TEACHER LIABILITY IN NEGLIGENCE FOR MANDATORY REPORTING FAILURES

HANNAH FAYE MCCONAGHY
BBus(Man) BCI(Mus) GradDipSecEd GradCertRE MICLaw
hannah.mcconaghy@mail.com

ABSTRACT

The mandatory reporting laws for child protection covering Australian teachers, particularly in Queensland, have been instigated to ensure the safety of all students. While most teachers attempt to follow the guidelines for reporting, it can be difficult for them to fully comprehend their reporting requirements and, furthermore, the ramifications they could face should they fail in their responsibilities.

Given there is yet to be a case in Queensland where a teacher has been found liable in negligence for failing to submit a mandatory report of their suspicions of child abuse, it is difficult to determine whether it is actually *possible* for a teacher to be found negligent in this area. There is evidence within the court system of both successes and failures in other sectors in determining whether a third party could be held to have a duty of care to report abuse. This leaves it open for the potential for this to occur in the future in the education sector.

While the ultimate focus for mandatory reporting laws is to protect the child, it is also important for teachers to feel safe in their profession in order to complete their role and tasks with the children effectively. Therefore, given written legislation and case law cannot confirm or deny the possibility of a teacher being found liable in negligence for failing in their mandatory reporting duties, the conversation is one that needs to be started.

Keywords: teacher, mandatory reporting, negligence

I INTRODUCTION

The recent Royal Commission has seen a media frenzy surrounding the testimonies of Cardinal George Pell, the most senior Catholic in Australia, who has denied knowing about the existence of paedophile priests during the 70s and 80s.[1] While he himself has not been the subject of substantiated child abuse claims, it has been suggested that Cardinal Pell was aware of circumstances of abuse and did not step in to protect the victims.[2] This has formed a discussion on an interesting element in Australian Law. That is, to what extent is a third party responsible and/or liable for child sexual abuse?

While the laws on adults abusing children are clear, they most commonly involve two parties: the alleged perpetrator and the victim. It appears as though a shift is currently occurring in the Australian mindset which is increasingly attributing blame to third parties in addition to those who may have had either a 'reportable' or a 'reasonable' suspicion of abuse, who now under law may be required to report this. This shift is represented in laws governing schools,

[1] Author Unpublished, 'Australia's Cardinal Pell testifies from Rome in abuse inquiry' *BBC News* (online) 29 February 2016, 6

[2] Dan Box, *Cardinal George Pell Know of Abuse for a* Decade (16 September 2016) The Australian <http://www.theaustralian.com.au/national-affairs/in-depth/royal-commission/cardinal-george-pell-knew-of-abuse-for-a-decade/news-story/393ece2b1271cf609904d60aa6cae541>

with respect to the mandatory reporting laws that require teachers and other relevant persons to submit reports. However, even with these reporting laws, it is still difficult to support the proposition that a teacher who *suspects* abuse could be liable for *causing* any ongoing harm caused by their failure to report their suspicions.

For a teacher in a Queensland school today, this difference is a very important one. For while schools must keep relevant child protection policies to deal with a teacher's suspicion of child abuse, the ramifications for a teacher if they fail to submit a report are at this time unclear. The notion that their failure to submit a report on their suspicions of abuse could hold them liable for *causing* the ongoing abuse is a scary consideration indeed.

At this point, limited case precedent exists on the issue, as there has not yet been a successful case against a teacher for failing to report their suspicions of child abuse in Queensland.[3] However, that is no guarantee that in time we will not begin to see cases of negligence in failing to exercise a teacher's statutory power begin to appear. In fact, the case *Glennie v Glennie*,[4] which we will discuss within this paper, highlights the potential that we could begin to see these cases enter our courts.

Ultimately, it is the opinion of this paper that it could indeed be possible for a teacher to be sued for negligence under tort law for failing to file a report on their suspicions of abuse. However, as a case has not yet gone through Queensland courts in this area, it is impossible to tell how the courts will handle the issue. Certain flags within case law from other jurisdictions, and community discussions, are being raised to suggest that we could soon see these cases begin to emerge in the future. Should this begin to occur, it will be even more important than ever before for teachers to know, understand, and complete their reporting requirements.

This paper is to be considered as a starting point for conversations on this topic. Given that few academics have commented on the issue to date, it is hoped that this paper will raise awareness of the current situation and how it needs to be improved. This paper is by no means an exhaustive analysis of all laws pertaining to teacher's duties or powers to report suspected child abuse, nor the implications that could occur should they fail to do so. However, it will identify a number of key factors in the situation and commence a discussion as to how they can affect teacher liability.

II QUEENSLAND CHILD PROTECTION REPORTING LAWS

Firstly, in order to understand whether a teacher can be sued for negligence, it is necessary to briefly outline their mandatory and non-mandatory reporting duties.

