the existence of an employment relationship, the approach to determining vicarious liability had remained relatively stable over time.[16] It was from this position of relative stability that Gummow and Hayne JJ examined the recent advances by the Supreme Court of Canada and the House of Lords in allowing an institution to be held vicariously liable for the sexual abuse of a child within its care by an employee.

In Gummow and Hayne JJ's view, neither the reasoning of the Supreme Court of Canada nor the House of Lords necessarily departed from the well-established rules for imposing vicarious liability.[17] To establish vicarious liability, a claimant had to show the presence of an employment relationship and that the employee had engaged in wrongdoing in the 'course of employment'. What had changed was the approach of the courts to determining the 'course of employment'. A majority of both the Supreme Court of Canada and the House of Lords had found it necessary to extend the circumstances in which wrongdoing by an employee might be considered to be within the 'course of employment' to circumstances in which there was a sufficiently 'close connection' between the nature of the employment and the risk of the wrongdoing complained of occurring. This change was thought necessary, by at least some judges,[18] to address the above-mentioned policy concerns recognised as underpinning vicarious liability.

The approach of Gummow and Hayne JJ in determining whether it was appropriate to extend vicarious liability in Australia in the manner suggested by both the Supreme Court of Canada and the House of Lords was, therefore, to examine the claim that the extension was justified in terms of policy. On this point, Gummow and Hayne JJ disagreed with the Supreme Court of Canada and the House of Lords. First, Gummow and Hayne JJ did not agree that extending the 'course of employment' test would encourage employers to put in place processes and procedures that were capable of deterring such abuse; if the criminal law was an ineffective deterrent, any processes or procedures introduced by an employer were also unlikely to be effective.[19] Second, Gummow and Hayne JJ were of the view that any extension of the 'course of employment' test risked removing the necessary link with employment and consequently any capacity to justify vicarious

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13 *Lepore* (2003) 212 CLR 511, 580, quoting *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21, 37.
14 Ibid 581.
15 Ibid.
16 Ibid 580.
17 Ibid 586.
18 See, eg, *Bazley* (1999) 174 DLR (4th) (McLachlin J) and *Lister* [2002] 1 AC 215 (Lord Steyn).
19 *Lepore* (2003) 212 CLR 511, 587.

liability in terms of 'enterprise risk'.[20] They were particularly concerned that the 'close connection' test required an examination of *how* the employee carried out the wrong, rather than an examination of *what* the employee was employed to do.[21] The result of this change was to shift:

> attention from the risks which conducting the enterprise brings with it (through employees doing the tasks they are employed to do) to the risk that individuals will break the law and their employment contract while they are at work. The inquiry about risks becomes an inquiry about opportunity for wrongdoing.[22]

Extending the 'course of employment' test in the manner suggested by the Supreme Court of Canada and the House of Lords might have been justified in terms of 'deep pockets', but Gummow and Hayne JJ thought this inappropriate given that the sexual abuse of a student was the very antithesis of what the teacher had been employed to do.[23] In the judges' view, to hold as such 'would strip any content from the concept of course of employment and replace it with a simple requirement that the wrongful act be committed by an employee'.[24]

Having declined to extend the 'course of employment' test in the manner suggested by the Supreme Court of Canada and the House of Lords, Gummow and Hayne JJ then proceeded to consider whether the sexual abuse in *Rich* and *Samin* occurred in the course of the teacher's employment in accordance with the traditional Salmond test.[25] At this point, Gummow and Hayne JJ acknowledged that there were cases in which intentional wrongdoing by an employee had been found to be within the 'course of employment'. An example was the decision of the House of Lords in *Lloyd v Grace, Smith & Co*,[26] in which a solicitor was found vicariously liable to a client who had been defrauded by the solicitor's conveyancing clerk. Such cases were isolated, however, and generally involved situations where 'what was done by the employee was done in the apparent execution of authority actually, or ostensibly, given to the employee by the employer'.[27] For instance, the fraud in *Lloyd* occurred while the conveyancing clerk was arranging the sale of property on behalf of the client, having been conferred authority by the solicitor 'to arrange and negotiate sales of real property and to carry them out, and also to receive deeds for safe custody'.[28] Justices Gummow and Hayne accepted that teachers were conferred authority by schools to direct the conduct of students. Such authority, however, did not extend to sexually

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20 Ibid.
21 Ibid 589.
22 Ibid 586.
23 Ibid.
24 Ibid 594.
25 In J W Salmond, R F V Heuston and R A Buckley, *Salmond and Heuston on the Law of Torts* (Sweet & Maxwell, 19th ed, 1987) 521–2, the authors explained:

> An employee's wrongful conduct is said to fall within the course and scope of his or her employment where it consists of either (1) acts authorised by the employers or (2) unauthorised acts that are so connected with acts that the employer has authorised that they may rightly be regarded as modes – although improper modes – of doing what has been authorised.

26 [1912] AC 716 ('*Lloyd*').
27 *Lepore* (2003) 212 CLR 511, 593.
28 *Lloyd v Grace, Smith & Co* [1912] AC 716, 717.

abusing a student.[29] Consequently, the judges held that there were no circumstances in which the sexual abuse of a student could occur within the course of a teacher's employment and no basis upon which a school could be held vicariously liable for such sexual abuse.

With respect to strict liability for breach of a 'non-delegable duty of care', Gummow and Hayne JJ were prepared to accept, in accordance with the decision of the High Court of Australia in *Commonwealth v Introvigne,*[30] that the duty of care owed by a school to its students was 'non-delegable'. They were also prepared to accept, in accordance with *Introvigne*, that such a 'non-delegable duty' arose because a school 'assumes responsibility' for the safety of its students.[31] What Gummow and Hayne JJ were not prepared to accept was that strict liability for breach of the 'non-delegable duty' owed by a school to its students extended to intentional misconduct by a teacher.

