IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMON LAW DIVISION
MAJOR TORTS LIST

Not Restricted

S CI 2013 01067

HADASSA ERLICH — Plaintiff

v

MALKA LEIFER — First Defendant

ADASS ISRAEL SCHOOL INC — Second Defendant

JUDGE:	RUSH J
WHERE HELD:	Melbourne
DATES OF HEARING:	5, 6, 7, 8, 11, 12, 13 and 15 May 2015
DATE OF JUDGMENT:	16 September 2015
CASE MAY BE CITED AS:	Erlich v Leifer & Anor
MEDIUM NEUTRAL CITATION:	[2015] VSC 499

NEGLIGENCE – Claim for psychiatric injury sustained as a result of the sexual abuse of the plaintiff by the first defendant – Nature of the duty of care –Direct and vicarious liability – Whether the second defendant breached the duty of care owed to the plaintiff – Causation of damage – Extent that plaintiff's injury is attributable to the period when the plaintiff attended the premises of the second defendant as a student – *Nationwide News Pty Ltd v Naidu & Anor; ISS Security Pty Ltd v Naidu & Anor* (2007) 71 NSWLR 471 – *Tesco Supermarkets Ltd v Nattrass* [1972] AC 153 – *Christian Youth Camps Ltd v Cobraw Community Health Services Ltd* (2014) 308 ALR 615 – *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 1 AC 500 – *Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd* [1915] AC 705 – *Director of Public Prosecutions Reference No. 1 of 1996* [1998] 3 VR 352 – *Hawkins v Clayton* (1986) 5 NSWLR 109 – *Beach Petroleum NL v Johnson* (1993) 115 ALR 411 – *State of New South Wales v Lepore* [2003] 212 CLR 511 – *Sprod v Public Relations Orientated Security Pty Ltd* [2007] NSWCA 319 – *Blake v JR Perry Nominees Pty Ltd* (2012) 38 VR 123 – *Withyman v State of New South Wales and Blackburn* [2013] NSWCA 10 – *A, DC v Prince Alfred College Incorporated* [2015] SASC 12.

DAMAGES – Damages awarded for pain and suffering, loss of enjoyment of life, economic loss and medical expenses – Claim for aggravated and exemplary damages – Exemplary damages awarded against the first and second defendant – *Carter & Anor v Walker & Anor* [2010] VSCA 340 – *Backwell v AAA* [1997] 1 VR 182 – *Downes v Amaca Pty Ltd* (2010) 78

NSWLR 451.

APPEARANCES:	Counsel	Solicitors
For the Plaintiff	Mr D.F. Hore-Lacy QC with Mr D. Seeman	Lennon Mazzeo Lawyers
For the Second Defendant	Mr C.J. Blanden QC with Ms K.L. Burgess	Perry Maddocks Trollope

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HIS HONOUR:

Introduction

1 Hadassa Sara Erlich, the plaintiff, was born on 24 June 1987. She is the fourth of seven children. Her family belong to the Ultra Orthodox Jewish community connected to the Adass Israel Congregation ('the Adass community'). She attended a school administered by the Adass Israel School Inc, the second defendant, located at 10 – 12 King Street, Elsternwick ('the School'). The School, for religious reasons, operates a boys' campus and a girls' campus.[1] The School is governed by a Board ('the Board')[2] elected biannually by the parents and members of the Adass community.[3] The Board's primary 'role is to govern' and ensure 'a proper oversight of the management and planning, both financial and strategic'[4] of the School. That oversight includes 'employment of some senior teaching staff, such as Heads of [the boys' and girls'] School'.[5] The plaintiff attended the School from kindergarten year, aged three, until Year 12, aged 18.[6] At the conclusion of Year 12, she was employed at the School the following year (2006) as a teacher for approximately eight months until she was married.[7]

2 The plaintiff claims that between 2003 and 2006, she was sexually abused by the headmistress of the School, Mrs Malka Leifer, the first defendant ('Leifer').

3 The plaintiff in this proceeding claims as a consequence of that sexual abuse she has sustained severe psychiatric injury and claims damages for this injury and the consequent losses. The plaintiff also claims aggravated and exemplary damages against Leifer and the School.[8]

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1 In these reasons, any reference to the School will concern the girls' campus administered by the School when discussing the plaintiff and first defendant.

2 In these reasons, I refer to the second defendant interchangeably as both 'the School' and 'the Board' as appropriate.

3 The School is incorporated under the *Associations Incorporation Act 1981*. See plaintiff's exhibit (PX) 57 (Certificate of Incorporation).

4 Defendant's exhibit (DX) 8 (Adass Israel School Strategic Plan of February 2008) at 2-3. The Strategic Plan, if there was one, prior to Leifer's employment at the School was not tendered.

5 Ibid.

6 Supreme Court Transcript ('Transcript') at 124.21 - 124.27.

7 Transcript at 135.19 - 135.30 and 150.1 - 150.8.

8 The plaintiff does not include the year 2006 in this claim when she was employed by the School and when she alleges she continued to be sexually abused by Leifer.

4 Judgment had been entered against Leifer prior to the commencement of trial. Leifer currently resides in Israel, having left this jurisdiction on 6 March 2008. Leifer is facing extradition to Victoria from Israel in respect of criminal charges involving the sexual abuse of girls at the School.[9]

5 The School, in its Second Further Amended Defence, admits it operated the School, that Leifer was Principal of the School from December 2002 until March 2008 and that the School owed a duty to take reasonable care to prevent foreseeable injury to the plaintiff as a student at the School. At trial, Mr C.J. Blanden QC, senior counsel for the School, accepted that this duty was a non-delegable duty.[10] The School denies it breached its duty of care to the plaintiff, that it was negligent or reckless in its engagement with and oversight of Leifer and, despite the admission in its Second Further Amended Defence, denied at trial that Leifer was Principal. The School denies it employed Leifer, that Leifer was the servant or agent of the School and that the School is vicariously liable for Leifer's actions.

6 At trial, the School alleged Leifer was employed by the Congregation Adass Israel Talmud Torah ('the Congregation'), an unincorporated association concerned in part with religious instruction at the School. According to the Adass Israel School Strategic Plan (the 'Strategic Plan'), the Congregation provides a wide range of religious and community services to the Adass community, including Jewish studies for school aged boys and girls 'where such Jewish Studies are conducted on the premises of Adass Israel School'.[11] The School and the Congregation 'have a distinct but overlapping membership'.[12]

7 The plaintiff pleads in the alternative that, by virtue of her position and responsibilities within the School, Leifer 'was in fact the mind and will' of the School and the School is directly liable for her actions. The School denies this allegation.

8 The School, during the course of trial, did not challenge the nature or extent of

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9 Transcript at 111.10 – 111.11. Judgment in default of appearance was entered on 19 December 2014.
10 Transcript at 646.7.
11 DX-8 (Adass Israel School Strategic Plan of February 2008) at 2-1.
12 Ibid.

Leifer's sexual abuse of the plaintiff as detailed by the plaintiff.

The Adass community and School

9 To properly understand the issues raised by the pleadings, it is important to have a basic understanding of Ultra Orthodox Judaism as practised by the Adass community.

10 The evidence reveals a community that adheres to, by comparison with contemporary Australian society, an exceptionally rigid and strict code of behaviour. The Adass community is very close in terms of its associations, interrelationships and neighbourhood. It is also completely closed.

11 In accordance with the religious beliefs and practices of the Adass community, the plaintiff and her siblings were brought up in a home with no access to television, radio, internet, magazines or newspapers;[13] not even a sales catalogue entered the home.[14] Children were not raised having knowledge of world events and were completely isolated from anything 'beyond the community [they] were within'.[15] There was no connection or mingling with students of other Jewish schools.[16] Children were only allowed to read Jewish books from the library,[17] which were vetted to exclude anything concerning a relationship between a male and a female: 'we weren't to know that a relationship could exist between a female and a male … we didn't have anything to do with males [outside family] in the community from about three years old, completely separated'.[18]

12 The School was founded by members of the Congregation in Ripponlea and first registered as a school in 1953.[19] The intent of those who established the School was 'to educate the new generation with a guarantee that the unbroken chain of Jewish

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13 Plaintiff, Transcript at 124.7 - 124.8.
14 Meyer, Transcript at 178.30 - 178.31.
15 Meyer, Transcript at 178.20.
16 Meyer, Transcript at 178.24.
17 Meyer, Transcript at 179.1.
18 Plaintiff, Transcript at 124.8 - 124.15.
19 Herszberg, Transcript at 335.14 – 335.15.

tradition would be continued, even in a faraway continent'.[20] In 2008, over 500 children were enrolled at the boys' and girls' campuses.