A *Non-Mandatory Reporting of Risks of Significant Harm other than Sexual Abuse*

Firstly, a report which is made referring to a **"Reasonable" Suspicion** includes a report which is based on the belief that a child has, is, or is at risk of, suffering significant harm

[3] *AB v State of Victoria* Unreported, Supreme Court of Victoria, Gillard J, 15 June 2000 saw a successful case of negligence for a Principal who failed to report what should have been a suspicion of abuse. However, this occurred before the introduction of mandatory reporting laws as we see them today.

[4] [2009] NSWSC 154

which is *not* caused by sexual abuse.[5] In these instances, a teacher may form their belief that abuse is occurring by considering any detrimental effects on the child's body as well as what the child's psychological and emotional state is. This could be caused by the act of abuse, or by the omission of care; neglect.[6]

A teacher has the discretion to decide whether a report of this nature is made, as reporting of reasonable suspicion is at this time in Queensland not mandatory, providing there is no suspicion of a criminal offence relating to the child (in which case a report must be made to the police).[7] In deciding whether to make a non-mandatory report of this nature, often influences other than statutory provisions (such as workplace culture, school policy documents, etc.) may help a teacher to determine whether a report is made.

B *Mandatory Reporting of Sexual Abuse and other Significant Risks of Harm*

According to Queensland laws, sexual abuse falls into the second category of reporting procedures, called 'reportable suspicions'. A report made referring to a "Reportable" Suspicion is a report covered by mandatory reporting requirements, which apply to doctors, nurses, teachers and police officers.

According to the *Child Protection Act 1999*,[8] a 'relevant person' (that is, a person who mandatory reporting laws apply to) must only follow mandatory reporting guidelines if they form their suspicions while engaged in their professional employment. The legislation outlines this as following:

> If a relevant person forms a reportable suspicion about a child in the course of the person's engagement as a relevant person, the person must give a written report to the chief executive under section 13G.[9]

Therefore, a teacher needs only make a mandatory report if they form their suspicion of abuse while in their employment. This does not mean that the teacher must witness the abuse during their employment. Nor does it mean that the abuse has to have occurred within the learning environment. Rather, the teacher must form their suspicion of abuse while within their work as a teacher.

These requirements dictate that suspicions made under this category *must* be reported using the legislated guidelines.[10] This includes reports that based on a reasonable suspicion that a child in need of protection has, is, or is at unacceptable risk of, suffering significant harm caused by physical or sexual abuse.[11] Two elements of a reportable suspicion need to be considered separately, to accurately determine the statutory duties of teachers to report.

Firstly, before even outlining what abuse incurs a reportable suspicion, the statute limits reporting to a 'child in need of protection'. According to the *Child Protection Act 1999*, a child in need of protection is a child who

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[5] *Child Protection Act 1999* (Qld) s13C
[6] Ibid s 9
[7] Ibid s 14
[8] Ibid s 13E
[9] Ibid
[10] Ibid
[11] Ibid

a) Has suffered significant harm, is suffering significant harm, or is at unacceptable risk of suffering significant harm; and
b) Does not have a parent able and willing to protect the child from harm. [12]

When determining whether to make a report, a teacher must not only form a reasonable suspicion that a child is suffering significant harm, but they must *also* be unprotected by an able or willing adult. The inclusion of the latter aspect adds an element of judgement to a teacher's decision-making process that could be difficult for a teacher to determine. That a teacher needs to use their own judgement in determining such a difficult aspect of a child's home situation feasibly works against the notion of a mandatory reporting guideline, which in theory *encourages* the lodgement of reports. Furthermore, it brings into question to what degree a teacher's judgement on the issue is reasonable. As every teacher is raised in a different home setting with different degrees of parent interaction and protection, it is likely that the subjective nature of this judgement could create a great divide amongst teachers considering this question using their own pasts and experiences as reference. In that regard, who exactly has the 'correct' frame of reference on whether or not a parent is able and willing to protect their child?

As Underwood points out, an educator's role is neither to form an official investigation into the abuse nor to interrogate the child or the potential abuser.[13] Therefore, when faced with minimal information about the abuse and without the freedom to form an investigation into the facts, a teacher must make a determination as to the child's situation and the likelihood that either their parent is abusing them or their parent is willing and able to protect them. This appears to place teachers in a difficult situation where they must make impacting decisions on little information.

Therefore, the suggestion that a teacher could be negligent for failing to submit a report of suspected abuse is a complicated one, given that so much personal judgement is required on behalf of a teacher to determine whether a report is even necessary.

III THE POTENTIAL IMPACT OF GLENNIE V GLENNIE[14]

While we have discussed the role that the Royal Commission into Institutional Responses to Child Sexual Abuse and the testimonies of Cardinal Pell has had in bringing this topic to the forefront of society's minds, the *Glennie v Glennie* case has also highlighted the timely need for these discussions to occur.