Justices Gummow and Hayne commenced their examination of strict liability for breach of a 'non-delegable duty of care' by noting that such liability had never been absolute.[32] This was demonstrated in the context of the school relationship by highlighting situations in which a school could avoid liability despite a student being harmed on school premises during school hours:

> Is a school authority to be held liable if, without any negligence on the part of it or its employees or contractors, a child is injured on school premises during school hours, when the child stumbles and falls in the perfectly maintained and supervised school yard? Is the authority to be held liable if, without negligence on the part of it, or its employees or contractors, a child is struck and injured by a bottle thrown into the school yard by a passer-by? In each case the answer 'no' should be given.[33]

Justices Gummow and Hayne then noted that 'all of the cases in which non-delegable duties have been considered in this Court have been cases in which the claimant has been injured as a result of negligence'.[34] It followed that any attempt to hold a school strictly liable for the sexual abuse of a student by a teacher for breach of the 'non-delegable duty of care' owed by the school to the student was an extension of existing law. For a number of reasons, Gummow and Hayne JJ considered such an extension unwarranted.

First, extending strict liability for breach of a 'non-delegable duty of care' to cover intentional wrongdoing would be to 'remove the duty altogether from any connection with the law of negligence'.[35] A school would be held liable not because it failed to exercise reasonable care, but because it failed to bring about a particular result; the result that students at the school would not be harmed by employees and contractors engaged by the school, regardless of whether such harm could have been prevented by the exercise of reasonable care. Second, Gummow

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29 *Lepore* (2003) 212 CLR 511, 594.
30 (1982) 150 CLR 258 ('*Introvigne*').
31 *Lepore* (2003) 212 CLR 511, 599.
32 Ibid 600.
33 Ibid 601.
34 Ibid 599.
35 Ibid 601.

and Hayne JJ doubted whether extending strict liability for breach of a 'non-delegable duty of care' in such a way could be justified in terms of deterrence. As strict liability was imposed regardless of wrongdoing by the school, 'any deterrent or prophylactic effect that might be said to follow from extending the "non-delegable duty of care" of a school ... to include liability for intentional trespasses committed by teachers would, at best, be indirect'.[36] Finally, Gummow and Hayne JJ were concerned that to extend strict liability for breach of a 'non-delegable duty of care' to cover intentional wrongdoing would leave 'no room for any operation of orthodox doctrines of vicarious liability'[37] since such liability could be imposed without having to demonstrate the existence of an employment relationship.[38] This would be a curious result given that strict liability for breach of a 'non-delegable duty of care' was initially limited to a gap-filling role, having been created as a device to overcome technical hurdles to imposing vicarious liability (such as the doctrine of common employment).[39]

Having rejected the claims in *Samin* and *Rich* based on both vicarious liability and strict liability for breach of a 'non-delegable duty of care', Gummow and Hayne JJ dismissed the appeals.

III Concerns regarding the Imposition of Strict Liability for Institutional Child Sexual Abuse in Australia

Gummow and Hayne JJ were thorough in their demolition of the appellants' claims in *Rich* and *Samin*. Their various arguments, however, can be reduced to four general concerns regarding the imposition of strict liability for institutional child sexual abuse. It will be necessary to find a way to address each of those concerns before such liability can be recognised in Australia.

The first concern is that the absence of any principled basis for explaining either vicarious liability or strict liability for breach of a 'non-delegable duty of care' makes it very difficult for judges to determine whether strict liability should be extended to cases of institutional child sexual abuse. To date, both forms of strict liability have been justified in terms of broad policy or glib labels that have proved incapable of explaining the circumstances in which such liability is imposed.

Consider efforts to justify vicarious liability in terms of 'enterprise risk'.[40] It is argued that just as an employer takes the benefit of an employee's work in terms of profit, so too should that employer bear the burden of any damage caused by an employee in the course of earning that profit.[41] Such accounts struggle to explain why an employer is only held strictly liable for the wrongdoing of an employee and not for an independent contractor who might also deliver the employer a

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36 Ibid 602.
37 Ibid.
38 Ibid 597.
39 Ibid.
40 See further Christine Beuermann, 'Dissociating the Two Forms of so-called "Vicarious Liability"' in Stephen G A Pitel, Jason W Neyers and Erika Chamberlain (eds), *Tort Law: Challenging Orthodoxy* (Hart Publishing, 2013) 464–5.
41 Jane Stapleton, *Product Liability* (Cambridge University Press, 1994) 193.

benefit.[42] There is also the problem of explaining why an employer is only held strictly liable for damage *wrongfully* caused by an employee, as opposed to being held strictly liable for all damage caused by an employee.[43] That an employer takes the benefit of an employee's work cannot explain why liability is imposed in one situation but not the other.

Similar difficulties exist in explaining strict liability for breach of a 'non-delegable duty of care'. Commonly, such liability is justified in terms of an 'assumption of responsibility'. As Barker has demonstrated, the concept is used in a variety of senses: sometimes it indicates an implied promise by the defendant to take care; sometimes it means the defendant has assumed the legal risk of the consequences of their actions; and on yet other occasions, it means nothing more than that the defendant has voluntarily chosen to act in a particular way.[44] As judges do not always articulate the sense in which they are using the concept, the concept can appear little more than a label for the particular conclusion a judge wants to reach. Furthermore, an 'assumption of responsibility' is not always sufficient for strict liability for breach of a 'non-delegable duty of care' to be imposed.[45] As recently noted by the Supreme Court of the United Kingdom in *Woodland v Swimming Teachers' Association*,[46] although a school might be held strictly liable for breach of the 'non-delegable duty of care' owed to its students as a result of the negligence of an independent contractor who is a swimming teacher, a school is unlikely to be held strictly liable for the negligence of other independent contractors such as bus drivers and museum guides.[47] An 'assumption of responsibility' cannot explain why a school would be held strictly liable in the one situation, and not the other, given that a school generally assumes responsibility for the safety of its students.

