Australia and New Zealand Education Law
Association (ANZELA) Conference

Novotel Hotel Brisbane
October 2 – 4, 2002

Paper Sessions
11.30 am – 12.20 pm
Friday 4 October

Topic: When Erratic Behaviour of Children
May be a Tell-Tale Sign of Sexual Abuse:
Lessons from AB –v- State of Victoria

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Abstract

Teachers and schools owe a duty of care to their pupils while they are in their care, control and supervision. The law lays down this basic rule very clearly. A pupil who suffers damage due to the recklessness of his/her teachers is entitled to be compensated for injuries that result from the acts or omissions of the teachers. The duty of care exits due to a special relationship between a pupil and a teacher and whenever and wherever the “teacher-pupil” relationship exits.

Generally, factors outside the control of teachers do not impose a legal obligation for them to be careful. However, the Victorian Supreme Court jury in AB –v- State of Victoria (15 June, 2000: Supreme Court of Victoria, unreported) decided that a pupil who showed erratic behaviour, including severe mood swings, used foul language, and drew pictures of male genitalia while in school was the victim of sexual abuse and that her teachers (principal and deputy principal) who failed to act despite a suspicion that the pupil may have been be sexually abused were negligent in their behaviour towards the pupil and, hence, liable for the pupil’s injury.

The case seems to have redrawn the parameters of schools and teachers’ responsibility to protect students from foreseeable injury. This paper examines the case AB –v- State of Victoria and discusses its implications for schools and teachers.
Introduction

Sexual abuse of children is not a new social problem, but it seems to have crept up into the educational arena lately. In 1997, The Sunday Age reported that, “sexual abuse of state-school students by teachers had reached an all-time high, with allegations made against 21 teachers in the past year, according to the Education Department figures”. The paper reported that “in the past two years there have been 38 paedophile and sexual abuse allegations against state school teachers and 71 in the past five years…. Similar rates of abuse were also prevalent in the private and Catholic school systems….”

Most recently, sexual abuse of school children by educators has made the headlines in major newspapers in this country. Sexual abuse of children by clergy and other church officials also came under the media spotlight and was aired in public with the church making a public apology and payments to victims and taking out public indemnity insurance policies to protect themselves from the cases of sexual abuse.

“Since the Fogarty Report in Victoria in 1993, and the Wood Royal Commission in NSW in 1996-1997, governments have had to make serious adjustments to investigations, procedures and penalties [for child abuse cases], or suffer the political consequences”.

The Federal Government’s interest in the safety and security of pupils in schools has also been reflected in the “Safe Schools Framework” announced by the Education Minister in July this year. The Framework provides mechanism to monitor and report publicly on safety in schools. It requires all schools in Australia to submit abuse action plans and mandatorily report the sexual abuse of pupils in schools.

The judiciary in this country has also grappled with cases of child sexual abuse in various school settings.

In June 2000, the Supreme Court of Victoria confronted an unusual and novel child sexual abuse case: AB –v- State of Victoria [unreported]. This case is peculiar in its

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1 “School sex-abuse at record high”, The Sunday Age, 26 October, 1997, p. 1
3 An interview with George Pell, the Archbishop of Melbourne on Channel 9, 60 Minute program, Sunday 2 June, 2002
4 “We acknowledge with deep sadness and regret that the evil of sexual abuse and other betrayal which have been committed by a small minority of Catholic Clergy…. We apologise sincerely and undeservedly to all victims of abuse and to the Australian community, for the wrongs and hurt suffered”, The Weekend Australian, June 8-9, 2002, p. 15.
6 “Church insured for abuse claims”, The Age, Monday July 1, 2002, p. 3
7 “To sir, with accusation”, Good Weekend, The Age Magazine, November 11, 2000, p. 24
facts, as the alleged sexual abuse neither occurred in school or committed by a
teacher/educator, nor on a school-related activity such as a school camp or excursion.
In fact, the abuse occurred at pupil’s home and was perpetrated by the pupil’s
stepfather.

The plaintiff (AB) alleged that the school staff should have picked up the signs of
sexual abuse and reported their suspicion to relevant authorities, or at least should
have linked the plaintiff’s erratic behaviour to her sexual abuse.