In brief, this case involved a child that was sexually abused by their father over a period of time. During this time, the uncle of the child, who happened to be a medical practitioner, was aware of the abuse. While the uncle met with the father and reportedly told the father to stop abusing the child, the uncle failed to submit any form of child protection report in order to protect the child from ongoing harm.

The case which has already gone before the courts was concerning the statute of limitations. This case was challenging the limitations, claiming that the child (now a woman) had not been in her right mind during this timeframe as a result of the abuse she suffered when she was younger. Her intention was to have the statute of limitation waived so that she could

[12] Ibid s 10
[13] Julie Underwood, 'Educators have unique role in reporting suspected abuse' (2016) 97.2 *Kappan Magazine* 2.
[14] [2009] NSWSC 154

then pursue both her father and her uncle for damages for the harm that was caused to her as a child. It is possible that the uncle, as a medical practitioner, could be held to the same mandatory reporting laws which require some professionals (including teachers) to report suspected child abuse.

While the judge presiding over the case provided no comment on the situation or the likely success or fail of the resulting case, the statute of limitations was waived in order to allow the proceedings to continue. This in itself forms an interesting turn, in that allowing the case to continue through the court system presents the possibility that this could be a novel case through the system which sees a professional who is covered by the mandatory reporting laws sued for failing to submit a report of suspected sexual abuse. As the cases against her father and her uncle are yet to be heard, it is impossible to tell whether or not they will be successful. However, regardless of what the end verdict will be, the case could have a profound impact.

As both the medical profession and the teaching profession are covered by the same mandatory reporting laws for child abuse, there is a direct link between the results of this case and the education sector. While the two industries are very different in many ways, the common link of the reporting laws means that developments which occur within the medical profession could be mirrored within the teaching sector.

Should the case against the uncle be successful, and the victim is ultimately awarded damages for the abuse she suffered because of the uncle's failure to report the abuse to relevant authorities, this could set a precedent. The success of this case would mean that for the first time a third party who is covered by mandatory reporting laws is held liable for the abuse committed by another person. This could have dramatic effects for both past abuse victims and those in the future, as it presents to them a civil pathway in order to gain compensation for the resulting harm from the professional's failure to report. Should this happen, we could see a number of flow on effects on not only the medical industry, but also the teaching profession.

Assuming, based on *Glennie v Glennie*, the courts are willing to hear a case of negligence, let us discuss how the tort of negligence can apply to a teacher and the elements which would need to exist in order for the case to be successful.

IV Do Teachers Have a Duty of Care to Report?

In order to determine the existence negligence, it needs to be determined that a duty of care exists in the common law. For, if a duty of care does not exist, it is impossible to say that they have been negligent. While we have discussed that teachers have a statutory duty to report certain suspicions of abuse, it must be determined this statutory duty raises a duty of care at common law.

In the *x (Minors) v Bedfordshire County Council* case, the following consideration was made:

> In order to found a cause of action flowing from the careless exercise of statutory powers or duties, the plaintiff has to show that the circumstances are such as to raise a duty of care at common law. The mere assertion of the careless exercise of a statutory power or duty is not sufficient.[15]

We must recall that we are considering whether teachers owe students a duty of care to protect them from suffering a *specific kind of harm*. It is not enough for us to say that

[15] [1995] 2 A.C. 633, 104

teachers hold a duty of care towards their students to protect them from all harm, as according to statute they are only responsible for providing a safe learning environment (as opposed to protecting children from harm *at all times).* The *Education (General Provisions) Regulation 2006*, which refers in numerous circumstances to the *Child Protections Act*, details that schools must be managed in such a way that promotes a safe, supportive and productive learning environment.[16] While teachers, as individuals, need to work in a way that does not negligently cause harm, this statute details that their accountability is for the learning environment – not over the child in general. This is quite an impacting consideration for, while a teacher will no doubt naturally hope that a child is safe from harm, the legislation that governs them specifically refers only to their control over the learning environment, rather than the child in general. Therefore, we must raise the question of whether or not a teacher is responsible for protecting a child from harm when that child is *beyond* their learning environment.

Rather than working with the overarching assumption, then, that a teacher owes a student a duty of care to keep them safe, we must work with a more specific definition of a teacher's duty of care. Specifically, we will work with the notion that a teacher has a duty of care to report their suspicions of child abuse, in an effort to prevent ongoing harm to a child.

As there has never been a case in Queensland of a teacher who has been sued for failing to submit a mandatory report of their suspicions of child abuse, we must turn to other cases that deal with the civil liability of third parties in order to analogise whether or not it is in fact possible for a case such as this to occur. Of the cases that deal with the negligence of third parties to exercise their statutory powers, three cases form a useful picture with which we can surmise what the outcome could be for teachers. These cases include *Graham Barclay Oysters Pty Ltd v Ryan* (the *'Barclay Oysters'* case),[17] *Stuart v Kirkland-Veenstra* (the *'Stuart'* case)[18] and, finally, *Crimmins v Stevedoring Industry Finance Committee* (the *'Crimmins'* case).[19] Each of these cases deal with the question of duty of care differently, and ultimately form a picture of when a third party *can* be held liable (as in the case of *Crimmins*), and when a third party *cannot* be held liable (as in the *Stuart* and *Barclay Oysters* cases).