A second concern that needs to be addressed before strict liability can be imposed for institutional child sexual abuse in Australia is that, in the absence of a convincing justification, any extension of vicarious liability or strict liability for breach of a 'non-delegable duty of care' risks the unprincipled expansion of strict liability more generally. This fear is well-founded. Consider the recent decision of the Supreme Court of the United Kingdom in *The Catholic Child Welfare Society v Various Claimants*.[48] In determining whether the Catholic Church could be held vicariously liable for the sexual abuse of students by lay brothers at a church school, the Supreme Court held that an employment relationship is no longer required for vicarious liability to be imposed. In the Supreme Court's view, strict

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42 It has been argued that employees might be distinguished from independent contractors on the grounds that the benefit to be delivered by an independent contractor will generally be limited by the terms of the contractor under which the contractor has been engaged, whereas the benefit to be delivered by an employee is unlimited: ibid. See also P S Atiyah, *Vicarious Liability in the Law of Torts* (Butterworths, 1967) 18.

43 P S Atiyah, *Vicarious Liability in the Law of Torts* (Butterworths, 1967) 28.

44 Kit Barker, 'Unreliable Assumptions in the Modern Law of Negligence' (1993) 109 *Law Quarterly Review* 461.

45 Christine Beuermann, 'Tort Law in the Employment Relationship: A Response to the Potential Abuse of an Employer's Authority' (2014) 21 *Torts Law Journal* 169.

46 [2014] AC 537.

47 Ibid 584–5 [25].

48 [2013] 2 AC 1.

liability could be imposed if the Catholic Church had generated a sufficiently 'close connection' between the lay brothers and the claimants. Consequently, a relationship 'akin' to employment was sufficient. It is unlikely that this decision would have been reached without the earlier developments in *Bazley* and *Lister*.

A third concern regarding the imposition of strict liability for institutional child sexual abuse in Australia is that it can be difficult to distinguish between vicarious liability and strict liability for breach of a 'non-delegable duty of care' and the circumstances in which the two forms of strict liability arise. As a result, it is unclear whether there is one form of strict liability or two.[49] This was a particular problem on the facts of *Rich* and *Samin* given that both forms of strict liability notionally applied; vicarious liability was a possibility because the teacher was an employee of the State of Queensland and strict liability for breach of a 'non-delegable duty of care' was a possibility because the duty of care owed by the State of Queensland (as school authority) to the appellants was 'non-delegable'.

The final concern that needs to be addressed before strict liability for institutional child sexual abuse can be recognised in Australia is that, generally speaking, it is relatively unusual for one person to be held strictly liable for the intentional wrongdoing of another. As Gummow and Hayne JJ noted, such liability is generally limited to situations where the intentional wrongdoing is done in the '*apparent execution of authority*' (as was the case in *Lloyd*).[50] This is an astute observation, particularly in the context of the cases involving institutional child sexual abuse, and one that arguably provides the key to addressing the first three concerns.

IV Institutional Child Sexual Abuse Cases and the Feature of Authority

Not all claimants in England and Canada have been successful in establishing strict liability for institutional child sexual abuse. Consistent with Gummow and Hayne JJ's general observation in *Lepore*, such liability has generally been limited to situations in which the sexual abuse occurred 'in the apparent execution of authority'.[51]

Consider the circumstances in which strict liability was imposed by the Supreme Court of Canada in *Bazley*.[52] The defendant institution in that case operated 'two residential care facilities for the treatment of emotionally troubled children'.[53] The Government of British Columbia placed children in the care of the facilities operated by the institution when those children could no longer be cared for by their parents or foster parents. While at the facility, the institution was solely responsible for the care of the children. It was vested with the same authority to

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49 Fleming famously suggested that strict liability for breach of a 'non-delegable duty of care' was simply a 'disguised form of vicarious liability': John G Fleming, *The Law of Torts* (Thomson Reuters, 9th ed, 1998) 434. See also Glanville Williams, 'Liability for independent contractors' (1956) *Cambridge Law Journal* 180.

50 *Lepore* (2003) 212 CLR 511, 593 (emphasis added).

51 Ibid.

52 (1999) 174 DLR (4th) 45.

53 Ibid 50 [2].

direct the conduct of the children as a parent has to direct the conduct of their own children. This authority was vested in the institution by the Government of British Columbia[54] and included the right to discipline the children should they not comply with a direction.

The claimant in *Bazley* had been placed into full-time care at one of these facilities as a young boy. While at the facility, the claimant was repeatedly sexually abused by Leslie Curry. Curry was employed by the institution as a childcare counsellor.[55] His role was to act as a surrogate parent to the children in the facility.[56] This included 'ensuring various house rules were obeyed' and 'ensuring the children got to school on time'.[57] To enable Curry to perform his duties, the defendant institution had conferred its authority to direct the conduct of the children in its care on Curry. Curry was purporting to exercise this authority immediately before he committed the sexual abuse.

Similar circumstances existed in *Lister*.[58] The defendant institution in that case operated a school and boarding annex for boys. A number of boys were sexually abused at the boarding annex by Dennis Grain, who was employed as warden and housemaster of the boarding annex. Boys were sent to the school and boarding annex by local authorities, often because they had 'emotional and behavioural difficulties'.[59] While at the school and boarding annex, the institution was solely responsible for the care of the children. The institution was vested with the same authority to direct the conduct of the boys as a parent has to direct the conduct of their own children. This authority was vested in the institution by the local authorities[60] and included the right to discipline the children should they not comply with a direction. Grain's duties as warden and housemaster of the boarding annex included 'making sure the boys went to bed at night, got up in the morning and got to and from school'.[61] It was necessary for the institution to confer its authority to direct the conduct of the boys to Grain to enable him to perform his duties. Grain was purporting to exercise this authority immediately before he committed the abuse.