13 The School is in every sense a religious school. Its philosophies and policies:

> …are sourced in the traditions, values and practice of Orthodox Judaism. The community, which supports the school, is totally committed to the inclusion of these traditions and values and has established and chosen this school for their children so the values and attitudes of the school and home are consistent. It is therefore imperative that the school maintains strict adherence to this philosophy.[21]

The Adass Israel School Staff Handbook for 2008 (the 'Staff Handbook') states:

> Every aspect of the curriculum was to be permeated by a sensitivity and respect towards steadfast Torah observance of high morals and ethics.[22]

14 The Strategic Plan makes clear that Orthodox Judaism governs religious beliefs, lifestyle and everyday behaviour, and this is reflected in the organisation and orientation of the School. For example, for religious reasons, co-education is considered unacceptable in the Adass community. Thus, as previously stated, the School is strictly divided between a boys' campus and a girls' campus. This gender division required that males attending the girls' campus speak from behind a divider screen: 'we couldn't see them and they couldn't see us'.[23]

15 During the time the plaintiff attended the School, there was no secular qualification offered, such as the Victorian Certificate of Education ('VCE') or the Victorian Certificate of Applied Learning ('VCAL').[24] Students who attended the School obtained no qualification recognised externally: 'Year 12 was only the Jewish studies program, the teacher training program'.[25] The School offered 'a significantly restricted curriculum – approved by the Registered Schools Board – within a very

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20 PX-51 (Two Copies of Adass Israel School Staff Handbook for 2008) at 5.
21 DX-8 at 1-1.
22 PX-51 at 5.
23 Plaintiff, Transcript at 126.7 - 126.8.
24 Spigelman, Transcript at 441.24 - 441.29.
25 Herszberg, Transcript at 346.25. It is also to be noted that the teacher training program concerned the teaching of Jewish Studies, a role that the plaintiff was engaged in at the School in 2006, the year after she completed Year 12.

sheltered cultural environment.'[26]

16 Until 2007, the School did not offer an 'official' curriculum although it was registered as a school. The School was informed in 2007 by the Victorian Registration and Qualifications Authority ('VRQA') that unless there was a formal curriculum, the School would not be registered as a school to teach Years 11 and 12. The School thus adopted the VCAL program. Two reasons were provided in evidence for choosing VCAL over VCE for the girls' campus. Firstly, VCE provides a pathway to university, but because of religious restrictions 'it's very difficult to encourage our girls to go to university'.[27] Secondly, the School cannot vet the VCE program offered: 'VCE is set and we can't look into it and choose "is that a good book that we want our girls to read[?]" and so on'.[28] In this respect VCAL provided more of an opportunity for the School to limit what was offered by way of curriculum.[29]

17 Mrs Esther Rizel Spigelman, now the Head of secular studies ('General Studies') at the School, said that secular and religious education were of equal importance.[30] I do not accept this evidence. In fact, at the time the plaintiff attended the School, there 'was only the Jewish studies programme' in Year 12 ('Jewish Studies').[31]

18 The Strategic Plan sets out a number of overall goals for the School.[32] The first listed goal is to produce graduates who 'are able to preserve Orthodox Jewish traditions and practices and pass these on to the next generation'.[33] I am satisfied the teaching of Jewish Studies within the School was of paramount importance; more important than General Studies. This restrictive education program within the School was, in part, designed to maintain the rigid separation of its students from the wider community.

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26 PX-14 (Letter from Mr Moshe Nussbacher, administrator of the School, to Mr Geoff Coleman, Immigration Department, 29 November 2000).
27 Spigelman, Transcript at 440.19 - 440.21.
28 Spigelman, Transcript at 440.26 - 440.29.
29 Spigelman, Transcript at 440.30 - 441.5.
30 Spigelman, Transcript at 441.28.
31 Herszberg, Transcript at 346.26 - 346.28.
32 DX-8 at 1-2.
33 Ibid at 1-2.

19 That religious education was the fundamental reason for the existence of the School explains how Leifer came to control the day-to-day functioning and operation of the School, as I refer to in further detail below, particularly as she held the position of Head of Jewish Studies, in addition to her role as Principal or headmistress.[34]

The recruitment and employment of Leifer

20 The precise manner in which Leifer was approached in Israel and then appointed Head of Jewish Studies at the School in 2000 is unclear. According to Mr Benjamin Koppel, who was, at the relevant times, President of the Congregation, a Mr David Rosenbaum,[35] who was not called to give evidence, was tasked with enquiring into a number of candidates in Israel.[36] Mr D. Rosenbaum was a member of the Board at this time,[37] and according to Mr Koppel, was very keen for Leifer to take up a position at the School.[38]

21 The following tendered documents demonstrate that it was the School, not the Congregation, who was responsible for recruiting and employing Leifer in 2000:

(a) On 18 October 2000, Mr Moshe Nussbacher, the 'administrator' of the School, wrote to the Commonwealth Department of Immigration ('Immigration Department') seeking a labour market waiver for '<u>our</u> application for the Immigration of Mrs Leifer who we would like to appoint as a Head Teacher of Adass Israel School'.[39]

(b) A 'Sponsorship for Temporary Residence in Australia' Form (the 'Form') completed by hand was tendered in evidence.[40] Although the name of the sponsor was inconveniently whited out on the Form, the address of the sponsor is recorded as the address of the School, being 10 – 12 King Street, Elsternwick. Moreover, 'Adass Israel School Inc' is nominated as employer of

34 Transcript at 463.15.
35 Transcript at 542.7 - 542.10.
36 Koppel, Transcript at 542.13.
37 Koppel, Transcript at 544.10.
38 Koppel, Transcript at 544.16.
39 PX-5 (Letter, School to the Immigration Department 18 October 2000) (emphasis added).
40 PX-7 (Sponsorship for Temporary Residence in Australia, Form 55).

Leifer and Mr Nussbacher is recorded as the point of contact.

(c) On 27 November 2000, Mr Nussbacher reported to Mr P. Kemeny, Treasurer, Mr Yitzhok Benedikt, President, and Mr D. Rosenbaum, member of the Board that the labour market waiver request had been rejected by the Immigration Department.[41]

(d) On 13 December 2000, Rabbi L.Y. Greenfeld, then Principal of the School, wrote to the Immigration Department indicating 'we' had advertised the position Leifer was intended to fill in The Age and The Australian.[42]

(e) On 18 December 2000, Mr Geoff Coleman of the Immigration Department wrote to Mr Nussbacher stating that the School's sponsorship of Leifer for an Educational Visa had been approved on the basis of the signed undertakings provided to the Immigration Department. The School sponsored Leifer, her husband Jacob and her then five children to come to Australia. The letter specified that Leifer, as holder of the visa, could not change employer or occupation in Australia without departmental permission.[43]

22 At trial, Mr Blanden submitted that it was the Congregation that employed Leifer. He relies primarily on oral evidence that I refer to later in these reasons. It is to be noted that at the time of the initial engagement of Leifer none of the written documentation referred to the Congregation as Leifer's employer. Other than Mr Koppel, all the persons involved with the appointment of Leifer occupied positions on the Board or were employed by the School. The documentation demonstrates the School not only sponsored Leifer to come to Australia, but also employed her at the School.

23 In 2002, the School restructured. Professor Israel Herszberg, now Principal of the School (both campuses) gave evidence that at this time Leifer was appointed to a

41 PX-11 (Memorandum, Mr Nussbacher to Messrs Kemeny, Benedikt and Rosenbaum, 27 November 2000).

42 PX-17 (Letter, Rabbi Greenfeld, principal of School, to Mr Coleman, 13 December 2000) (emphasis added).

43 PX-18 (Letter, Mr Coleman to Mr Nussbacher, 18 December 2000).

position in charge of the girls' campus, both primary and secondary:[44]

> Her job was to be in charge of the girls' school, the overall charge of the girls' school and her primary responsibility was in the Jewish studies department with oversight of the ethos and practice of the School generally. She was supported by head of campus, Mrs Spigelman, whose responsibility was to look after the campus as a whole and to deliver the general studies program that was delivered.[45]

24 This evidence of Professor Herszberg[46] (apart from Mrs Spigelman being Head of the girls' campus) is consistent with tendered documents that concerned Leifer's new position. Because of this new position, the School was again required to liaise with the Immigration Department to obtain a visa to enable Leifer to work as 'headmistress' at the School. Tendered documents show that:

(a) A registered migration agent, Mr Farrel Savitz, of Australian Visa Services ('Agent'), was arranged by the School to assist in the preparation of the visa application to the Immigration Department for Leifer. The agreement noted that the School was the sponsor of Leifer.[47]

(b) The Agent informed Mr Nussbacher, for the purposes of the visa application, that a flowchart would be necessary to demonstrate the administrative structure of the School and to 'also describe where the school committee would be included'.[48] The costs of the Agent were billed to the School.[49]

(c) The Agent advised Mr Nussbacher that it would be necessary to demonstrate that 'her application will be an exceptional appointment' to obtain a visa for Leifer.[50] Thus, the Agent emailed Mr Nussbacher on 15 November 2002[51] stating that it was necessary to provide a resume detailing Leifer's tasks and duties for her proposed roles as headmistress/religious instructions

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44 Herszberg, Transcript at 337.8 - 337.10.
45 Herszberg, Transcript at 338.2 - 338.9.
46 In 2008 and after the departure of Leifer, Professor Herszberg became Principal of the School.
47 PX-23 (Agreement between Leifer, sponsored by the School, and Australian Visa Services, 16 October 2002).
48 PX-24 (Correspondence, the Agent to Mr Nussbacher, 17 October 2002).
49 Ibid.
50 PX-25 (Email, the Agent to Mr Nussbacher, 30 October 2002).
51 Ibid.

coordinator: 'Mrs Leifer's resume needs to show past experience in these areas – especially as a head mistress'.[52] Assistance was offered by the Agent to Mr Nussbacher for the purposes of crafting a resume to fit the visa requirements.