In order to form a structure for our analysis, we will turn to the *Crimmins* case, which identified a number of elements that should be satisfied in order to determine that a duty of care exists. The *Crimmins* case was brought against the Australian Stevedoring Industry Authority, because of a waterside worker being diagnosed as suffering from mesothelioma, which is caused by the inhalation of asbestos fibres. This case was interesting in that it was brought against the authority which overseas stevedoring operations, rather than the specific employer of the man who fell ill. While the duty of care for an employer towards their employee is well established, this case brought into question whether the authority was liable as a third party to this. Within the deliberations of this case, the judges identified a number of aspects that need to be met in order to establish whether a duty of care exists between an authority and a third party. Included in these are

- whether the authority holds sufficient power to intervene to minimise risk of harm

[16] (QLD) s5
[17] [2002] HCA 54
[18] [2009] HCA 15
[19] [1999] HCA 59

- whether the authority holds sufficient control over the risk of harm
- whether the plaintiff is vulnerable and therefore reliant on the authority to exercise its powers, and
- whether the authority has knowledge of the potential harm.

While this in no way forms an exclusive list for factors that determine whether a duty of care exists, they will form the structure for our discussion here. Let us look at how the three cases have dealt with these factors in order to establish whether a teacher could have a duty of care to the child to report their suspicions of child abuse.

A *Knowledge*

As perhaps the simplest of the elements of a duty of care to establish, knowledge of the potential risk for harm forms the initial basis required to establish whether a duty of care exists. For if a person or authority is not aware of a situation, it cannot be possible for them to be held liable for the harm which occurs. As pointed out in the *Crimmins* case, knowledge is a prerequisite of a duty of care in cases, for "it would offend current community standards to impose liability on a defendant for acts and omissions which he or she could not apprehend would damage the interests of another."[20] In looking at the duty of care for teachers, it is possible to determine, then, based on the statutes, that a duty to report suspected abuse can only be formed if the teacher actually holds a suspicion of abuse. If a teacher has no knowledge of the situation that is placing the child in harm, they cannot hold any duty to exercise their powers in the situation.

However, having knowledge of a risk alone is not sufficient to establish that a third party holds a duty of care. As pointed out in the *Stuart* case,

> The co-existence of a knowledge of a risk of harm and power to avert or minimise that harm does not, without more, give rise to a duty of care at common law.[21]

While we will look in further detail at the power to avert or minimise risk, it is important to understand that knowledge in itself is not sufficient to establish a duty of care. Therefore, it cannot be said that the fact that a teacher is aware of abuse occurring to a child is enough to guarantee that they hold a duty of care to report the abuse under the common law.

For a teacher, this is an interesting consideration. The media representation of Cardinal Pell throughout the recent Royal Commission into Institutional Reponses to Child Sexual Abuse demonstrates society's stance that (allegedly) having knowledge of a situation should be enough to instigate a duty of care to report it. Regardless of ultimately whether he knew of the abuse or not, society sees that suspicion of abuse should be enough. And while it is possible that it could be, the comment made in the *Stuart* case highlights that this may not be enough. There must be other factors which 'co-exist' with the knowledge in order for a duty of care to exist.

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[20] [1999] HCA 59 12, 101
[21] [2009] HCA 15, 16, 88

B *Vulnerability*

Of the three cases looked at here, the only case that was ultimately successful in determining that the third party *did* hold a duty of care was the *Crimmins* case. While there were numerous reasons for this, one of the reasons why this case was successful was that the person harmed was vulnerable, and relied on the Authority governing their industry to ensure that safe workplaces were maintained. In this case, it was decided that the Authority should have given orders to encourage safe working conditions for workers because of the vulnerability of them. The case used the term 'vulnerable' as practically, having little or no capacity to protect themselves.[22]

> Crimmins was not only vulnerable to injury by reason of the hazardous nature of his employment but he was less able than employees in most other industries to protect his own interests. The casual nature of his employment precluded the development of any long-standing employer-employee relationship in which he might usefully seek to secure his own health and welfare.[23]

The *Stuart* case, however, was critical of the emphasis placed on vulnerability in the *Crimmins* case. The judge stated that vulnerability when considered as it was in the *Crimmins* case is not universally accepted as a 'useful tool' for determining duty of care.[24] There must be other considerations (such as knowledge, power, control, etc.) within the decision-making process, in order to establish a duty of care. This notion is supported in the *Barclay Oysters* case, which states