In contrast, authority has not been a feature of the cases in which strict liability for institutional child sexual abuse was denied. Consider *Jacobi v Griffiths*,[62] a case decided by the Supreme Court of Canada at the same time as *Bazley*. The defendant institution in that case operated a recreational club for boys and girls held after school and on Saturdays.[63] The claimants, a pair of siblings who regularly attended the club, were sexually abused by Harry Griffiths, the

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54 *Protection of Children Act,* RSBC 1960, c 303, s 210. This section made the defendant institution the legal guardian of the children in its care.

55 (1999) 174 DLR (4th) 45, 50.

56 Ibid.

57 Ibid.

58 [2002] 1 AC 215.

59 Ibid 220.

60 *Children Act 1975* (UK), c 72, s 60. This section vested in the defendant institution parental rights and duties in respect of the child.

61 *Lister* [2002] 1 AC 215, 220.

62 (1999) 174 DLR (4th) 71.

63 Ibid 76–7.

club's Program Director. Although the institution employed Griffiths, it was not held strictly liable for the sexual abuse. An examination of the relationship between the institution and the children who attended the club indicates why. Attendance at the club in *Jacobi v Griffiths* was voluntary and children were free to come and go as they pleased.[64] There was no legislation in place to give the institution authority to direct the conduct of the children at the club or to discipline those children in the event of non-compliance. The children were not engaged in dangerous activities for which disciplinary acts might be justified on the grounds of keeping the children safe (as with a school-crossing supervisor, for example[65]). Nor was it apparent that the parents of the children had vested the institution with that authority. The circumstances of the cases can be distinguished, therefore, from cases such as *Bazley* and *Lister* in which the institutions were vested with authority either by legislation or principal carers to direct the conduct of the children in their care and to discipline those children in the event of non-compliance.[66]

G (ED) v Hammer[67] is another case in which an institution was not held strictly liable for the sexual abuse of a child within its care by an employee. The claimant in that case had attended a government school at which she was sexually abused by a janitor employed by the School Board. The School Board was vested with authority to direct the conduct of the children in its care by legislation. Such authority, however, had not been conferred upon the janitor. It was not necessary for the janitor to be conferred any authority to direct the conduct of the children in order for the janitor to perform his duties. As McLachlin CJC commented in delivering the judgment of the Supreme Court of Canada:

> Janitors had no direct duties relating to the care or instruction of students. Nor did they have direct authority over the students — not even the authority to discipline them. If a janitor saw a student misbehaving, the most he could do was report the behaviour to the principal, who would then discipline the child herself.[68]

Similar circumstances arose in *B v Order of the Oblates of Mary Immaculate*.[69] The claimant in that case attended a residential school for First Nations children run by the defendant institution. The claimant was sexually abused on numerous occasions by Martin Saxey, the school baker.[70] The baker, as with the janitor in *G(ED) v Hammer*, did not need to be able to direct the conduct of children at the school to perform his duties. No such authority had been conferred upon Saxey and the institution was not held strictly liable for the sexual abuse.

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64 Ibid 83.

65 Francis Trindade, Peter Cane and Mark Lunney, *The Law of Torts in Australia* (Oxford University Press, 4th ed, 2007) 100.

66 Even if some type of authority could be found to have been vested in the club in certain limited circumstances (either because dangerous activities were being engaged in or because parents had conferred specific authority upon the club), much of the abuse in *Jacobi v Griffiths* occurred at Griffith's home so that it could not have been said that he was exercising any authority to direct the conduct of the students that had been conferred upon him by the club at the time the abuse occurred.

67 (2003) 230 DLR (4th) 554.

68 Ibid 557–8.

69 (2005) 258 DLR (4th) 385.

70 Ibid 389.

As has been shown, the circumstances in which an institution has been held strictly liable in Canada and England for the sexual abuse of a child within its care by an employee are quite different from the circumstances in which such liability is denied. The cases suggest that for strict liability to be imposed it is first necessary for an institution to have been vested with authority to direct the conduct of the children in its care, including the right to discipline the children should a child not comply with a direction. The institution then has to have conferred that authority upon the employee who committed the sexual abuse. Finally, the employee has to be purporting to exercise that authority immediately before the sexual abuse occurred.[71] It does not appear that strict liability for sexual abuse has been imposed on an institution charged with the care of children outside these circumstances.

The feature of authority therefore distinguishes the cases in which strict liability is imposed for institutional child sexual abuse from the cases in which it is not. Although this finding is consistent with the observation of Gummow and Hayne JJ in *Lepore* that strict liability for the intentional wrongdoing of another person is limited to situations where the wrongdoing is done 'in the apparent execution of authority',[72] the judges curiously disregarded the authority conferred by the State of Queensland upon the teacher in *Samin* and *Rich* as a basis for imposing strict liability for the sexual abuse. Justices Gummow and Hayne distinguished *Samin* and *Rich* from other cases of intentional wrongdoing, such as *Lloyd,* on the basis that the teacher in *Samin* and *Rich* was not authorised to engage in sexual abuse. The same point, however, can be made in respect of *Lloyd*; the conveyancing clerk was not authorised to defraud the solicitor's clients. Arguably, Gummow and Hayne JJ were asking the wrong question with respect to the authority vested in the State of Queensland in *Samin* and *Rich*. It is not whether the teacher was authorised to engage in wrongdoing that is important (generally this will not be the case), but whether the teacher was purporting to exercise the apparent authority conferred by the State of Queensland immediately prior to the wrongdoing. This was the case in *Lloyd*; immediately prior to the wrongdoing, the conveyancing clerk was purporting to exercise his apparent authority to sell property on behalf of the solicitor's clients. The cases are therefore indistinguishable.