(d) By email on 18 November 2002, the Agent wrote to Mr Nussbacher as follows:

> Moshe to make this less complicated we should forget about the Religious Instructions Coordinator and only stipulate Headmistress on both applications and ensure all our documents regarding Mrs Leifer describes [sic] her as a person who is a Headmistress and that she has past experience in this area, i.e. that she has had the type of experience that a person in a Ultra-orthodox school would need to have had to become a head mistress of such an institution.[53]

(e) An advertisement was placed by the School in The Age on 30 November 2002 stating: '**HEADMISTRESS** req'd for Ultra Orthodox Jewish primary and secondary school. Must be qualified to teach Biblical texts, Jewish law and Chassidic philosophy and to provide pastoral care to students'.[54]

(f) On 2 December 2002, Mr Nussbacher wrote to the Immigration Department stating, in part:

> On September 4, 2002 we restructured the Boys and Girls School which made available the position of Head Teacher for the Girls Primary and Secondary School. This position was required to be filled urgently.[55]

(g) On 12 December 2002, Ms Biljana Nastic of the Immigration Department wrote to Mr Nussbacher care of the Agent, advising that the application had been approved.[56] The Sponsor was recorded as 'Adass Israel School Inc'. The occupation of Leifer, whom the School was sponsoring, was recorded as 'School Principal (Headmistress)'. A visa, subclass 457, was also granted in this letter, with conditions including that Leifer, as the visa holder, 'must not cease to be employed by their sponsor, work in a position or occupation

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52 PX-25 (Email, the Agent to Mr Nussbacher, 15 November 2002).
53 PX-25 (Email, the Agent to Mr Nussbacher, 18 November 2002).
54 PX-27 (Fax Proof Advertisement, The Age, 25 November 2002).
55 PX-28 (Letter, Mr Nussbacher to Immigration Department, 2 December 2002).
56 PX-31 (Letter, Ms Nastic to Mr Nussbacher, 12 December 2002).

which is inconsistent with that which was nominated and approved by [the Immigration Department] or work for another person/company or themselves'.[57]

(h) On 12 December 2002, Ms Nastic also wrote directly to Mr Nussbacher, again noting the conditions of the visa concerning Leifer's employment with the School and the School's responsibilities as her sponsor.[58] The letter also attached undertakings that were required of the School as Leifer's sponsor. The undertakings agreed to by the School included to deduct tax from salary, accept the financial responsibility for all medical and hospital costs of the sponsored person incurred in Australia and to co-operate fully with the Immigration Department in monitoring the sponsored person.[59]

(i) On 15 January 2003, Ms Nastic wrote directly to Leifer.[60] This letter again recorded 'Adass Israel School Inc' as the sponsor of Leifer. The letter informed Leifer she must not 'cease to be employed by [her] sponsor', 'work in a position or occupation which is inconsistent with that which was nominated and approved by the [Immigration Department]' or 'work for another person/company or themselves'.[61]

25 This evidence demonstrates that the School, both in 2000 and in 2002/2003, arranged the employment of Leifer, informed the Immigration Department that it was the employer of Leifer and provided undertakings to the Immigration Department that it would continue to employ and be responsible for Leifer whilst she resided and worked in Australia. Mr Nussbacher was the point of contact. No document was produced to demonstrate any alteration to these arrangements with the Immigration Department during the period of Leifer's employment at the School. Further, no document was produced to demonstrate any change to the employment agreements and arrangements existing between the School and Leifer.

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57 PX-31.
58 PX-32 (Letter, Ms Nastic to Mr Nussbacher, 12 December 2002).
59 Ibid.
60 PX-33 (Letter, Ms Nastic to Leifer, 15 January 2003).
61 Ibid.

26 There was other evidence tendered demonstrating that the School employed Leifer. An unsigned copy of a document headed 'Contract between Adass Israel School Inc and Mrs Malka Leifer' was tendered in evidence ('Contract').[62] When cross-examined concerning this Contract, Professor Herszberg stated he did not understand why the School was party to the Contract, as it should have been the Congregation.[63] Professor Herszberg agreed that there was no evidence that the Contract was not signed.[64] I do not accept the evidence of Professor Herszberg that the Contract should have been in the name of the Congregation. That the Contract was in the name of the School is entirely consistent with the body of evidence demonstrating the School was the sponsor and the employer of Leifer. If Leifer had been employed by the Congregation, the School would have been in breach of the undertakings given to the Immigration Department concerning her employment. Further, importantly, Professor Herszberg was not directly involved in the employment of Leifer.[65] The School failed to call persons intimately involved with her engagement at the School, namely, Mr Nussbacher and the then President of the Board, Mr Benedikt.

27 In final submissions, Mr Blanden contended that a number of matters raised by the evidence pointed to Leifer being employed by the Congregation as follows:

(a) The Congregation played a key role in the recruitment of Leifer by establishing a committee to find a candidate to fill the position of teacher of Jewish Studies at the School and Mr D. Rosenbaum made inquiries as to suitability. This submission relies on the evidence of Mr Koppel. Mr Koppel's evidence does not support the proposition that the Congregation employed Leifer. At best, the evidence of Mr Koppel supports the contention that the Congregation inquired as to the suitability of Leifer to teach Jewish Studies. As referred to above, Mr D. Rosenbaum, who conducted these

62 PX-50 (Unsigned document headed 'Contract between the Adass Israel School Inc and Mrs Malka Leifer').
63 Herszberg, Transcript at 375.1 - 375.6.
64 Herszberg, Transcript at 375.25 - 375.26.
65 Herszberg, Transcript at 336.7 - 336.8.

investigations, was a member of the Board. In fact, Mr Koppel agreed with the proposition put by Mr Blanden: '… at the time Mrs Leifer was first engaged by the School were you approached to make some inquiries in order to satisfy yourself she was an appropriate candidate?'[66] Mr Koppel did not state that the Congregation employed Leifer.

(b) Leifer's salary was paid by the Congregation, which had a separate ABN number to that of the School. I do not accept that the Congregation paid the salary of Mrs Leifer between 2003 and 2006, being the period in which the alleged sexual abuse occurred. This submission relies on the evidence of Professor Herszberg. Professor Herszberg had no formal position with the School or Congregation over this period. His evidence relied upon 'the best of [his] recollection'[67] that the financial records showed that the salary of Leifer was paid by the Congregation.[68] Professor Herszberg also stated that he recently checked the employment records from 2008 and that these records showed that Leifer's salary was paid by the Congregation. These records were not produced at trial and, in any event, do not relate to the period during which the abuse occurred. No other primary source documents supporting this oral evidence of Professor Herszberg were tendered: no wage records and no pay slips were produced to demonstrate the Congregation paid Leifer's salary. In fact, the one document concerning the salary of Leifer that was tendered (by the plaintiff) on its face supports the evidence that the School was responsible for her salary; the salary document is headed 'ADMIN – Adass Israel School Inc'.[69]

(c) Professor Herszberg stated that from 2008, there was a more rigorous separation of the School and Congregation.[70] This may or may not have occurred in 2008. There is no evidence to suggest any such separation

66 Koppel, Transcript at 542.11 - 542.15 (emphasis added).
67 Herszberg, Transcript at 336.27.
68 Herszberg, Transcript at 336.25 - 336.31 and at 418.22 - 418.25.
69 PX-22 (Document concerning payroll and superannuation details of Leifer).
70 Herszberg, Transcript at 357.14-.16.

occurred prior to 2008. All correspondence and documentation concerning Leifer's employment is on the School's letterhead. I do not accept that this occurred solely because of some lack of sophistication at the School or that the Congregation did not have its own letterhead.[71] The use of the School's letterhead is entirely consistent with other evidence demonstrating that Leifer was employed by the School. Again I observe, Mr Nussbacher, the person on the evidence who was most closely associated with the employment of Leifer, was not called. Mr Benedikt, President of the Board at the time of Leifer's engagement, was also not called to give evidence. No explanation for the failure to call these witnesses was proffered by Mr Blanden on behalf of the School. The best evidence, being the written documentation at the time of first engaging Leifer in 2000 and at the time of appointing her as headmistress of the girls' campus in 2002/2003,[72] unequivocally demonstrates that the School employed Leifer. No document was tendered that in any way demonstrated her employer changed from the School to the Congregation.

(d) It is contended that a lease agreement between the Congregation, Leifer and her husband, Rabbi Jacob Leifer, of 26 February 2001[73] demonstrates an employment relationship between Leifer and the Congregation. The lease agreement concerned the lease of a Tarago van. The van was leased by the Congregation on behalf of the Leifers. Lease payments were to be deducted from Leifer's salary. I do not agree with the submission on behalf of the School that this lease agreement demonstrates employment. The document discloses no more than a lease agreement between the Leifers and the Congregation. Further, Professor Herszberg gave evidence that the Hebrew writing on the document indicated that the car belonged to Jacob Leifer and that he could sell the vehicle whenever he wished and retain any profits from the sale.[74] The document does not support the proposition that the

71 Herszberg, Transcript at 372.10 - 372.24.
72 Transcript at 337.8 - 337.9.
73 DX-3 (Agreement between Adass Israel Talmud Torah and Rabbi and Mrs Leifer).
74 Herszberg, Transcript at 339.6 - 339.15.

Congregation employed Leifer. Further, I note this document, in contrast to Leifer's Employment Contract, bears the letterhead of the Congregation.

A distinction between Jewish Studies and General Studies at the School

28 Mr Blanden submitted that I should accept evidence that he claimed demonstrated a clear distinction between the teachers of Jewish Studies and teachers of General Studies at the School. He contended the evidence demonstrated that teachers of Jewish Studies were employed by the Congregation, whilst teachers of General Studies were employed by the School. Professor Herszberg, in his evidence, took this distinction further. He stated that Leifer did not 'take classes under the auspices of the registered schools program'.[75] Leifer was never registered with the State authority as a teacher at the School. In cross-examination, Professor Herszberg provided the following evidence:

> She's not a teacher?---That's right.
>
> Are you serious about that? She is headmistress, taught at the School, and you say she wasn't a teacher?---She didn't teach in the School, she didn't teach in a registered school - - -
>
> Didn't teach in the School?---She taught under a program run by the congregation which was separate from the School.[76]

29 Professor Herszberg provided contradictory evidence concerning the role of Leifer in the School. He agreed with the proposition that as 'principal' of the School, Leifer was responsible for both religious and secular studies.[77] He described Leifer as being 'in charge of the girls' school, the overall charge of the girls' school'.[78] When I asked Professor Herszberg why, if Leifer was referred to as 'headmistress', her role was restricted to the teaching of Jewish Studies, he replied, after a substantial pause, 'I can't answer that question'.[79] Professor Herszberg said Mrs Spigelman, Head of General Studies, 'was given the job to work with [Leifer] as an assistant'.[80]

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75 Herszberg, Transcript at 414.11 - 414.13.
76 Herszberg, Transcript at 414.28 – 415.3.
77 Herszberg, Transcript at 416.28 - 416.30.
78 Herszberg, Transcript at 338.2 - 338.5.
79 Herszberg, Transcript at 368.20 - 368.21.
80 Herszberg, Transcript at 365.1 - 365.2. As was subsequently disclosed in evidence, Mrs Spigelman

30 I do not accept that Leifer was in some way removed from the School, that she did not 'teach' at the School or that her involvement was through a separate program of religious education. The evidence demonstrates that Leifer was the most powerful figure within the School. The evidence of Professor Herszberg on this issue, in my opinion, was unreliable and embellished in an attempt to hide Leifer's true role at the School. The reason for the embellishment: Professor Herszberg well knew Leifer was not a registered teacher, yet she was teaching and was the senior teacher and headmistress of the School, a registered school.[81]

31 The duty statement prepared upon Leifer assuming the position of headmistress was tendered in evidence ('Duty Statement').[82] Leifer's duties included –

(a) responsibility for the primary and secondary schools of the School;

(b) the coordination of religious and secular staff;

(c) speaking regularly with Jewish Studies and General Studies staff concerning progress and problems;

(d) motivating and assessing staff performance;

(e) the oversight of curriculum audit and documentation;

(f) assisting staff with curriculum development and monitoring implementation;

(g) assisting the organisation of casual relief staff;

(h) researching and evaluating religious and secular teaching materials and resources for staff and students;

(i) assisting the manager or his deputy in hiring staff;

(j) the monitoring and supporting of staff concerning the consistent implementation of all policies;

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also was not a registered teacher.