> Vulnerability, power, control, generality or particularity of the class, the resources of, and demands upon the authority, may each be, in a given case, a relevant circumstance, but none should, I think, of itself be decisive.[25]

In looking at our situation of determining whether a teacher holds a duty of care towards their students for reporting their suspicions of abuse, if relying purely on the consideration of vulnerability, it would be easy to determine that a teacher would hold the duty. While *Crimmins* was vulnerable because he did not have the power to negotiate safe employment, it can be determined that children too are vulnerable in the eyes of the law that may therefore increase the duty of care that is owed to them. For if a child is being harmed, they may not necessarily be able to find help to get themselves away from the hazardous situation. Additionally, a child is not able to secure their own health and welfare for the fact that they are reliant on others (presumably adults) to protect their interests. Therefore, in looking at the treatment of vulnerability within the *Crimmins* case it could be suggested that, based on the vulnerability of children, a teacher could be held to hold a duty of care towards them.

However, the *Stuart* and *Barclay* cases – while still considering the vulnerability of plaintiffs, identify that vulnerability- like knowledge, is not enough to establish that a duty of care is owed. While we cannot predict exactly how a case such as ours would be treated before the courts, the fact that two cases have identified that vulnerability is not enough to establish a duty of care suggests that it cannot be guaranteed that a teacher would be held to hold a duty based solely on the vulnerability of the children towards harm.

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[22] [1999] HCA 59 12, 100
[23] [1999] HCA 59 7, 44
[24] [2009] HCA 15, 23, 133
[25] [2002] HCA 54 61, 321

Therefore, it is necessary to consider two other major sources that could potentially carry more weight in the conversation. That is, whether – despite the vulnerability of the children – the power to act is enough to determine a duty of care and, whether acting could actually hold sufficient control over the situation to minimise the risk of harm. Let us look at these elements separately.

C *Power*

We must consider now whether the power invested in teachers through the statutes to report their suspicions of abuse is sufficient to place a duty of care on the teachers.

As considered in the *Stuart* case,

> There can be no duty to act in a particular way unless there is authority to do so. Power is therefore a necessary condition of liability but it is not a sufficient condition. Statutory Power to act in a particular way, coupled with the fact that, if action is not taken, it is reasonably foreseeable that harm will ensure, is not sufficient to establish a duty to take that action.[26]

Let us break this into two sections.

Firstly, the judge states that there can be no duty to act in a particular way unless there is authority to do so. In looking at our situation of teachers reporting their suspicions of abuse, it could be said that teachers *do* have an authority to act in a particular way (which is to file a report of their suspicions of abuse) as a result of the legislation governing both mandatory and non-mandatory reporting of abuse. However, these two types of reporting do not instil equal powers onto the teachers.

In the case of a mandatory report (which covers suspicions of sexual abuse), it can be said that a teacher holds a statutory duty to report their suspicions. This duty simultaneously creates a power for a teacher to act in such a way that causes action to prevent ongoing harm for the child. However, it is important to note that a teacher does not automatically hold the power to submit a mandatory report of abuse upon realising that abuse is occurring. For as we discussed in terms of the statutes, there are a number of elements to the formation of a suspicion that must be satisfied before a report must be filed. Therefore, it is only when all of these factors are met that a teacher can be said to hold the power.

This issue was discussed in the *Stuart* case, which discussed whether police officers who chose not to apprehend a man who then went on to commit suicide owed the man a duty of care to prevent him from harming himself. In this case, it was discussed that the powers invested in police officers to apprehend a person *only* exist when certain requirements are met – such as believing that person was mentally ill. As the officers genuinely did not believe this criterion was met, their powers to apprehend him were not 'enlivened'.[27]

This is an interesting consideration for teachers, as it demonstrates that a teacher's power to submit a report of mandatory abuse is not 'enlivened' until they believe the criterion are met. Therefore, unless this belief exists, there is no duty to submit the report. This does not discuss whether they *should* believe the criteria are met. Rather, that they *do* or *do not* believe it is met. As stated in the *Stuart* case, "the opinions held by the police officers were

[26] [2009] HCA 15, 14, 112
[27] [2009] HCA 15, 9, 62

considered and reasoned. The statute requires no more".[28] Should the teacher operate in a way that is considered and reasoned, it cannot be said that more is required of them.

However, in the case of non-mandatory reporting, it can only be said that they hold a statutory *power*, rather than a statutory duty. The power which they hold, given it is not mandatory for them to exercise their power, is said to be a discretionary power.

The *Barclay Oyster* case deals with the discretionary power of the council with regard to the council's decision to monitor the quality of the water in the lake. While the council did decide to monitor it for three years, the fact that this was discretionary meant that it created *no* relationship with the oyster consumers such that the failure to continue monitoring it was a breach of duty of care.[29] Therefore, it was at liberty to continue monitoring or to cease monitoring the quality of the water without paying regard to the consumers of the oysters.