V The Significance of Authority

If authority is the distinguishing feature of the cases in which the courts impose strict liability in cases of institutional child sexual abuse, the question then is why. Why is this feature of authority significant? It is submitted that the significance of the authority present in the cases in which strict liability is imposed for institutional child sexual abuse lies in the potential for that authority to be abused.

Consider the relationship between a school and its students, a school being typical of the types of institutions held strictly liable for child sexual abuse and the particular type of institution in question in *Samin* and *Rich*.

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71 For instance, in *Bazley v Curry* (1999) 174 DLR (4th) 45 Curry was acting in his role as 'surrogate parent' immediately before the abuse occurred (as noted earlier).

72 (2003) 212 CLR 511, 593.

Schools exist to educate students. This is important for both the students and the broader community. As explained by Lord Clyde in *Phelps v Hillingdon London Borough Council*:

> It is not only in the interests of the child and his or her parents that such provision should be made but also in the interest of the country that its citizens should have the knowledge, skill and ability to play their respective parts in society with such degree of competence and qualification as they may be able to develop.[73]

Consequently, all children of a certain age are required by legislation throughout Australia to be educated.[74] This generally means that parents must enrol their child in a school approved by the Government,[75] although parents retain a choice as to which school, and what type their child attends. Once at school, students attend classes arranged by the school and receive schooling in accordance with government-set curriculum. The school also makes arrangements for the students to have breaks throughout the day. During this time, students are generally free to engage in whatever activities they like, although any inappropriate behaviour may be restrained and the students must remain within the perimeter of the school.

From this description of the school relationship, it can be seen that a school can direct the activities and behaviour of its students. Schools are vested with authority to direct the conduct of their students in this way. Such authority is not derived from parents,[76] but from legislation.[77] This legislation first gives schools the authority to require students to attend school. Once a student has been enrolled at a school, the school must monitor attendance[78] and mechanisms are put in place to respond to instances of truancy.[79] Second, the legislation gives schools the express authority to maintain discipline within the school.[80] This means that schools are not only authorised to direct the behaviour of students, but to discipline individual students for failing to comply with those directions.

Authority to direct the conduct of a student is an important component of the student–school relationship. Education is unlikely to happen if students are in an environment where they are not physically safe or where there are numerous disruptions. The success of the student–school relationship therefore depends on the school being able to exercise authority over the students to ensure that they attend and have a suitable environment for learning.

An inherent danger of the authority vested in a school to direct the conduct of students is that a school is put in a position of significant power. Students are vulnerable to an abuse of that power. Restraints are consequently placed on how a

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73 [2001] 2 AC 619, 668-669.
74 See, eg, *Education Act 1990* (NSW) s 22.
75 Although home-schooling is available in limited circumstances. See, eg, ibid s 25.
76 *Hole v Williams* (1910) 10 SRNSW 638, 656-657.
77 Justice Taylor stated, 'I prefer the view that a public schoolteacher [sic] in the exercises of his functions as such is exercising an authority delegated to him by the Crown in respect of obligations assumed by the Crown': *Ramsay v Larsen* (1964) 111 CLR 16, 38.
78 See, eg, *Education Act 1990* (NSW) s 24.
79 See, eg, ibid s 23(5).
80 See, eg, ibid s 35.

school may exercise its authority to direct the conduct of students. For example, legislation in a number of jurisdictions prohibits schools from using corporal punishment to discipline students.[81] A school, however, is not required to exercise its authority to direct the conduct of students personally. As a school is not a natural person, this would indeed be very difficult.[82] Instead, a school typically confers its authority to direct the conduct of students upon teachers and other educators[83] who then undertake the task of educating students. When a school confers its authority to direct the conduct of a student upon a teacher or other educator, that teacher or other educator is not necessarily subject to the same restraints in the exercise of that authority as the school. This is because the restraints placed on the exercise of authority by a school are generally incorporated into the legislation that creates the authority and are not automatically transferred to a teacher or other educator when the authority is conferred. Legislative obligations in respect of students, for instance, are generally placed on schools[84] and do not necessarily apply to a teacher or other educator unless the school also makes such obligations a condition of the authority being conferred.

As with the vesting of authority in a school to direct the conduct of students, the conferral of authority by a school upon a teacher or other educator to direct the conduct of students creates a power relationship that did not previously exist.[85] This power relationship enables the teacher or other educator to direct the conduct of a student and creates an expectation that the student will obey. As the teacher or other educator is not necessarily subject to the same restraints in the exercise of the authority as the school, there is significant potential for this power relationship to be abused. A teacher, for instance, may direct a student to perform a scientific experiment, but fail to provide that student with appropriate safety equipment.[86] Students are consequently put at risk of harm whenever their school confers authority upon a teacher or other educator to direct the conduct of the student.

VI Conferred Authority Strict Liability

It is submitted that it is this potential for a person conferred authority by an institution to direct the conduct of a child within the institution's care to abuse the conferred authority that attracts the concern and the intervention of the law. Conferred authority strict liability responds to the potential for abuse of the power relationship created by the institution's conferral of authority by holding the institution liable regardless of fault for any harm wrongfully caused to a child within its care by the person upon whom authority has been conferred.

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81 See, eg, *Education Act 1990* (NSW) s 47(h). See also *Education Act 1996* (UK), c 56, s 548.

82 In which case the authority has to be exercised by those in the 'managing mind' of the school, as with corporations.

83 For example, a swimming teacher. See *Woodland v The Swimming Teachers' Association* [2014] AC 537.

84 For example, *Education Act 1990* (NSW) s 47 requires a school to put in place school policies that do not 'permit corporal punishment of students' but such policies will not necessarily extend to external service providers of activities such as swimming lessons or camps.