81 Teachers then were required to be registered under the *Education and Training Reform Act 2006*.

82 PX-29 (Duty Statement For Headmistress on Adass Israel School letterhead).

(k) supporting staff concerning parental issues and student welfare; and

(l) the oversight of student welfare and discipline.

The Duty Statement confirms Leifer's position at the School was 'a full time position necessitating constant availability (i.e. including after hours)'.[83]

32 The role set out in the Duty Statement indicates that Leifer, within the girls' campus, held the preeminent position of power. In evidence, she was described as 'head of school and she ran everything that happened in the school'.[84] Mrs Mindel Weisner, an ex-student of the School, was a teacher at the School for Years 10, 11 and 12 from 2003 until 2006.[85] She was employed by Leifer.[86] She gave evidence that Leifer 'conducted the school'[87] and was 'in charge' of Mrs Spigelman and Mrs Sharon Ann Bromberg (a senior teacher and now School chaplain).[88] A practical demonstration of the dominating position of Leifer within the School is evident from an extract contained in the Staff Handbook.[89] Under the heading, **'Vetting of text books and all teaching material'**, the Staff Handbook states:

> In accordance with Adass Israel philosophies, staff are required to submit all new course material for screening. No material (e.g. novels, storybooks, poems, general articles, non-prescribed text books, tapes, songs or lyrics etc) may be used without prior approval from the Principal of Jewish Studies.[90]

Leifer was head of Jewish Studies.[91]

33 Mrs Spigelman gave evidence that as head of General Studies she worked closely with Leifer,[92] who she described as 'head of Jewish Studies'.[93] I do not see their work relationship as in any way reducing the overall authority of Leifer as head of

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83 PX-29.
84 Plaintiff, Transcript at 126.25 - 126.26.
85 Transcript at 231.16 - 231.31.
86 Weisner, Transcript at 231.11.
87 Weisner, Transcript at 233.17.
88 Weisner, Transcript at 241.13 - 241.16.
89 PX-51 at 11.
90 Ibid.
91 In the Staff Handbook, Leifer, as senior member of the School staff at the girls' campus of the School, is called 'Menahales', a position held by Rabbi Greenfeld at the boys' campus of the School. See PX-51 at 28 – 29.
92 Spigelman, Transcript at 429.16 – 429.23.
93 Spigelman, Transcript at 463.15.

the School. The evidence of Mrs Spigelman supports other evidence of the close involvement of Leifer with the operation of the School. Leifer's office was opposite the room occupied by Year 11 and Year 12 students;[94] Leifer had a close relationship with the students, with whom she interacted on a daily basis.[95]

34 The curriculum vitae of Leifer, presumably prepared to support her visa application for the position of headmistress at the School, contained a diagram of the administrative structure of the School.[96] This diagram indicates that at the head of the administration of the School was the Board and immediately under the Board was 'Principal Jewish Studies – Mrs M. Leifer', and 'Principal Secular Studies Rabbi L.Y. Greenfeld'.[97] Mrs Spigelman on the diagram was described as 'Assistant Principal', reporting to both Leifer and Rabbi Greenfeld.[98] I have no doubt this diagram generally reflects the power and authority of Leifer in the girls' campus and the critical importance of Jewish Studies in the girls' campus, as it is consistent with other evidence.

35 Mr Blanden referred me to correspondence between the VRQA, the Victorian Institute of Teaching ('VIT') and Mr Benedikt, President of the Board, in March 2008.[99] Mr Blanden submitted the correspondence supported the contention that Leifer was employed by the Congregation.

36 Mr Benedikt wrote to Ms Lynn Glover, director of the VRQA, on 17 March 2008 after receiving a request from the VRQA to provide information concerning the qualifications of Leifer who, by this time, had been named in media reports as having molested girls at the School.[100] In this correspondence, Mr Benedikt stated:

> Mrs Leifer was employed by the Congregation Adass Israel (the

94 Spigelman, Transcript at 439.21 - 439.23.
95 Spigelman, Transcript at 443.23 - 443.28.
96 DX-2 (Resume of Leifer).
97 Ibid.
98 Ibid.
99 See PX-34 (Letter, Mr Benedikt to Ms Lynn Glover, Director at VRQA, 17 March 2008); PX-35 (Letter, Ms Annabel Haslam of VIT, to Mr Benedikt, 28 March 2008); PX-36 (Letter, Mr Benedikt to Ms Haslam, 7 April 2008); and PX-37 (Letter, Ms Haslam to Mr Benedikt, 29 April 2008).
100 PX-53 (Copy of an article published in The Age headed 'Principal "molested schoolgirls"', 14 March 2008).

> Congregation), who operates a range of services for the Jewish Community including but not limited to Jewish religious education, which is partly conducted on the premises of Adass Israel School (the School) outside the secular curriculum of the School. The religious education programs for boys and girls are conducted separately and Mrs Leifer was associated with religious education for girls.[101]

37 Following this correspondence, on 28 March 2008, Ms Annabel Haslam, of VIT, wrote to Mr Benedikt[102] raising concerns that newspaper reports indicated the School employed Leifer as a teacher and the letter questioned why she had not been registered to teach in Victoria, where non-registration was a contravention of the *Education and Training Reform Act 2006*. Mr Benedikt replied to Ms Haslam on 7 April 2008 and stated:

> Contrary to the newspaper reports to which you refer, Mrs Malka Leifer was not employed as teacher [sic] at Adass Israel School, nor did she teach at Adass Israel School.
>
> Mrs Leifer was employed by the Congregation Adass Israel, which operates a range of services for the Jewish Community including but not limited to Jewish religious instruction, which is partly conducted on the premises of Adass Israel School outside the curriculum of the Registered School.[103]

38 The letters of Mr Benedikt are misleading concerning the School's employment of Leifer and do not explain the true role and responsibilities of Leifer at the School. The statement 'she did not teach at the School' is disingenuous. The letters, drafted after the exposure of Leifer's alleged sexual abuse in the media, most certainly do not stand as evidence that Leifer was employed by the Congregation, rather than the School. I consider the letters are self-serving, an attempt by Mr Benedikt on behalf of the Board to deflect the attention of the regulatory authorities away from the School to the Congregation. The letters fail to properly represent the duties of Leifer within the School, her daily contact with students of the School and her responsibilities as detailed in her Duty Statement. The failure to call Mr Benedikt without explanation permits the inference that Mr Benedikt's evidence would not have assisted the School's case. I draw the available inference that he would not have assisted the School's case on the issue of Leifer's employment and responsibilities within the

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101 PX-34.
102 PX-35.
103 PX-36.

School.[104]

Leifer stood down as headmistress

39 The manner in which the allegations of sexual abuse committed by Leifer were brought to the attention of the Board, the manner in which these allegations were investigated by the Board and the Board's decision to stand Leifer down and pay for the airfares of Leifer and her family to depart Australia for Israel are relevant to the issue of Leifer's employment and to the issue of the persons exercising power, supervision and control at the School.

40 The evidence discloses that Mrs Bromberg was the first to become aware of allegations of misconduct concerning Leifer with female students.[105]

41 Mrs Bromberg was contacted in August 2007 by a Melbourne psychologist, a friend, Ms Ruthie Casen, who asked her during the course of a telephone call, 'is it possible at all that Mrs Leifer has crossed any boundaries with the girls … is all in order there?'[106] Mrs Bromberg was not told, and apparently did not ask Ms Casen for the source of the information leading to this telephone call.

42 Mrs Bromberg, as a consequence of the telephone call with Ms Casen, visited Leifer 'a couple of days later' and raised the issue with her:

> Visit who?---Mrs Leifer. And I said to her, "Mrs Leifer, someone asked me a question about some of your interactions with the girls and I think you need to know that not everybody is entirely comfortable with that".
>
> And did you get any response from her at that stage?---She said "Thank you very much for coming to visit me. I've actually had a chat about this to" – what was the Vaad HaChinuch, the rabbinical umbrella…there was a group of rabbis that when she had questions she could turn to them to answer questions…And she told me that she had actually had a chat with them about it and all was in order, all was good. I didn't do more than that at that point.[107]

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104 See Glass JA in *Payne v Parker* [1976] 1 NSWLR 191, 200 – 202, setting out principles concerning failure to call a witness after review of relevant authorities including *Jones v Dunkel* (1959) 100 CLR 298 and *O'Donnell v Reichard* [1975] VR 916.

