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A report on the 2004 Bond University High School Mooting Competition

Introduction

What is the extent of a school's liability to its students if they are injured by the deliberate actions of someone who is either a member of staff, or associated with the school in some capacity which makes it possible for them to harm students in some way? This was the hypothetical question posed in the 2004 Bond University High School Mooting Competition, which in 2004 attracted over 130 school teams from nine regions of Australia, and was, for the first time, extended to allow Malaysian schools to take part in their own competition.

As usual, the topic selected by the organisers reflected an issue recently considered by the High Court of Australia. In *New South Wales v Lepore; Samin v Queensland; Rich v Queensland*[1], three related cases came before the Court, all of which dealt with the potential civil liability of a school for sexual assaults committed on students by teachers in their employment. The *Lepore* case came on appeal from a ruling of the NSW Court of Appeal that schools were liable, on the basis that their duty to ensure the safety on students on school premises was "non-delegable", and therefore remained with the school authority however much discretion was left to individual staff. The Queensland Court of Appeal, on the other hand, in the Samin and Rich cases, ruled in favour of the schools, thus creating, in the words of Chief Justice Gleeson,[2] "*. . . a conflict of authority between intermediate courts of appeal in this country which requires resolution*".

Ultimately, the High Court ruled that education authorities (and the schools which they operate) are **not** liable in circumstances in which staff "employed" by schools (whether on contracts of employment, or under "agency" contracts) commit what amount to **criminal offences** during the course of activities which they have been engaged to conduct. But the legal arguments "for" and "against" provided teams with plenty of grounds for lively argument in both the preliminary and final rounds, in which two separate "problem scenarios" were constructed around the central theme of education authority liability for crimes committed by hired staff.

The first scenario, employed in the preliminary rounds, involved the hypothetical case of "Wilkinson v The State

of Queensland", and presented students with an invented set of facts in which a school pupil attending a sports camp organised by the education authority, and designed to enhance his latent talents as a rugby union player under the watchful eye of a professional rugby union player turned coach, was seriously injured by that same coach when he tackled him in a manner which constituted a serious assault upon him.

As in the High Court case on which the scenario was based, there were two arguments *in support* of the suggestion that the education authority was "civilly" liable for what the coach had done.

The "non-delegable duty" argument

The first was that the duty to ensure the safety of a student was "non-delegable", in the sense that the authority was required to virtually guarantee the safety of students taking part in approved activities, and could not evade that responsibility by the simple argument that 'someone else' was the person to blame. This argument runs along the lines of "It was your job to ensure safety, and you failed in that task by employing unsafe people to carry out your functions". Put another way, and in the words of Justice Gaudron in the Lepore case[3]

> *". . . . the school authority is liable notwithstanding that it engaged a 'qualified and ostensibly competent' person to carry out some or all of its functions and duties"*

The difficulty with that statement of law, and the most persuasive argument against it, is that it creates a legal regime in which

> *"The employer's duty to take care, or to see that reasonable care is taken, has been transformed into an absolute duty to prevent harm by the employee"*[4]

The "vicarious liability" argument

This argument is more familiar to students of the law of negligence, and proceeds on the basis that when an employee carries out duties allocated to him by his employer, those activities are to be regarded, in law, as the activities of the employer itself, and that, if performed negligently, they reflect on the employer as badly as if the employer itself had committed the negligent act.

The vital question is whether or not this principle may be made to extend to deliberate, unlawful and unauthorised actions (such as, in the *Lepore* group of cases, sexual assaults on students). Gleeson CJ, in *Lepore*[5], was prepared to accept that the concept of vicarious liability encompassed even unauthorised actions *"if they are so connected with authorised acts that they may be regarded as modes – although improper modes – of doing them"*, and that this might even extend to *"intentional and criminal wrongdoing"*.

This broad statement by the nation's Chief Justice was seized upon with relish by those school teams allocated the role of representing the appellant John Wilkinson, who nearly all argued that since the injury had occurred during the course of an on-field tackle demonstration, and the coach had been employed to conduct just such activities, therefore his actions were those of the education authority.

Against this, teams acting for the education authority adopted the words of Callinan J[6], who observed that

> *" . . . . deliberate criminal conduct is not properly to be regarded as connected with an employee's employment: it is the antithesis of a proper performance of the duties of an employee"*

Fogging the picture

There were also three other issues raised in the "Wilkinson" scenario, which both complicated and lengthened the debate, and tended to obscure the two central issues already identified.