Therefore, when applied to teachers, while a teacher with a discretionary power to report non-mandatory suspicions of abuse can certainly work to minimise harm for the child, choosing to file a report does not necessarily create a relationship whereby failing to report could be considered as a breach of duty of care. As the power to file a non-mandatory report is discretionary, teachers hold the authority to decide whether to file the report without considering their duty of care towards the students.

The second consideration, then, in the discussion from the *Stuart* case, is that it is not sufficient to say that a power to act when coupled with the likelihood that failing to act will cause harm, creates a duty of care. Similar statements have already been discussed in regards to the vulnerability of plaintiffs and the knowledge of the risk of harm. To add therefore the idea that the power to act in addition to these other factors, in isolation, will not create a duty of care, compounds the issue of determining whether a duty of care is held. This leaves one final element of our discussion. That is, whether despite the vulnerability of the plaintiff, the knowledge of the risk of harm and the power to act, a third party's actions to minimise the risk of harm actually give them sufficient *control* over the situation to enact a duty of care.

D *Control*

While it can be determined that a third person may have power to act, that they have knowledge of a situation with potential risk, and that the person at risk is vulnerable; there is no guarantee that their actions could actually work to control the element of risk to the third party. In our case, this discusses whether a teacher's acts or omissions actually *can* affect whether or not the child is still harmed by the abuser. In discussing how control impacts on the question of duty of care, each of the cases studied comment on this issue and how it factors in whether or not the third party was found liable.

In the *Stuart* case, two police officers were sued for negligence in failing to apprehend the suicidal man. This case, which ultimately failed, considered not only whether the officer's actions should have occurred but also whether – had they acted, they could have ultimately prevented him from taking his own life. In the discussion, the judge stated the following:

> The control able to be exercised by the officers was of a limited nature. It was not apparent that the exercise of the power could have removed the risk to the deceased.[30]

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[28] [2009] HCA 15, 19, 149
[29] [2002] HCA 54 17, 97
[30] [2009] HCA 15, 4, 27(iii)

This is an important consideration in our discussion, as it highlights that it is not always possible for a person with power to act to actually change the element of risk to a third party. In the *Stuart* case, the underlying element was that the man ultimately wanted to end his life. While apprehending him *may* have prevented this from occurring for a certain amount of time, ultimately it was beyond the officer's control to stop the man desiring to take his life.

A similar decision was reached in the *Barclay Oysters* case, in that the court found that even if the council *had* stepped in to further control the water quality of the lake, it would not have averted the risk of the harm to the consumers. In this case, it was stated that the risk arose because of the influx of heavy rainfall and *not* because of the council's actions.[31] Therefore, the council's actions ultimately had no control over how much risk was placed on the consumers of the oysters.

Realistically, there appear to be few occasions in law where a person is in direct control of another person's actions at all times. A suggestion of when this could occur is within a corrections facility, where a criminal's ability and freedom to protect themselves is placed in the hands of their carers who hold full control over whether the inmates may come in contact, whether there are other protections surrounding them if they do, and whether a safe escape pathway is available to a potential victim.[32] However, it is only because an inmate must give up their own personal freedoms in favour of a warden knowingly taking full control over them that this exchange can occur. The fact that, in the case of teachers, the abuse is being committed by a separate person over which they have no control, they realistically have little control over the harm that the child is placed in risk of.

In contrast to these two cases, the *Crimmins* case *did* find the Authority liable as a third party to the harm that was caused. The reason for this was that, unlike the other cases where the third parties had no control over the harm that was caused, the Authority in this case could have controlled (or at least minimised) the risks by exercising their statutory powers.[33] Whereas the third parties in the other cases could have taken actions which may or may not have minimised the risks, the Authority could have exercised their control not only over the working conditions but also where the workers were sent. Therefore, they could have prevented the risk to the workers in a way that the other cases could not have.

In our case of teachers, it is difficult to see how a teacher's actions will *directly* influence the risk of harm to a child. As the first step in the reporting chain, a teacher who raises a concern over their suspicions of abuse will pass their report onto an authority who can then intervene in the situation. While the authority cannot act unless the report is submitted to them, they are actually the party in the case who hold the control in the situation. Therefore, in determining whether a teacher holds a duty of care to report their suspicions based solely on their control over the situation, it would be difficult to ascertain that a teacher could actually control the outcome through their acts or omissions.

V Intention of the Legislation

The *Stuart* case made reference to the case of *Smith v Leurs*[34], where it stated "the common law generally does not impose a duty upon a person to take affirmative action to protect

[31] [2002] HCA 54, 52, 293
[32] consider *Howard v Jarvis* (1958) 98 CLR 177
[33] [2009] HCA 15, 15, 115
[34] (1945) 70 CLR 256

another person from harm".[35] This comment, despite the fact that a child is a vulnerable party who may rely on the actions of others to protect them from abuse, could suggest that – while a teacher has a mandatory reporting duty for sexual abuse, further than upholding this statutory duty, they may not necessarily be held to have a duty of care to protect the child from abuse. For it is possible that, even if a third party may have sufficient control over a situation in order to prevent harm occurring, the existence of a duty of care on them to do so could be contrary to the intentions of the legislation which gives them power to do so.