105 Mrs Bromberg commenced teaching religious studies at the School in 1981. She is also not a registered teacher.

106 Bromberg, Transcript at 486.26 – 487.11.

107 Bromberg, Transcript at 487.25 – 488.9.

43 Mrs Bromberg did not believe that Leifer could be capable of committing sexual misconduct against girls at the School. The conversation was raised with nobody else.[108] Mrs Bromberg's lack of urgency in relation to these allegations was unexplained on the evidence.

44 Mrs Bromberg received a further phone call from Ms Casen 11 to 12 days before Leifer left the country on 6 March 2008. Ms Casen informed her that allegations had again been raised concerning the conduct of Leifer and that 'there seems to be some substance to these allegations'.[109] Ms Casen stated that 'apparently there's been a young lady [an ex-student of the School] in therapy who has divulged to the therapist that inappropriate conduct has taken place between herself and Mrs Leifer'.[110] Mrs Bromberg knew the ex-student who had made the allegations. Mrs Bromberg telephoned the ex-student, who was in Israel. This telephone conversation confirmed for Mrs Bromberg the substance of the allegations that 'clearly sexualised behaviour' had taken place and 'important boundaries had been crossed'.[111]

45 After this conversation with the ex-student, Mrs Bromberg telephoned Leifer at around midnight and then went and picked Leifer up in her motor vehicle. After driving a short distance, Mrs Bromberg stopped and told Leifer of the allegations that had come to light again.[112] Leifer thanked her for raising the issue, told Mrs Bromberg that she had the issues already covered, having discussed the issues and received advice from the Vaad HaChinuch.[113]

46 Mrs Bromberg was not comforted with this reassurance on this occasion. She gave much consideration to whom she thought she could raise the issue with responsibly. Mrs Bromberg believed Leifer had 'groomed' the Adass community to believe in her, and so she decided she would 'head for two authorities who I felt were protecting

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108 Bromberg, Transcript at 488.8 – 488.9.
109 Bromberg, Transcript at 488.26 – 488.27.
110 Bromberg, Transcript at 488.24 - 488.31.
111 Bromberg, Transcript at 490.11 - 490.26.
112 Bromberg, Transcript at 491.6 - 491.13.
113 Bromberg, Transcript at 491.14 - 491.21.

her and whose word would be respected by all'.[114] They were Rabbi Wurzberger and Rabbi Beck, who were part of the Vaad HaChinuch for the School. Rabbi Beck was Rabbi of the Congregation, and Leifer frequently went to Rabbi Wurzberger and his wife for advice on religious matters and the School.[115]

47 Mrs Bromberg made an appointment to attend the Wurzberger home at 3.00pm on Friday 29 February 2008. She was later informed by Mrs Wurzberger that it was not possible to attend her home.[116] As a consequence, Mrs Bromberg spoke to Mrs Wurzberger by telephone and, during the course of the conversation, Mrs Wurzberger informed her that 'she knew what [she] was calling about and she was literally feeling sick'.[117] Mrs Wurzberger said 'I've heard a little bit about this before', and at the end of the conversation, apparently within the hearing of her husband, Rabbi Wurzberger, she stated 'I think there may be some truth to these allegations'.[118]

48 Mrs Bromberg then arranged to meet Rabbi Beck. Rabbi Beck said little, yet apparently listened carefully. As it was getting close to the Sabbath, Mrs Bromberg left that meeting believing she had acted appropriately by raising the issue.[119]

49 The following Tuesday, 4 March 2008, Mrs Bromberg attended a meeting at the home of Rabbi Telsner with Rabbis Telsner, Donnembaum and Katz, barrister Mr Norman Rosenbaum and psychologist Dr Vicki Gordon.[120] Mrs Bromberg was not sure of the role of those in attendance at the meeting; she informed those present of her conversation with the ex-student and why she believed the allegations.[121] By this stage, she was aware two different persons, ex-students, had made allegations

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114 Bromberg, Transcript at 492.1 - 492.7. The actual role the Vaad HaChinuch played in the operation of the School and the Board was not the subject of evidence, apart from it potentially being a rabbinical board that 'answers questions for the School' (Bromsberg, Transcript at 492.10 – 492.12).

115 Bromberg, Transcript at 492.16 - 492.22.

116 Bromberg, Transcript at 495.16 - 495.21.

117 Bromberg, Transcript at 429.26 – 429.27.

118 Bromberg, Transcript at 496.5 - 496.18. How long Mrs Wurzberger had known of allegations concerning the misconduct of Leifer, again, was not the subject of evidence.

119 Bromberg, Transcript at 497.1 - 497.3.

120 Dr Gordon is the daughter of the late Mr Izzy Herzog (Spigelman, Transcript at 449.2).

121 Bromberg, Transcript at 499.1 - 499.6.

concerning the conduct of Leifer.[122]

50 Mrs Bromberg was then asked to attend a meeting at the home of Mr Izzy Herzog, a respected Adass community member. She recalled Mr Benedikt, Mr Mark Ernst (both Board members) and Dr Gordon being in attendance. She only attended for five or ten minutes. The meeting was held on Wednesday, 5 March.[123] Ms Bromberg said, the next day, Leifer was not at the School. Dr Gordon addressed the students on Thursday, 6 March, and Mrs Bromberg addressed staff on Friday, 7 March, to tell them Leifer had been stood down.[124]

51 Leifer left Australia for Israel on Thursday, 6 March 2008 at 1.20am.[125]

52 Mr N. Rosenbaum, a barrister, from time to time provides pro bono legal advice to the Congregation and the Adass community. He was called as a witness in the School's case. Mr Rosenbaum was initially contacted by psychologist Dr Gordon and understood 'she had certain information which had come to her from victims of abuse by – alleged abuse by Leifer'.[126] Mr Rosenbaum stated he was present at the meeting held at the home of Mr Herzog[127] and at this meeting, it was decided that Leifer should be stood down. Mr Rosenbaum said he gave advice that Leifer should be stood down rather than dismissed.[128] Mr Rosenbaum stated that Mr Benedikt, Mr Ernst and maybe Mr Herzog called Leifer to inform her that she was being stood down.[129] A conference telephone was used.[130] Although in the same room, Mr Rosenbaum claimed he could not hear the discussion that took place.[131] He said he was subsequently informed by those involved in the discussion that Leifer had said: 'You have destroyed my reputation. I'm not going to stand for this. I'm leaving. I

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122 Bromberg, Transcript at 499.21 - 499.23.
123 Rosenbaum, Transcript at 574.29.
124 Bromberg, Transcript at 503.20 - 503.26.
125 See PX-38 (Airline tickets and payment details concerning the issuing of tickets on 5 March 2008 and flights on 6 March 2008 for Leifer and members of her family).
126 Rosenbaum, Transcript at 551.8 – 555.11.
127 Rosenbaum, Transcript at 554.30.
128 Rosenbaum, Transcript at 575.20 – 575.31.
129 Rosenbaum, Transcript at 555.6 - 555.12.
130 Rosenbaum, Transcript at 560.16.
131 Rosenbaum, Transcript at 561.12 - 561.16.

resign'.[132] Mr Rosenbaum said he later heard Leifer had left the country. This evidence of Mr Rosenbaum is contradicted by the evidence of Mr Ernst who stated that Leifer was asked to leave the country, which implies dismissal, rather than being stood down,[133] and by the letter of the School to alumnae stating that Leifer 'had been dismissed from the School for inappropriate conduct'.[134] Further, Mr Ernst stated in evidence that all decisions made on that evening were 'collective' and were made with 'all the people present'.[135]

53 Mr Rosenbaum said that the allegations of sexual abuse by Leifer were not directly reported to police, and that 'we didn't know who the people were, the victims'.[136] However, it is apparent from the evidence that within a day of the School becoming aware of the allegations concerning Leifer, thus before her departure from the jurisdiction, the School knew of 'a further eight person's [sic] affected by Mrs Leifer's alleged misconduct'.[137]

54 Mr Rosenbaum said he spoke to police on behalf of the Adass community. He was unable to recall whether these discussions occurred before or after the publication of The Age newspaper article on 14 March 2008.[138] He said at the time of the first conversation with police he was not aware that Leifer had departed the country.[139] This is surprising as he was at the meeting on Wednesday 5 March when Leifer was telephoned by Messrs Benedikt, Ernst and Herzog, following which urgent arrangements were made for Leifer to depart the country. As stated above, Mr Ernst said decisions made that evening were collective, made by all the people present.

55 The allegations considered at the meeting at the home of Mr Herzog on Wednesday 5 March were allegations of serious criminal conduct by Leifer, yet police were not advised or consulted as to the appropriateness of facilitating Leifer's departure from

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132 Rosenbaum, Transcript at 555.20 - 555.23.
133 Ernst, Transcript at 264.7. See also Reasons at [60].
134 DX-10 (Letter, School to Alumnae, undated).
135 Ernst, Transcript at 264.9 - 264.12.
136 Rosenbaum, Transcript at 555.31 – 556.1.
137 PX-34.
138 Rosenbaum, Transcript at 574.7 – 574.13. See PX-53.
139 Rosenbaum, Transcript at 574.17.

this jurisdiction in the face of such serious allegations.[140]

56 Professor Herszberg, in evidence-in-chief, stated he first found out about the allegations of sexual abuse on the day she left Australia. He said two members of the Board were dealing with it.[141] Professor Herszberg said that as a result of these investigations: 'The two members of the Board at the time there [sic] came to the conclusion that she [Leifer] couldn't continue on at the school. She was stood down'.[142]

57 Although apparently not directly involved, Professor Herszberg, on behalf of the School, sent an email to a representative of WorkCover on 24 March 2014 concerning the investigation and handling of the allegations against Leifer by the School.[143] He informed the WorkCover representative as follows in the email:

(a) during the period Sunday, 2 March to Friday, 7 March 2008, the matter was further investigated and a further victims were identified and a panel established to investigate and 'determined there was case [sic] for Mrs Leifer to answer';

(b) on Sunday, 9 March 2008, the President and Secretary of the Committee of Management were apprised of the situation, following which the President confronted Leifer with the allegations which she vigorously denied. Leifer was stood down pending further investigations. Within a few hours, Leifer resigned and informed the President that she was returning to Israel; and

(c) on Tuesday, 11 or Wednesday, 12 March 2008, Leifer 'left Melbourne, presumably for Israel'.[144]

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140 I do not accept that not knowing the names of the victims may be used as an excuse for not reporting the allegations concerning Leifer to police before she left the jurisdiction. It had been determined by the evening of Wednesday 5 March that Leifer had a case to answer. If the rabbinical/Board inquiry could reach such a conclusion it emphasises the importance of full disclosure to police prior to Leifer's arranged departure from the jurisdiction.