85 Christine Beuermann, 'Vicarious liability and conferred authority strict liability' (2013) *Torts Law Journal* 265, 269.

86 *Williams v Eady* (1893) 10 TLR 41.

relationship, conferred liability effectively holds an institution to account for damage wrongfully caused to a child by a person upon whom an institution has conferred its authority to direct the conduct of the child. In so doing, the liability provides children within the care of institutions with a degree of protection from an abuse of the authority conferred by the institution upon another person.

As noted by Gummow and Hayne JJ in *Lepore*, it is relatively unusual in tort law for one person to be held strictly liable for the wrongdoing of another.[87] As the defendant did not personally engage in wrongdoing, some other connection between the defendant and the wrongdoing needs to be drawn. It has never been sufficient for such purposes that a defendant merely provided an opportunity for wrongdoing to occur.[88] When an institution confers authority upon another person to direct the conduct of a child within its care, however, it does more than provide a mere opportunity for wrongdoing to occur.[89] The power relationship created by the conferral of authority can provide the means by which wrongdoing might occur. A teacher, for instance, can use the authority conferred upon him or her by a school to direct a student into a private room in order to perpetrate a sexual assault. It is not that an abuse of authority will necessarily occur, but there is always a risk that the authority conferred by the institution upon another person to direct the conduct of a child within its care will be abused. As can be seen from the case law, that risk appears sufficient to warrant the imposition of conferred authority strict liability.

Importantly, conferred authority strict liability is not an absolute form of liability; it is not imposed in the *absence* of wrongdoing.[90] It still needs to be shown that the person upon whom an institution has conferred authority to direct the conduct of a child within its care engaged in wrongful conduct that caused a child harm. The liability is, however, imposed *regardless* of wrongdoing by the institution.[91] This means that conferred authority strict liability can be imposed even though an institution may be able to adduce evidence that the conferral of authority by the institution did not wrongfully contribute to the damage suffered by the child. The liability can also be imposed even though an institution may be able to adduce evidence that an abuse of the authority conferred by the institution upon the person who wrongfully injured the child did not actually take place. This is because conferred authority strict liability responds to a *potential*, rather than an *actual* abuse of the authority conferred by the institution.

It may seem unfair that an institution can be subject to conferred authority strict liability regardless of personal wrongdoing, but an institution need not necessarily bear such liability alone. In certain circumstances, an institution will be entitled to seek contribution and/or an indemnity from the person upon whom authority has been conferred in respect of any damages paid to the injured child.[92]

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87 Beuermann, above n 84.

88 *Bazley v Curry* (1999) 174 DLR (4th) 45, 63–4.

89 Chief Justice McLachlin noted that a mere opportunity for wrongdoing was an insufficient basis upon which to impose strict liability for the wrongdoing of another in tort*: Bazley v Curry* (1999) 174 DLR (4th) 45, 63–4.

90 Peter Cane, 'Responsibility and Fault: A Relational and Functional Approach to Responsibility' in Peter Cane and John Gardner (eds), *Relating to Responsibility* (Hart Publishing, 2001) 81, 99.

91 Ibid.

92 For example, for breach of contract or under an employer's right of indemnity.

VII Conferred Authority Strict Liability or Vicarious Liability?

To date, the strict liability imposed in cases of institutional child sexual abuse in Canada and England has been labelled vicarious liability and explained in terms of the relationship between the institution and the employee who commits the sexual abuse. It is submitted that there is no basis for imposing vicarious liability in such cases as it is the relationship between the institution and the abused child that attracts the strict liability imposed in cases of institutional child sexual abuse, and not the employment relationship. Such liability has commonly been referred to as strict liability for breach of a 'non-delegable duty of care', but can be more meaningfully described as conferred authority strict liability. The two forms of strict liability are distinct.

First, the two forms of strict liability respond to the wrongdoing of different types of people. Conferred authority strict liability can respond to the wrongdoing of an independent contractor, an employee or a person who has been acting gratuitously.[93] This is because it is not the status of the person who has engaged in the wrongful conduct that is important, but the fact that he or she has been conferred authority by an institution to direct the conduct of a child within the care of the institution. Vicarious liability, on the other hand, only responds to the wrongdoing of an employee.

Second, the two forms of strict liability differ in scope. The scope of vicarious liability has traditionally been limited by what it is an employer has *actually* directed (whether expressly[94] or impliedly[95]) the employee to do. Vicarious liability is imposed on an employer whenever an employee wrongfully injures a stranger to the employment relationship while acting within the course of their employment.[96] In accordance with the Salmond test, the test endorsed by Gummow and Hayne JJ in *Lepore*, an employee's wrongful conduct does not fall within the course of their employment unless the employee was acting in accordance with their employer's *actual* directions (express or implied) at the time of the wrongdoing.[97]

The scope of conferred authority strict liability, however, is not limited by the terms of the actual authority conferred by an institution upon another person to direct the conduct of a child within its care. Instead, it extends to circumstances in which the person conferred authority is acting within the terms of *apparent* authority conferred by the institution. This is because a child will interact with a

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93 See *Woodland v The Swimming Teachers' Association* [2014] AC 537.

94 The first limb of the Salmond test: Salmond, Heuston and Buckley, above n 25, 521–2.

95 The second limb of the Salmond test: Salmond, Heuston and Buckley, above n 25, 521–2. This limb has been interpreted to include situations where an employee contravenes express orders, but acts in a way that still benefits the employer; for example, *Bugge v Brown* (1919) 26 CLR 110. See further Beuermann, above n 45.