The case of *Hunter and New England Local Health District v Merryn Elizabeth McKenna*[36] discussed this very issue, as to whether or not imposing a duty of care on the third party (in this case the hospital) is contrary to the intentions of the legislation. In this case, it was argued that the health authority's decision to release a man from a mental health institution made them liable for the harm caused when the released patient then killed another man. Now in this situation, it is possible to see that a health authority can possess a high degree of authority over the person in their care and, effectively, control over their actions. However, this could be incompatible with the intention of the legislation which gives them their authority.

For, if health authorities were to be held liable for the harm caused by a released patient, it is foreseeable that they would prolong the care of patients to prevent their own liability. While this may see that patients get the care they need, the effects of this are far reaching. By holding patients for longer than necessary, medical costs could grow exponentially, and greater strain could be placed on the health industry than necessary. While it serves a purpose to protect the health professionals from liability should a released patient cause another harm, it effectively harms others by limiting the care that they can receive.

In using this analogy in the education sector for reporting, if a teacher *is* held to a duty of care for reporting suspicions of abuse, it could potentially be incompatible with the intentions of the legislation. While more cases of abuse may be investigated, the very strain placed on the investigative authorities caused by the over-reporting of teachers trying to minimise their liability would mean that investigations would take too long in order to be done while still useful. Furthermore, the distress of teachers caused by the potential for liability could mean that they are less effective in their roles as teachers, therefore further damaging the effectiveness of the reporting provisions.

VI CONCLUSION

Ultimately, our discussion of the three cases of *Graham Barclay Oysters Pty Ltd v Ryan*,[37] *Stuart v Kirkland-Veenstra*[38] and, finally, *Crimmins v Stevedoring Industry Finance Committee*,[39] have found that when considering whether a third party can be held liable for harm caused, the verdict can go either way. Each of these cases held similarities in that they featured a person or body in a position of authority who did not use their statutory powers to act in such a way as to prevent harm to a person. However, while two of these cases found that the third party did *not* owe them a duty of care, the third case found that they *did*. The

[35] [2009] HCA 15, 16, 127
[36] [2014] HCA 44
[37] [2002] HCA 54
[38] [2009] HCA 15
[39] [1999] HCA 59

factors which impacted this included the vulnerability of the victim, the knowledge the authority had of the harm, the power the authority held, and whether or not they could control the elements of risk. While none of these factors may have been 100% conclusive as to whether or not a duty existed, the relationship between these factors contributed to the overall decision.

In considering how a case of a teacher who fails to submit their report of suspicions of abuse could go before a judge, this makes it difficult to determine whether or not the case could be successful. While other jurisdictions such as the United Kingdom have adopted a number of tests which can be used to determine whether a duty of care exists, Australian law at this stage does not have a 'formula' which courts can follow in order to determine whether a duty of care exists in every situation. While there are patterns which emerge within judgements, it is not always easy to predict what a court will find. In fact, the High Court has even acknowledged its failure to provide a clear and concise formula to ascertain whether or not a duty of care exists.[40] The only way, then, to determine whether a teacher could be found to hold a duty of care as a third party to report suspected child abuse is to refer to cases where the duty of care of third parties has been discussed in an effort to identify patterns of considerations. In our discussion of cases here, it can only be deduced that at this point of time in Australian law, it is impossible to say with any confidence which way a case could be decided, as there is evidence within the system of both successes and failures in determining whether a third party could be held to have a duty of care to report abuse. So while there is yet to be a case of this type for the education sector, it does leave open the potential for this to occur in the future.

When cases do emerge in this area, which they no doubt eventually will, the courts will need to decide whether a duty for the teachers does in fact exist based on the salient factors of the case. As they do this, they will need to determine whether finding a positive duty of care is compatible with the legislation governing reporting. For if teachers are held to a duty of care to report their suspicions, and a breach of this duty of care could see them held liable for the damages to the child, it could lead to a gross influx of over-reporting which would effectively mean deserving cases would not get investigated in a timely manner. This seems incompatible with the intention of the legislation, which is to see legitimate cases of abuse identified and investigated in a timely manner so as to prevent further harm to the child.

A successful case against a professional covered by the mandatory reporting laws would result in the potential for other victims to also pursue professionals who, at the time of their abuse, should have filed a report. Given the Royal Commission has brought the issue of child abuse to the attention of the community through the media, it would no doubt cause a dramatic response from the community. This could see an influx of these cases into the courts, which would unfortunately be likely to see the cases dealt with in a decreasingly timely manner.