141 Herszberg, Transcript at 344.6 - 344.11. Other evidence indicates that the two Board members were Mr Benedikt and Mr Ernst.

142 Herszberg, Transcript at 376.20 - 376.24.

143 PX-49 (Unredacted email, Mr Herszberg to Ms Bernadette Marshall, 24 March 2014).

144 Ibid.

58 In the light of the evidence of Mrs Bromberg, the ticketing arrangements for the departure of Leifer and family members on the morning of 6 March and the evidence of Mr Ernst as to the removal of Leifer from the School, the account of Professor Herszberg to the WorkCover representative is unsatisfactory and inaccurate, particularly as to the references to the date and arrangements for Leifer's departure from the jurisdiction.

59 Mrs Tammy Koniarski, a travel agent, stated in evidence that she received a phone call from Mrs Hadassa Ernst at about 9.00pm or 10.00pm on the evening of 5 March.[145] Mrs Ernst is the wife of Board member Mr Ernst.[146] Mrs Koniarski stated she was informed in that telephone conversation that people were required to travel to Israel 'urgently'.[147] Mrs Koniarski booked the tickets for travel to Hong Kong, then on to Israel, departing Melbourne at 1.20am on 6 March.[148] Copies of the tickets were tendered in evidence, indicating travel for Leifer and four children.[149]

60 The course of events based on the evidence is as follows - Mrs Bromberg reported her concerns of the impropriety of Leifer to Rabbis Wurzberger and Beck on Friday 29 February, and by Wednesday 5 March, Leifer was found to have a case to answer. A meeting was held on Wednesday 5 March at the home of Mr Herzog. After a discussion by telephone with Leifer, arrangements were made for her to leave the country by 1.20am on 6 March. The 'urgency' of the issuing of tickets and removal of Leifer from the jurisdiction was not satisfactorily explained in evidence. Mr Ernst was subpoenaed to give evidence by the plaintiff. He stated he had, at the time, been a member of the Board for two years.[150] He attended the meeting resulting in Leifer's departure, as did Mr Benedikt, the President of the Board.[151] At one stage of his evidence, Mr Ernst said there was no urgency in removing Leifer from the

145 Koniarski, Transcript at 246.5 - 246.6.
146 Ernst, Transcript at 256.22.
147 Koniarski, Transcript at 245.26 – 245.31.
148 Koniarski, Transcript at 247.23 - 247.29.
149 PX-38.
150 Ernst, Transcript at 271.30.
151 Ernst, Transcript at 269.18 - 269.22. Note – in the course of the evidence of Mr Ernst, the Board was referred to as a committee both by the witness and counsel. The committee, so described, was in fact the Board – the incorporated entity. See Ernst, Transcript at 269.23 – 271.2.

country.[152] Later, he said he could not recall the motivation for asking Leifer to leave the country.[153] Later again, he stated there was a need to stand Leifer down 'as quick as possible'.[154]

61 The airline tickets for the flights of Leifer and members of her family were paid for by an Adass community member, Mr Robert Klein, and a company associated with Board President, Mr Benedikt. The School reimbursed these persons for payment of the tickets.[155] At the time of the arranging the departure of Leifer, Mr Benedikt and Mr Ernst were acting on behalf of the Board.[156]

62 Professor Herszberg stated in evidence that at the time of the departure of Leifer, there was advice to executive members of the Board (unnamed, but presumably Messrs Benedikt and Ernst) 'that there was really nothing we could do to keep her, to make her stay' and paying for the tickets was 'part of our legal obligation' to her.[157] Who provided that legal advice and when it was provided was not the subject of evidence.

63 I am unable to understand what legal obligations would be cast upon the School to pay for the airfares of Leifer and family members to so urgently depart Australia in circumstances where, after investigation, representatives of the School had determined 'there was case [sic] for Mrs Leifer to answer'[158] concerning very serious criminal conduct. This issue was not explored in any depth at trial. It is apparent the persons involved were determined to get Leifer out of the country within a matter of hours of the decision to remove her from her position at the School. The timing of the booking of the tickets and departure of Leifer and members of her family is extraordinary. More importantly, in the context of the issues in this case, the payment of Leifer's airfares by the School in purported compliance of contractual obligations is yet further evidence, if more were necessary, that the School was the

152 Ernst, Transcript at 258.1 - 258.4.
153 Ernst, Transcript at 264.7.
154 Ernst, Transcript at 266.23.
155 Herszberg, Transcript at 382.7 - 382.21.
156 Herszberg, Transcript at 386.27.
157 Herszberg, Transcript at 381.9 - 381.15 and 382.15.
158 PX-49.

employer of Leifer. I deal further with issues concerning the departure of Leifer when considering the plaintiff's claim for exemplary damages.

Sexual abuse

64 The plaintiff had an unhappy home life. In evidence, the plaintiff stated that within her home, she was subjected to physical and emotional abuse from her mother, as were her other siblings.[159] Physical punishment could include beatings, slapping or kicking, and emotional deprivation included picking on one child and providing privileges to another, the refusal of meals or being locked out of the house.[160]

65 Leifer developed a relationship with the plaintiff's oldest sister, Ms Nicole Meyer (who Leifer also sexually abused), which the plaintiff observed: 'seemed to be a very supportive connection'.[161] Leifer developed a connection when she approached the plaintiff and informed her that she knew of the difficulties concerning the plaintiff's home life and she could help with those difficulties.[162]

66 Leifer was described by Mr Ernst as being manipulative in the way she spoke with students, something he knew before the events of sexual molestation were known.[163] The evidence demonstrates that Leifer was manipulative in her dealings with the plaintiff. Leifer would gain permission from the plaintiff's mother for the plaintiff to attend School camps where she would take the plaintiff out of class to talk about the plaintiff's home issues. When the plaintiff was in Year 10, Leifer organised, both at School and at Leifer's home, for her to undertake special one on one lessons in Jewish values and Jewish morals.[164] The plaintiff stated she came from a home where she did not feel worthy, and that the attention from Leifer made her feel very special and privileged. The uncontradicted evidence is that Leifer held a special place in the Adass community, that Leifer was looked up to 'and anyone that had a

159 Plaintiff, Transcript at 146.6 - 146.10.
160 Plaintiff, Transcript at 146.16 - 146.25.
161 Plaintiff, Transcript at 126.29.
162 Plaintiff, Transcript at 126.29 - 127.1.
163 Ernst, Transcript at 272.5 - 272.12.
164 Plaintiff, Transcript at 127.14 - 127.30.

connection with her, other people became jealous over it'.[165] The plaintiff viewed Leifer as someone that was completely trustworthy.[166] Mrs Meyer commented that Leifer 'managed to charm everyone very quickly'.[167] It is within this setting that the sexual molestation of the plaintiff by Leifer commenced.

67 The plaintiff was aged 15 when Leifer commenced the sexual abuse.[168] The first encounters involved Leifer rubbing and touching the plaintiff on her thighs and back over her school uniform. Leifer would say to the plaintiff that 'She loved [her] … she was like a mother to [her], that she felt really close to [her] and this was her way of showing how close she felt to [her]'.[169]

68 The nature of the abuse committed by Leifer on the plaintiff soon became more serious, with Leifer touching the plaintiff on her skin, rubbing her back, stomach and breasts, sucking her breasts and penetrating her vagina with her fingers.[170] The plaintiff stated she would touch her vagina almost every time she touched her in any way. The abuse sometimes occurred two to three times a week and sometimes not for a couple of weeks.[171]

69 The sexual abuse was accompanied by Leifer telling the plaintiff how much she loved her, which made the plaintiff feel special.[172] In these sessions, Leifer would frequently pick up the plaintiff's hand and place her hand on various parts of her own body.[173] The abuse occurred at Leifer's home and on School camps. On many occasions, the abuse occurred in offices at the School itself.[174]

70 In her life, the plaintiff had not been exposed to any form of nakedness prior to the abuse of Leifer. At home, she dressed and undressed privately in the bathroom –

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165 Plaintiff, Transcript at 128.3 - 128.8 and Bromberg, Transcript at 536.11 - 536.16.
166 Plaintiff, Transcript at 128.11.
167 Meyer, Transcript at 180.2.
168 Plaintiff, Transcript at 148.21.
169 Plaintiff, Transcript at 129.1 - 129.4.
170 Plaintiff, Transcript at 130.1 - 130.5; 130.26 - 130.31.
171 Plaintiff, Transcript at 149.1 - 149.2.
172 Plaintiff, Transcript at 131.30 - 132.4.
173 Plaintiff, Transcript at 132.26 - 132.31.
174 Plaintiff, Transcript at 131.14 - 131.25 and 133.14 - 133.18.

'we were always completely covered'.[175] That the plaintiff's upbringing had been so closed and restricted meant she was extraordinarily vulnerable to a person such as Leifer.