96 See generally, Beuermann, above n 45.

97 I have argued elsewhere that the reason vicarious liability is so limited is because of the potential for an employer to abuse their authority to direct the conduct of an employee by creating a conflict between an employee's duties under their employment contract and other general law obligations or responsibilities an employee might owe. Beuermann, above n 45.

person conferred authority by the institution on the basis of the terms of the apparent authority conferred by the institution upon him or her.[98] One reason a student will go with a teacher into a storeroom, for instance, is because the teacher has the apparent authority to direct the student to do so.[99] It is the terms of the apparent authority that has been conferred by the institution, therefore, that shapes the power relationship between the person conferred authority and the child and it is the potential for abuse of this power relationship that attracts the concern and intervention of conferred authority strict liability.

The differences between vicarious liability and conferred authority strict liability are particularly significant in cases of institutional child sexual abuse. Reconsider the facts of *Samin* and *Rich*. The question was whether the State of Queensland (as school authority) could be held strictly liable for the sexual abuse of the students by their teacher. As noted above, vicarious liability has traditionally been limited by what it is an employer has actually directed (expressly or impliedly) an employee to do. In *Samin* and *Rich*, the teacher who committed the sexual abuse had not been directed by the State of Queensland (either expressly or impliedly) to sexually abuse the students or to engage in conduct with the purpose of sexually abusing the students.[100] It follows that it was very difficult to impose vicarious liability in respect of the sexual abuse, as Gummow and Hayne JJ emphasised.[101]

Although it was not possible for vicarious liability to be imposed in *Samin* and *Rich*, conferred authority strict liability could have been imposed. This is because the teacher in *Samin* and *Rich* was not just an employee, but an employee who had been conferred authority by the State of Queensland (as school authority) to direct the students' conduct. Conferred authority strict liability, as previously explained, is not limited by the terms of the actual authority conferred by an institution upon another person to direct the conduct of a child within its care, but extends to circumstances in which the person upon whom authority has been conferred is acting within the terms of the apparent authority conferred by the institution. It was therefore not necessary in *Samin* and *Rich* for the students to show that the teacher was acting in accordance with the actual directions (express or implied) of the State of Queensland. It was sufficient for the students to show that the teacher was purporting to exercise the apparent authority conferred by the State of Queensland to direct the conduct of the students immediately prior to the wrongdoing. There was no evidence available on this point before the High Court of Australia in *Samin* and *Rich*.

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98 Objectively determined, not determined by reference to the specific child.

99 As happened in *Lepore* (2003) 212 CLR 511.

100 It was acknowledged by the Supreme Court of New Zealand that acts knowingly done for the purpose of enabling wrongdoing to occur could not be considered to have been done within the actual authority of the wrongdoer: *Dollars & Sense Finance Ltd v Rerekohu Nathan* [2008] 2 NZLR 557, 576.

101 See Section II above.

VIII Recognising Conferred Authority Strict Liability in Australia

The High Court of Australia struggled in *Lepore* to find a convincing basis upon which to hold an institution strictly liable for the sexual abuse of a child within its care by an employee. This article has argued that such a basis can be found in Gummow and Hayne JJ's observation in *Lepore* that strict liability for the intentional wrongdoing of another person is generally limited to situations where the intentional wrongdoing is done 'in the apparent execution of authority'.[102] This feature of authority not only explains the strict liability imposed in cases of institutional child sexual abuse, but does so in a way that addresses the four key concerns that prevented Gummow and Hayne JJ from holding the State of Queensland strictly liable for such sexual abuse in *Samin* and *Rich*.

Recall Gummow and Hayne JJ's first concern that the absence of any principled basis for explaining either vicarious liability or conferred authority strict liability makes it very difficult for judges to determine whether either form of liability should be extended. This article has demonstrated that a convincing basis for conferred authority strict liability can be found in the potential for abuse of the authority vested in an institution to direct the conduct of the children in its care, when that authority is conferred upon another person. Unlike an 'assumption of responsibility', the conferral of authority by an institution upon another person who sexually abuses a child within the institution's care is both a necessary and sufficient condition for conferred authority strict liability to be imposed. Specifically, it explains why a school is held strictly liable for the sexual abuse of a student by a teacher or other educator, but not by a janitor or a baker.

The benefit of recognising a convincing basis for conferred authority strict liability is that there is much greater guidance available for judges when determining whether the strict liability should be extended. It can now be seen, for instance, that conferred authority strict liability can extend to intentional wrongdoing where a person conferred authority by an institution to direct the conduct of a child is purporting to exercise that apparent authority immediately before sexual abuse occurs. Justices Gummow and Hayne admittedly thought such an extension would disconnect the liability from the law of negligence more generally. Any such connection, however, was more perceived than real. Conferred authority strict liability is imposed regardless of personal wrongdoing and has nothing to do with the law of negligence. The perceived connection was suggested by the misleading nomenclature previously used to describe conferred authority strict liability and that nomenclature has consequently been replaced.

Judges will also be better placed to determine the types of institutions to which conferred authority strict liability might apply. The Royal Commission into Institutional Responses to Child Sexual Abuse, for instance, has heard considerable evidence with respect to sexual abuse committed by priests and other religious leaders appointed by churches. Churches are not generally vested with formal authority to direct the conduct of their congregation, nor do they have the right to

[102] *Lepore* (2003) 212 CLR 511, 593.

discipline a member of the congregation who fails to comply with such a direction. Any children in the congregation, then, are in much the same position as the children in *Jacobi v Griffiths*.[103] It could be argued, however, that although churches are not vested with formal authority to direct the conduct of their congregation, they are bestowed with a different type of authority in respect of the spiritual behaviour of their congregation. Such authority is not dissimilar in nature to the authority vested in a school, as a failure to obey directions may be perceived as having disciplinary consequences (though perhaps not immediate). The extent of this authority will also tend to increase the more 'immature and inexperienced' members of the congregation are.[104] When viewed in these terms, the decision of the Supreme Court of Canada in *John Doe v Bennett*[105] can be seen as correct. In that case a church was held strictly liable for the sexual abuse of altar boys by a priest. As members of the church, the altar boys were brought up in a belief structure in which the church mediated their ultimate relationship with God, giving the church considerable authority over the boys. This authority had been conferred upon the priest who sexually abused them. The same cannot be said for the decision of the English Court of Appeal in *Maga v The Trustees of the Birmingham Archdiocese of the Roman Catholic Church*.[106] In that case, the child who had been sexually abused was not a member of the congregation and the church 'did not seek to engage with him on any religious level'.[107] It is very difficult to say that the church in that case held the priest out as having any authority over the child. The connection between the church and the sexual abuse was consequently insufficient to warrant the imposition of conferred authority strict liability.