The cases which go before the courts could potentially end up being 'my word against theirs' cases as teachers will then need to justify the decision they made regarding why they decided not to file a report. Given that the legislation for reporting sexual abuse requires a high degree of judgement on behalf of the teacher, we could even see cases emerge where teachers

[40] Kit Barker, Peter Kane, Mark Lunney, Francis Trindade, *The Law of Torts in* Australia (Oxford University Press, 5th ed, 2012) 197

are sued for failing to file a report when they never actually formed a suspicion that abuse was even occurring. This is especially possible given the fact that teachers need to use their own judgement to determine not only whether the child is at risk of abuse, but also whether or not they are 'in need of protection'. Given that there is no actual way to prove that a teacher formed a suspicion of abuse but chose not to report it (provided they did not write down their suspicions, or discuss it with others), this could prove to be a dangerous situation where students pursue either current or past teachers with very little evidence to support their accusations.

Given this possibility, a successful case would no doubt lead to an increase in reporting for teachers. The fear of civil liability could increase a teacher's tendency to report on cases which otherwise might have been left unreported, which allows more intervention on behalf of the children at risk.[41] Ultimately this is positive as it means that a greater number of child abuse cases could be identified and pursued in order to see that the child is kept safe. However, at the same time, it does come with dangers. An increase in teacher's fears towards liability for failing to report could mean that – when faced with a potential abuse case, they would err on the side of caution in order to submit a report. As not all reports to child protection services are ultimately substantiated, it could lead to a greater number of unsubstantiated reports being made, resulting in vital time and resources being taken away from the deserving cases.[42] So while abuse is *more likely* to be identified if the reporters are motivated to make a report, true abuse cases are also *less likely* to be dealt with in a timely manner. As any form of abuse casts long-lasting effects into the lives of its victims, the element of time is vital in seeing victims removed from dangerous situations as quickly as possible. That the child protection services may be delayed in removing a child from a dangerous situation because they were busy dealing with cases which may otherwise have never been reported if not for the fear of a teacher would be absolutely detrimental to the functionality of the system.

Furthermore, the fear that teachers could experience because of the potential for civil liability could also work to deter professionals from entering the teaching profession. Particularly in the case of a secondary school, many teachers hold careers in other industries and make the decision to do a post-graduate degree in Education to transition from working in the industry to then teach. However, the added potential for teachers to be sued for failing to make a report could prevent these industry professionals from desiring to make the transition in the first place from a potentially safe environment into one which could see them held liable for abuse which they themselves didn't commit. This could see a loss in the teaching profession of people who would otherwise be of great benefit to a far higher number of children as a result of the expertise they could bring to the position.

Interestingly, the pay scale for a primary school teacher within Australia ranges from $38,920 to $82,415, with the average salary being $56,403.[43] Given that the average full time wage

[41] Jody Aaron, 'Civil Liability for Teachers' Negligent Failure to Report Suspected Child Abuse' (1981) 28,183 *Wayne Law Review* 212
[42] Steven J. Singley, 'Failure to report suspected child abuse: Civil liability of mandated reporters' (1998) 19 *Journal of Juvenile* Law 237
[43] Payscale Human Capital, *Primary School Teacher Salary (Australia) (*17 March 2016) <http://www.payscale.com/research/AU/Job=Primary_School_Teacher/Salary>

for Australians in general is $74,724,[44] the fact that an industry with tertiary-trained professionals on lower-than-median-incomes could face the added potential of civil liability could see even greater strain on the recruitment of new teachers as well as the retainment of current teachers. For, at those rates, it is possible to even see situations where what would otherwise be a successful case against a teacher falls through because the teacher does not have the money in order to pay the damages awarded. It could also see the situation where teachers who have a civil case laid against them could face not being able to afford adequate legal representation.

The question is, then, are the courts willing to inflict these ramifications onto the teaching profession? To date the teaching profession has enjoyed a degree of protection whereby they have not had to be concerned about the ramifications for failing to make reports, other than the ramifications any profession faces for failing to follow workplace policies and procedures. The addition of the threat of civil liability could change this dramatically and, as we've discussed, cause a large number of flow-on effects for the profession.

The fact that there has not been a successful case in this area suggests that, as yet, the courts have not been willing to inflict this on the profession. However, it could be possible that in time, through the changing cultures of society and the increased demands placed on teachers and the role they play in a community increased pressure could be placed on seeing these cases tried. Given the Royal Commission has recently drawn even more attention to this area, it could be possible to even see this transition happen in the near future, while the topic is still in the forefront of the community's minds.

[44] Author Unknown, *Do you consider yourself a struggling, comfortable or rich Australian?* (8 May 2014) News.com.au <http://www.news.com.au/finance/money/do-you-consider-yourself-a-struggling-comfortable-or-rich-australian/story-e6frfmcr-1226910189131>

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