71 Throughout the period of abuse, the plaintiff confided in Leifer all the difficulties of her home life and her personal life.[176] This caused great pressure on the plaintiff because of fear of disclosure: '… the way that the community works, if the abuse that was going on at home would have come out, it would have lowered my chances of getting married, and the matchmakers wouldn't set me up. So the threat of people knowing that I came from an abusive background was a very big threat for me at the time'.[177] In these circumstances, the plaintiff did not feel equipped to stop what was happening with Leifer – 'she was the principal of the School and was a very, very, very powerful – she had a very powerful personality that everyone looked up to. I saw the way that she reacted to people that attempted to cross her and I could see the way that she reacted to that and I was scared'.[178] In reality, the plaintiff did not understand what was happening to her.[179]

72 In Year 12, the sexual abuse took on the guise of Leifer teaching the plaintiff about marriage.[180]

73 The sexual exploitation continued in exactly the same way the year after the plaintiff finished Year 12, in 2006, when she returned to the School employed (by Leifer) as a teacher. The plaintiff was 18 at the end of Year 12. The abuse continued throughout the summer before teaching and then increased during the year that she was teaching at the School.[181] The plaintiff taught at the School for approximately eight months until she was married in September of 2006 and left with her husband for Israel.[182]

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175 Plaintiff, Transcript at 149.15.
176 Plaintiff, Transcript at 133.1 - 133.3.
177 Plaintiff, Transcript at 133.4 - 133.12.
178 Plaintiff, Transcript at 133.20 - 133.25.
179 Plaintiff, Transcript at 133.26.
180 Plaintiff, Transcript at 136.24 – 137.1.
181 Plaintiff, Transcript at 135.23 - 135.26.
182 Plaintiff, Transcript at 135.28 - 135.30.

74 The sexual misconduct of Leifer detailed by the plaintiff is disturbing. The abuse continued over a period of approximately three years. I was impressed by the plaintiff as a witness. I accept that, because of her extremely sheltered background, she did not understand what was happening to her, particularly as to whether it was right or wrong. The plaintiff was extremely vulnerable. That the sexual abuse occurred under the guise of Jewish education by the headmistress of the School and person in charge of Jewish Studies makes the breach of trust associated with the abuse monstrous. The evidence of the plaintiff's fear, uncertainty and mental disturbance over the period of time the abuse occurred and since is readily acceptable. I deal with medical reports and issues of causation concerning the injuries sustained by the plaintiff as a consequence of the abuse later in these reasons.

Duty of care

75 The School, in its Second Further Amended Defence, admitted 'it owed a duty to take reasonable care to prevent foreseeable injury to the plaintiff as a student at the School'.[183] Mr Blanden, when asked as to the nature of the duty referred to in the Defence, said it was a 'non-delegable duty'.

76 The plaintiff, as I understand the submissions and pleadings, also maintains that, 'in the alternative', the School is vicariously liable as the employer of Leifer for her actions.[184]

77 I will return to issues of duty of care, breach and vicarious liability in due course.

Direct liability

78 The primary submission of the plaintiff concerning liability put by Mr D.F. Hore-Lacy QC, senior counsel for the plaintiff, was that the role, function, conduct and scope of authority of Leifer was such that she was the *mind and will* of the School, that it can be said the acts of Leifer are the acts of the School itself and, as such, the

183 Second Further Amended Defence at [5].
184 Third Further Amended Statement of Claim at [11].

School is directly liable for her conduct.

79 On behalf of the School, Mr Blanden submitted that the evidence could not support a finding Leifer was the embodiment of the School – the administrative structure and her responsibilities did not support such a finding. Importantly, it was not contended that the concept of direct liability was not applicable to the circumstances of this matter. The School's Defence is solely based on the contention that Leifer was not 'the embodiment of the AIS Inc (the School)' – a question of evidence.

80 Mr Hore-Lacy referred me to the decision of the New South Wales Court of Appeal in *Nationwide News Pty Ltd v Naidu & Anor; ISS Security Pty Ltd v Naidu & Anor* ('*Nationwide News*').[185] Mr Naidu was employed by ISS Security Pty Ltd. By a contract between ISS Security and Nationwide News, Mr Naidu's services were made available to Nationwide News. Mr Naidu alleged he was subjected to humiliating and harassing treatment by a Mr Chaloner, the fire and safety officer for Nationwide News whilst providing security services at the premises of Nationwide News. Mr Naidu pleaded Nationwide News had breached its duty of care to him. One of the issues determined by the Court was whether the conduct of Chaloner could be directly attributed to Nationwide News.

81 Beazley JA (as she then was) referred to a number of authorities concerning the principle of direct liability, observing they had been consistently applied in Australia. She set out a passage from the judgment of Lord Reid in *Tesco Supermarkets Ltd v Nattrass* ('*Tesco*'):

> A corporation…must act through living persons, though not always one or the same person. Then the person who acts is not speaking or acting for the company. He is acting as the company and his mind which directs his acts is the mind of the company. There is no question of the company being vicariously liable. He is not acting as a servant, representative, agent or delegate. He is an embodiment of the company or, one could say, he hears and speaks through the persona of the company, within his appropriate sphere, and his mind is the mind of the company. If it is a guilty mind then that guilt is the guilt of the company. It must be a question of law whether, once the facts have been ascertained, a person in doing particular things is to be regarded as the company or merely as the company's servant or agent. In

185 (2007) 71 NSWLR 471.

that case any liability of the company can only be a statutory or vicarious liability.[186]

82 Beazley JA then set out matters that resulted in her finding that Chaloner's position and responsibilities were such that he was the mind and will of Nationwide News so far as the management of its security requirements were concerned. Those matters included that, even though Chaloner reported to a more senior manager, he had a high level of seniority and his role gave him charge of security operations at the firm.[187] In his, 'appropriate sphere', the arrangement and implementation of security, he was the embodiment of the company.[188]

83 Spigelman CJ agreed with Beazley JA that Chaloner was Nationwide News.[189] His Honour stated: 'It can fairly be said that his act or omission is that of the company itself'.[190] Chaloner was, for all relevant purposes 'the company irrespective of the existence of lines of authority and reporting to those in the management hierarchy above him'.[191]

84 In *Christian Youth Camps Ltd v Cobaw Community Health Services Ltd* ('*Christian Youth Camps*'),[192] the Victorian Court of Appeal considered whether the conduct of an employee could be attributed to his or her employer company in order to find that the employer company itself had engaged in discriminatory conduct under the *Equal Opportunity Act 1995*. In finding that the conduct of the employee could be attributed to the employer, Maxwell P cited *Nationwide News* with approval, concluding that the employee represented the 'mind and will' of the business he was there considering.[193] Neave JA accepted the principle of direct liability and stated that in such circumstances '[t]he employer will be liable for the wrongful act even if the employer could not have been held vicariously liable because the act fell

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186 *Nationwide News Pty Ltd v Naidu & Anor; ISS Security Pty Ltd v Naidu & Anor* (2007) 71 NSWLR 471, 505 [233] ('*Nationwide News*') quoting *Tesco Supermarkets Ltd v Nattrass* [1972] AC 153, 170 ('*Tesco*').

187 *Nationwide News* (2007) 71 NSWLR 471, 505 [235] (Beazley JA).

188 Ibid, 505 [236].

189 Ibid, 488 [84].

190 Ibid, 488 [85] citing Wilmer LJ in *Arthur Guiness, Son & Co (Dublin) Ltd v The Freshfield (Owners) (the "Lady Gwendolen")* [1965] P 294, 343.

191 *Nationwide News* (2007) 71 NSWLR 471, 488 [86].

192 (2014) 308 ALR 615 ('*Christian Youth Camps*').

193 Ibid, [116].

outside the scope of the employee's course of employment …'.[194]

85 Before considering whether the position of Leifer was such that her conduct should be attributed to the School, it is important to clarify the theoretical basis on which such a finding of direct liability may be made. While I agree with the conclusion in *Nationwide News*, on one reading it appears to stand for the proposition that when a natural person represents the 'mind and will' of a company, the conduct of that person will necessarily be attributed to the company; that is the submission of Mr Hore-Lacy. With respect, and without making any assumptions as to whether or not Spigelman CJ or Beazley JA meant to convey this, this is not the state of the law of attribution in Victoria.

86 The authorities cited in *Nationwide News* do not expound a rule of attribution that will apply in all circumstances. Rather, these cases provide a framework for determining when the conduct of a natural person should be attributed to a company. As observed by the Privy Council in *Meridian Global Funds Management Asia Ltd v Securities Commission* ('*Meridian*'),[195] in each of these cases the courts determined that the conduct of a natural person should be attributed to the defendant company 'as a matter of interpretation or construction of the relevant substantive rule'.[196]

87 So, for example, in *Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd*,[197] the House of Lords held that 'upon a true construction' of s 502 of the *Merchant Shipping Act 1894* (UK), the fault of the managing director should be attributed to the defendant company.[198] Similarly, in *Tesco*, the House of Lords held that the conduct of shop managers should not be attributed to the defendant company because to do so would 'be to render the defence [pursuant to s 24(1) of the *Trade Descriptions Act 1968* (UK)] nugatory and so thwart the clear intention of Parliament in providing it'.[199]

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194 *Christian Youth Camps* (2014) 308 ALR 615, [370] (Neave JA) citing *Tesco* [1972] AC 153.
195 [1995] 1 AC 500.
196 Ibid, 507.
197 [1915] AC 705.
198 Ibid, 713 (Viscount Haldane L.C.).
199 *Tesco* [1972] AC 153, 203 (Lord Diplock).