Justices Gummow and Hayne's second concern with imposing strict liability on the facts of *Samin* and *Rich* was that such liability might lead to the unprincipled expansion of strict liability more generally. Recognising a convincing basis for conferred authority strict liability quells this fear. It can now been seen, for instance, that there was no need for the Supreme Court of the United Kingdom in *The Catholic Child Welfare Society v Various Claimants*[108] to extend vicarious liability to relationships 'akin to employment'. As explained above, the Catholic Church could still be held strictly liable for the sexual abuse of a student by a lay brother, whether that lay brother was an employee or not, if the Catholic Church conferred authority on the lay brother to direct the conduct of a student and the lay brother was purporting to exercise that apparent authority immediately prior to the sexual abuse occurring. It is the relationship between the Catholic Church and the student that attracts the strict liability, not the relationship between the Catholic Church and the lay brother. By imposing conferred authority strict liability in such circumstances, the doctrinal integrity of vicarious liability remains intact.

A more specific concern expressed by Gummow and Hayne JJ was that imposing strict liability on the State of Queensland in *Samin* and *Rich* might result in schools being held strictly liable for all wrongdoing by a teacher or other

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103 (1999) 174 DLR (4th) 71.
104 *Introvigne* (1982) 150 CLR 258, 271.
105 (2004) 236 DLR (4th) 577.
106 [2010] 1 WLR 1441.
107 Ibid 1447 [12].
108 [2013] 2 AC 1.

educator, effectively turning schools into an insurer of the children in their care.[109] This concern, however, is without basis. Conferred authority strict liability responds to the potential for a teacher or other educator who has been conferred authority by a school to direct the conduct of a student to abuse that authority. Such liability can only be imposed where the teacher or other educator is purporting to exercise that apparent authority immediately before the sexual abuse occurs. There is no basis, for instance, for a school to be held strictly liable if a teacher steals property from a student's bag left in the playground while the student is at lunch, unless the bag had been expressly entrusted to the teacher's care by the student for safekeeping.[110] In such circumstances, the teacher is not purporting to exercise any apparent authority in respect of the child immediately before the wrongdoing, and there is consequently no potential for such authority to be abused.

Justices Gummow and Hayne's third concern was that it was difficult to distinguish between vicarious liability and conferred authority strict liability. It can now be seen that there are two distinct forms of strict liability that arise by reason of different relationships. Vicarious liability arises by reason of an employment relationship and is restricted to circumstances in which an employee is acting within the actual scope of their authority. Conferred authority strict liability arises by reason of the relationship between an institution and the children in its care[111] and extends to circumstances in which the person who has been conferred authority over the claimant is acting within the apparent scope of that authority. This is not to suggest that there are not circumstances in which the two forms of strict liability might overlap. A student who is injured due to the negligence of a teacher, for instance, might look to hold the school vicariously liable for the teacher's negligence or seek to impose conferred authority strict liability. In such circumstances, a claimant would be free to choose whichever form of strict liability is more advantageous,[112] although it is not immediately apparent that there are any advantages to be obtained in pursuing one form of strict liability rather than the other.

Justice Gummow and Hayne's final concern with imposing strict liability on the facts of *Samin* and *Rich* was that to hold one person strictly liable for the intentional wrongdoing of another was relatively unusual. Recognising conferred authority strict liability does not change this — as conferred authority strict liability responds to a very specific risk, strict liability for the intentional wrongdoing of another remains the exception, rather than the rule. Recognising conferred authority strict liability might, however, assist to clarify the other circumstances in which strict liability for the intentional wrongdoing of another is imposed. Recall the decision in *Lloyd*, in which the solicitor was held strictly liable for the fraud of his conveying clerk. [113] It is significant that the conveyancing clerk in that case had been conferred authority by the solicitor to arrange property sales

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109 (2003) 212 CLR 511, 587, 602.

110 So that a bailment arrangement arose: *Morris v C W Martin & Sons Ltd* [1966] 1 QB 716.

111 Including the employment relationship, where an employer confers their authority to direct the conduct of an employee upon another person. See, eg, *Kondis v State Transport Authority* (1984) 154 CLR 672.

112 *Henderson v Merrett Syndicates Ltd (No2)* [1995] 2 AC 145.

113 [1912] AC 716.

on behalf of the solicitor's clients and was purporting to exercise that apparent authority immediately before the fraud occurred.

It follows that it is possible to overcome the concerns of Gummow and Hayne JJ in *Samin* and *Rich* about imposing strict liability in cases of institutional child sexual abuse by recognising conferred authority strict liability. It remains to be seen whether the High Court of Australia will take up the challenge posed by the highly unsatisfactory decision in *Lepore* and formally recognise conferred authority strict liability.[114]

[114] This article has not sought to address any broader issues of whether tort law is capable of providing an appropriate means of redress to victims of institutional child sexual abuse and whether any other compensation mechanisms might be more appropriate. Further information and references on these issues can be found in Jane Wangmann, 'Liability for Institutional Child Sexual Assault: Where Does *Lepore* Leave Australia?' (2004) 28(1) *Melbourne University Law Review* 169.