The Victorian Supreme Court jury found that the pupil who had severe mood swings,
used foul language, drew a picture of an erect penis, and whose teachers suspected
that she might have been the victim of sexual abuse, was entitled to damages in a case
of negligence against her school and the State of Victoria, as the teachers failed to act.

This paper examines the case and discusses its implication for schools and teachers.

**Background to the case**

AB, a seventeen-year-old girl from Victoria, previously a pupil in Carrum Primary
School from 1991-1992, alleged that the State of Victoria and two of its teachers were
negligent in not acting on the suspicion of her sexual abuse.

AB claimed that her stepfather sexually abused her between 1991 and 1995. While a
pupil at Carrum Primary School in 1991-92, she showed behavioural problems in her
class and on the playground. She drew sexually explicit drawings, including a
drawing of an erect penis in her Maths class. The teacher was concerned about AB’s
drawing, but did not discuss it with anyone in the school.

AB alleged that she was the victim of sexual abuse at home and her behavioural
problems reflected in her frustrations at school. She claimed that if her sexual abuse
was picked up and reported to the relevant authorities in 1991-1992, she would not
have suffered further abuse that continued until 1995.

Initially, she sought compensation from her mother, stepfather and the State of
Victoria on the grounds of negligence. Later, she withdrew her action against the
mother and stepfather. The State of Victoria applied to have the mother and stepfather
joined as co-defendants in the case.

AB alleged negligence on the part of her principal, deputy principal and the State of
Victoria through the Department of Education as they failed to take appropriate steps
to deal with her sexual abuse. She claimed that the cause of her physical and
psychological injuries was the teachers’ and the Education Department’s breach of
duty of care to her. She sought damages in respect of her injuries as a result of alleged
negligence of the State of Victoria through its employees.

AB’s stepfather was convicted of six counts of child sexual abuse in 1996 and was
sentenced to a total effective term of 38 months with a minimum term of 24 months
before he was eligible for parole. During the trial, AB’s stepfather maintained his
innocence of the charges, though he did not contest the charges in the witness box.
The stepfather represented himself in the trial and was allowed to cross-examine AB.

**Facts of the case**

AB was a nine-year-old girl in grade three at Carrum Primary School in Victoria when her deputy principal (the court called her Mrs Pat Jones) noticed her behavioural problems. AB had sudden mood swings from being extremely distressed to extremely happy. She drew rude pictures in her class, including a picture of an erect penis. “There was a seed of suspicion that the child was being sexually abused”, but Mrs Pat Jones did not discuss the matter with AB’s class teacher. At the trial the deputy principal asserted that she briefly mentioned AB’s behavioural problems to Mr Mirabella, the school principal, and suspected that AB might be a victim of sexual abuse. However, she admitted that she did not sit down with Mr Mirabella to report her concerns about AB’s sexual abuse.

Mrs Pat Jones claimed that she raised the issue of AB’s behavioural problems and suspected child abuse with her mother on three occasions and asked her whether the child exhibited the same sort of behaviour at home. Mrs Jones was told that AB’s natural father sexually abused her in the past and that was the reason why her mother had the sole custody of AB. The school did not keep any record of the meetings between Mrs Jones and AB’s mother. No court order was presented to Mrs Jones indicating AB’s sole custody arrangement. During the trial, the school principal admitted that the mother had provided the school with a copy of the consent order of the Family Court, but Mrs Jones was unaware of such an order. AB’s mother denied that she had any discussions with Mrs Pat Jones.


Mr Mirabella’s evidence indicated that the school had substantial difficulty in dealing with children with behavioural and learning problems. In 1991-92, the school had established a “Support Centre” where teachers provided the principal with a list of children who needed assistance. The principal had an outside resource to call in if it was necessary.

The principal did not recall receiving any verbal or written reports from Mrs Jones, regarding her suspicion or concerns about AB’s sexual abuse. He stated that if a report had been made to him he would have followed it up by seeking information from AB’s class teacher, by calling in AB’s parents and by seeking assistance from the “Support Centre”.

The principal stated that “it is my responsibility as principal if I know something like that is going on to report it, and to do something about it”.

He admitted that he had read the Education Department’s guidelines in the “School Information Manual”, but could not recall whether the guidelines related to sexually abused children.
The principal also admitted that the school did not have any policy concerning suspicion about sexual or any other kind of child abuse. He had not discussed any policy or issued any direction to his staff on how to deal with suspicions of child sexual abuse. Neither the principal nor any staff had undertaken protective behaviour training.