The first was whether or not the coach in the case (who had been hired on a short fixed-term contract for the length of the "camp") really was an "employee" of the education authority, or whether he was an "independent contractor". If he was the latter, then there was a secondary issue as to whether or not the "vicarious liability" principle could be held to extend to the activities of *anyone* who might be described[7] as being part of the "enterprise risk" of the activity, regardless of their precise status.

The second was whether or not liability for negligence might be "grounded" in the fact that the resident manager of the sports camp had in the past received complaints about the coach's training style, and done nothing. Since the manager was undoubtedly an employee, and since his behaviour was "negligent", rather than deliberately criminal, this direct line to establishing liability was a tempting alternative to that of wading through the new concepts emerging in the *Lepore* case, and yet surprisingly few schools adopted it.

Finally, there was a strong suggestion on the facts that the plaintiff in the case had "volunteered" for his injuries, by being prepared to be the one tackled by the coach during the demonstration. Most defending teams spotted this possible argument, and much debating time was taken up in arguments about the true nature of the defence of **'volenti non fit injuria'**.

Given the number and complexity of these arguments – and their potential to interact with each other – it is hardly surprising that the academic staff from Bond Law School who crossed and re-crossed Australia as "judges" in the preliminary rounds returned with reports of varying levels and standards of legal debate. From each of the 9 regions, the judges chose the top teams to compete in the Finals in the Princeton Room of Bond University on Saturday 24 July, arguing for appellants and respondents in a completely separate, and newly-created scenario also based on the principles emerging from the *Lepore* case.

The 'final' problem

In *"Armitage v The State of Queensland"*, the villain of the piece was a private security contractor "hired" by a local school to patrol its premises on a nightly basis, following inadequate checks on his background and experience, and insufficient enquiry regarding his ability to perform the tasks allocated to him. Mistaking a student from the school as an intruder, and with an excess of zeal which resulted in his subsequent conviction for grievous bodily harm, the security guard injured the pupil so badly that his entire future academic career was jeopardised. The issue for the competing teams was whether or not the education authority was liable to the student in damages as the result of that incident.

In this new scenario, the facts established far more personal negligence on the part of the school Principal, both in failing to "check out" the security guard in the first place, and then ignoring obvious signs that he was not up to the job, and some "appellant teams" made this their main argument, seeking to avoid the *Lepore* issues entirely. They were unerringly brought back to them by the panels of "judges" assembled for the day (many of whom had been judges in the preliminary rounds), and a lively seven hours of debate ensued, with parents, fellow-students and school staff watching on from their seats in the auditorium.

After a brief recess, the judges announced that the Grand Final would be between St. Clare's College, Canberra, and St Hilda's School, from Queensland's Gold Coast. A brand-new panel of judges was then installed, consisting of Bond University's own Emeritus Professor Mary Hiscock and Associate Professor Bernard McCabe (a Federal Administrative Appeal Tribunal member), and Justice Margaret Wilson of the Queensland Supreme Court, and the two Grand Finalists then went back into battle, re-arguing the "Armitage" problem, and obviously making good use of the lessons they had learned in the earlier round.

At approximately 6 pm, the winner of the 2004 Bond University High Schools Mooting Competition was announced as St. Hilda's School, and everyone then adjourned to the Competition Dinner, before retiring to their hotels ahead of the long journey home the following day. Another successful and enjoyable High Schools Moot, and another advanced advocacy experience for some 400 of Australia's most talented "lawyers in waiting" and their school mentors.

All the provisional indications are that the 2005 Competition will be just as enthusiastically supported by schools across the nation, and plans are well underway to run a second Malaysian competition, using a separate case scenario. The Australian preliminary rounds in 2005 will involve issues of constitutional law and freedom of political speech, and all interested schools should contact Events Manager Cherie Daye on cdaye@staff.bond.edu.au.

References

1 [2003] HCA 4
2 at para.[6]
3 at para.[105]
4 per Gleeson CJ at para.[32]
5 at para.[43]
6 at para.[345]. He was supported in this by Gummow and Hayne JJ.
7 in the words of Gleeson CJ at para.[65] and Kirby JJ at para.[303], both of whom approved the suggestion that such a person would be someone for whose actions the entrepreneur was liable