Mr Mirabella asserted that as a principal of Carrum Primary School, he had encountered only one case of child sexual abuse concerning a male pupil. The case was properly investigated and dealt with.

He accepted that his duty as a teacher was not only to see that the children were well educated but also he had an obligation to impart sound moral behaviour to them. Moreover, he admitted that if a child was showing psychological problems or disturbed behaviour, it was his duty to investigate it further and ‘to remedy the situation’.

Mr Mirabella maintained that the deputy principal did not report AB’s suspected sexual abuse to him and “if Mrs Jones made a report he would have done something about it”.

The questions before the jury were:

- Whether the State of Victoria was liable in negligence to AB;
- Whether both or one of the teachers were liable in negligence to AB;
- Whether the negligence of one or both of AB’s teachers was a cause of the aggravation of the plaintiff’s pre-existing condition;
- Whether the State of Victoria could claim contribution of damages from the former stepfather and the mother of AB if the State of Victoria was found liable in negligence to the infant plaintiff.

As jury deliberated on these questions, Justice Gillard provided clear and comprehensible instructions to the jury. On the principles of law, the honourable justice explained the concept negligence that involves:

- The existence of a duty of care;
- The proof of the breach of duty of care;
- The proof of a recognisable injury or damage; and
- The proof of causal connection between the breach of duty of care and the damage.

His honour held that “a teacher owes to a pupil a duty to take reasonable precautions for the safety of the pupil as a reasonable parent would have taken under the circumstances...the duty to take that care arises the moment the child passes out of the care and supervision of the parents and into the care and supervision of the teachers...A teacher has to take reasonable steps to protect a pupil from reasonably foreseeable injury”.

There was no dispute in the proceeding of the case that the State of Victoria and its employees owed a duty of care to AB. They had ‘the knowledge, the belief, the

10 AB –v- State of Victoria (2000), pp 29-30 (780)
suspicion and various ‘indicia’ that pointed to the fact that AB might have been sexually abused.

Both the principal and deputy principal “failed to take certain steps, having had certain knowledge” at the relevant time in late 1991, but into the beginning of 1992. If they had taken steps: “just by referring to the [School Information] Manual, Community Services Victoria, Investigation...all the unfortunate sexual abuse thereafter would have been avoided”.

The honour explained the type of damages that may be appropriate in AB’s case and instructed the jury to assess total damages to the plaintiff’s injury, including compensation for the acceleration of a pre-existing injury, pain and suffering and enjoyment of life, loss of earning capacity and future treatment.

The judge also referred to the principle of “vicarious liability” under which, an employer may be held responsible for the actions or non-actions of its employees. The judge stated that one “can sue the State of Victoria...for vicarious liability of an employee or agent of the state who at the relevant time was acting in the course and scope of his or her employment.”

There was no contest that both teachers during the period 1991-92 were acting in the course and scope of their employment at the time. The jury had sufficient evidence before them that at least the deputy principal had the knowledge of AB’s sexual abuse and she allegedly passed some of the knowledge on to the principal. The Department of Education had clear guidelines in its “School Information Manual” that if there was any risk of child abuse, the case should be investigated. “An average, reasonable, prudent, careful teacher in the position of Mrs Pat Jones and Mr Mirabella” should have taken appropriate action to investigate or report to the relevant authorities about the suspected child abuse of AB.

The jury found that The State of Victoria was liable under the ‘vicarious liability’ principle and in pursuant to the provisions of the Crown Proceedings Act 1958 (Vic).

The jury awarded a total damage of $490,000 for AB’s injury. However, the jury found that former stepfather of AB and her mother were also the cause of AB’s injury and the State of Victoria could recover a just and equitable amount (80% from the stepfather and 65% from the mother) from them. The jury asked the State of Victoria to pay $4,000 interest in the sum and the legal costs of the action.

So, what lessons can be learnt from AB’s case and what implication does this case has for schools and teachers?

One would find numerous examples of the case law in Australia where school systems have been held liable for the careless actions of their employees, provided the

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11 ibid, p. 33 (780)
12 Crown Proceedings Act 1958 (Vic), section 23 provides that “The Crown shall be liable for the torts of any servant or agent of the Crown or independent contractor employed by the Crown as nearly as possible in the same manners a subject is liable for the torts of his servant or agent.…. 
13 AB –v- State of Victoria, op. cit., p 26 (780)
pupil’s injury occurs in school or school related activities. Generally, the education authority being the employer (respondeat superior) of the teacher assumed responsibility of the careless acts or omissions of its employees and compensated the aggrieved pupil. School of the Future Reference Guide, Victoria, for example, states that “when a teacher employed by the State of Victoria is joined with the Crown as a defendant a solicitor appointed by the Department will act on the teacher’s behalf, unless the circumstances of the case are such that a teacher should have separate representation. Furthermore, if the teacher is (as is most unlikely) a sole defendant in a case alleging injury through negligence in the performance of duty and, having defended by a solicitor appointed by the Department, is found to have been negligent, the damages and costs awarded will be paid by the State” (September 1996: Reg. 6.14.2.1).

The courts have awarded damages if the educational administrator (such as the principal of a school) failed to:

- supervise its employees;
- investigate rumours, reports, complaints or suspicions of sexual misconduct of its employees;
- train its employees to respond adequately to signs, reports and complaints of sexual misconduct; and
- hire its employees carefully.

AB’s case seems to send “alarm bells right around the nation if teachers are expected to pick up on [child sexual] abuse”. Research shows that children who are sexually abused exhibit behaviours such as:

- Hyperactivity
- Moodiness
- Talking nonsense
- Regression in behaviours
- Social difficulties
- Falling behind in school and other warning signs of sexual abuse.

The facts of the case indicate that AB was showing the telltale signs of sexual abuse. At least one of the teachers was aware of AB’s behaviour. Nevertheless, she failed to take appropriate action to report to the relevant authorities about her suspicion, thus falling below an acceptable standard of a reasonable prudent teacher.

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17 Mary Bluettt, President of Australian Education Union, Victorian Branch, quoted in The Australian, 17-18 June, 2001, p. 3.
It can be argued that AB’s case was a trial by jury, therefore does not create a precedent for Victorian courts. Nonetheless it seems to have set conditions for a successful case in Queensland where the jury awarded compensatory and exemplary damages to the victim of sexual abuse totalling over $800,000 against the Diocese of Brisbane.\(^{19}\)

It is fair to say that these novel category of cases highlight the fact that:

- allegation and suspicion of child abuse, particularly child sexual abuse, should be taken seriously and the warning signs must be understood, identified, investigated and reported to the relevant authorities;
- teaching and non-teaching staff should be provided with appropriate training on child protection issues; and
- schools must keep proper record of the child’s progress and behaviour in school and should follow up erratic and abnormal behaviour of pupils.

**Conclusion**

This case is a timely reminder for schools to be vigilant about children’s safety and wellbeing. The principles of tort law can be used by pupils to remedy a wrong that otherwise considered to be the matter of criminal law.

Since 1993, the teachers in Victoria have statutory obligation to mandatory report to the Department of Human Services the cases of physical and sexual abuse of children, which they become aware of during the course of their employment. A failure to report such abuse constitutes an offence punishable by fine up to $1,000.\(^{20}\) Under the current statutory regimes, it is easier for the victims of sexual abuse to establish a breach of duty of care if the statutory standards are transgressed.

Needless to say that the Federal Government’s initiative of “Safe Schools Framework” that requires schools to mandatory report the cases of child sexual abuse, the statutory requirements of mandatory child abuse reporting under various state legislation, and the judiciary’s interest in the issue, indicate that the victims of sexual abuse have many more avenues to argue their case.

The school systems, therefore, should be mindful of their legal responsibility towards pupils and ensure the safety and security in schools. At least, AB’s case prompted the Victorian State Premier to seek advice whether teaching and non-teaching staff in Victorian state schools need retraining on child protection issues so that they could appropriately discharge their duty of care to pupils in future.\(^{21}\)

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\(^{19}\) S –v- The Corporation of the Synod of the Diocese of Brisbane [6 December, 2001 OSC 473]
\(^{20}\) Section 64 of the Children and Young Persons Act 1989 (Vic)
\(^{21}\) “Teachers go on red alert for sex abuse”, The Weekend Australian, June 17-18, 2000, p. 3.