88 In *Meridian*, the Privy Council held that these were 'exceptional cases' in which the courts attributed the conduct of a natural person to a company because the law in question was *intended* to apply to companies in those circumstances.[200] These decisions were made despite the fact that the primary rules of attribution[201] and the general principles of agency and vicarious liability did not require this result.[202] In these exceptional cases, the Privy Council held that:

> …the court must fashion a special rule of attribution for the particular substantive rule. This is always a matter of interpretation: given that it was intended to apply to a company, how was it intended to apply? Whose act (or knowledge, or state of mind) was *for this purpose* intended to count as the act etc. of the company? One finds the answer to this question by applying the usual canons of interpretation, taking into account the language of the rule (if it is a statute) and its content and policy.[203]

89 *Meridian* was accepted as a 'correct' statement of the law of attribution in Victoria in *Director of Public Prosecutions Reference No. 1 of 1996*[204] by Callaway JA, with whom Phillips CJ and Tadgell JA agreed.[205] In line with *Meridian*, many cases in Australia have found that a company is directly liable for the conduct of its employees on the basis of the intended application of the substantive law in question.[206]

90 Therefore, rather than expounding a particular rule of attribution that will apply in all cases, these authorities have created a 'framework for analysis' of corporate liability.[207] As stated by the Privy Council in *Meridian*, it is a 'question of construction rather than metaphysics'.[208] Applying this framework to the present case, I must assess whether (and if so, in what way), the policy and content of the

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200 *Meridian* [1995] 1 AC 500, 507.

201 Namely, those rules set out in a company's constitution and implied by company law by which conduct of employees will be attributed to a company.

202 *Meridian* [1995] 1 AC 500, 507.

203 Ibid.

204 [1998] 3 VR 352.

205 Ibid, 355.

206 See for example *Christian Youth Camps* (2014) 308 ALR 615, 637 [99] and 638 [101] (Maxwell P) and 693 [370] (Neave JA); *Director General, Department of Education and Training v MT* (2006) 67 NSWLR 237, 242 [17] (Spigelman CJ); *North Sydney Council v Roman* (2007) 69 NSWLR 240, 252-253 [43] (McColl JA).

207 *DPP Reference No. 1 of 1996* [1998] 3 VR 352, 355 (Calloway JA, with whom Phillips CJ and Tadgell JA agreed).

208 *Meridian* [1995] 1 AC 500, 511.

common law rule of negligence requires that the conduct of Leifer be directly attributed to the School.[209] As stated by McHugh JA in *Hawkins v Clayton*,[210] the principle objects of the law of torts are:

> …to deter wrongdoing, to compensate losses arising from conduct contravening socially accepted values, and where appropriate to distribute losses among those in the community best able to afford them.[211]

91 In my opinion, these objects demonstrate that the conduct of Leifer should be attributed to the School. The School, and employers generally, have a significant ability to deter the tortious conduct of their employees.[212] Further, it is clear that the School is in the best position to afford the losses required to compensate the plaintiff. While it is arguable that vicarious liability is sufficient to achieve these ends, it is clear from both *Nationwide News* and *Christian Youth Camps* that the availability of vicarious liability does not prevent a finding that a company is directly liable for the conduct of its employees[213] and further, that vicarious liability may not be available in certain circumstances.

92 A slightly more difficult question to answer is whose acts, in order to achieve these objects, are to be attributed to the company. However, as in *Christian Youth Camps*, it is not necessary for me to determine the outer limits of the rule of attribution in this case, suffice to say that it undoubtedly applies to Leifer due to her extensive powers and responsibilities, as set out below.[214] As in *Nationwide News*, Leifer's powers were such that she would properly be considered the 'mind and will' of the School.[215]

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209 As the substantive law in question in this case is not a statutory provision, the question is not what the Legislature intended, but rather what is 'contemplated by the case-law rule' (Austin, Ford and Ramsay, *Company Directors; Principles of Law & Corporate Governance* (Butterworths, (2005)), 14.13).

210 (1986) 5 NSWLR 109.

211 Ibid, 138.

212 See for example *Cassidy v Ministry of Health* [1951] 2 KB 343, 360 (Denning LJ).

213 *Nationwide News* (2007) 71 NSWLR 471, 488 [87] (Spigelman CJ) and 506 [239] (Beazley JA); *Christian Youth Camps* (2014) 308 ALR 615, 643 [124]-[125] (Maxwell P) and 703 [401] (Neave JA). I note that some have interpreted the 'exceptional cases' referred to in *Meridian* as only arising in circumstances where vicarious liability is not available (see for example Paul Davies, 'The Attribution of Tortious Liability between Director and Company' [1998] (March) *The Journal of Business Law* 153, 160). However, the weight of authority in Australia demonstrates that this is not the case.

214 *Christian Youth Camps* (2014) 308 ALR 615, [116] 642 (Maxwell P).

215 *Nationwide News* (2007) 71 NSWLR 471, 505 [236] (Maxwell P).

93 Finally, before setting out the further evidence which demonstrates Leifer's extensive powers within the School, it is necessary to address a point of contention in relation to the rules of attribution. In *Beach Petroleum NL v Johnson*,[216] von Doussa J stated that the:

> …Tesco principle is one appropriate to be applied to determine criminal responsibility of a company, but the wider notions of the principles of agency should be applied where the issue is civil responsibility arising under the general law.[217]

94 With respect to His Honour, I do not agree with this proposition. *Nationwide News* and *Christian Youth Camps* make clear that these principles will be applicable in civil cases. Further, although the majority of cases that have considered the notion of direct liability have been in the context of criminal liability or liability pursuant to a particular statutory provision, nothing in the authorities suggests that these principles should be limited to such circumstances.[218] Mr Blanden on behalf of the School made no such submission. That these principles may be applicable in cases involving a common law cause of action is implicitly considered in *Meridian*, where the Privy Council stated that the 'language of the rule' in question is relevant only insofar as the rule in question 'is a statute'.[219]

95 What, then, was the position, and authority of Leifer within the School? I have already referred to her position as headmistress of the School.[220] Further matters, not referred to earlier, concerning the duties required of Leifer in the School included: to speak regularly with religious Jewish Studies and secular staff (individually) regarding progress and problems, to hold regular staff meetings, to encourage and assist staff, to coordinate and approve all Festival programs, guest speakers, excursions and seminars, to coordinate remedial programs to organise

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216 (1993) 115 ALR 411.

217 Ibid, 571.

218 See also R. Grantham, 'Attributing Responsibility to Corporate Entities: A Doctrinal Approach' (2001) 19 *Companies and Securities Law Journal* 168, 175: 'There is nothing in his Lord Hoffman's [sic] comments to suggest he sees them limited to any particular context'. Note that this comment was made in relation to the primary rules of attribution, although in my opinion it applies equally to the 'exceptional cases' identified by the Privy Council.

219 *Meridian* [1995] 1 AC 500, 507.

220 See Reasons at [31] – [32].

graduation ceremonies, certificates and diplomas and to oversee student welfare and discipline. The only duty required of Leifer that placed her under some form of direction was where she was required to perform 'other duties…as directed by the Menahel or his deputy'.[221]

96 The duties of Leifer within the School meant that she assumed a position of great power. The duties described are all encompassing, extending to every area of the administration of the School. It is noteworthy that the Duty Statement does not set out any mechanism or protocol for her to report on her duties to the Board or for the Board to oversee her role or activities.

97 The evidence of the plaintiff, upon which she was not cross-examined, was that Leifer controlled the School and was in charge of everything.[222] The plaintiff stated that '[t]here was nothing that happened in the School that didn't have her approval'.[223] This evidence was supported by Mrs Weisner, who stated Leifer 'conducted' the School.[224] Leifer also ran School camps.[225]

98 The evidence demonstrates that Leifer operated within the School administration without any form of appropriate oversight or governance. The evidence led by the plaintiff demonstrates Leifer employed teachers at the School.[226] Leifer held a position of power such that one would not speak out about or against Leifer: 'you would be ostracised and put aside and – she was way too respected'.[227]

99 Leifer conducted herself as headmistress of the School without any form of oversight concerning her conduct with students; she would single out girls, pull them out of lessons and take them off for private chats.[228] She would also take children from

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221 PX-29.
222 Plaintiff, Transcript at 126.13 - 126.19.
223 Plaintiff, Transcript at 126.18 - 126.19.
224 Weisner, Transcript at 233.17.
225 Meyer, Transcript at 183.30.
226 Plaintiff, Transcript at 150.5; Meyer, Transcript at 182.19; Weisner, Transcript at 231.25. The three individuals were involved in teaching either religious studies or Jewish thought. Weisner had previous teaching experience. Erlich and Meyer taught the year after leaving school. None were registered teachers.
227 Meyer, Transcript at 188.25 - 188.26.
228 Meyer, Transcript at 180.6 - 180.9.

time to time to her own house,[229] which a senior teacher at the School knew was occurring and seemingly never questioned because of Leifer's standing in the Adass community.[230] On School camps, she would disappear with students for hours at a time, including the plaintiff.[231]

100 Other evidence led in the plaintiff's case was that there was no mechanism within the School through which a teacher could complain or raise a concern about the conduct of another teacher.[232] This was highlighted by the evidence of Mrs Weisner. In a religious community where physical contact outside of family members was not generally accepted, Mrs Weisner observed Leifer acting inappropriately when a student sat on Leifer's lap on a school bus returning from a School camp in 2004. She explained that she did not report this to the School as she 'didn't have anyone to turn to. Mrs Leifer was the principal'.[233] This was also supported by the evidence of another teacher, Mrs Bromberg. As discussed earlier in these reasons, when first alerted to the possibility of misconduct by Leifer in August 2007, Mrs Bromberg raised it with Leifer directly, rather than someone independent at the School or, indeed, a representative of the Board.[234] When it had been confirmed in Mrs Bromberg's own mind that Leifer had in fact been involved in sexual misconduct with students, she again first took the issue up with Leifer directly, and subsequently with Rabbis Wurzberger and Beck, who, on the evidence, had no formal position with the School or on the Board. I find it remarkable that matters of such significance, concerning the potentially serious misconduct of the headmistress of the girls' campus would not be directly raised by an experienced teacher at the School with a person involved in the administration of the School itself. The failure to inform the Principal of the School, Rabbi Greenfeld, demonstrates his lack of authority within the girls' campus itself, especially compared with that of Leifer. It

229 Meyer, Transcript at 192.28.
230 Bromberg, Transcript at 536.5 - 536.16.
231 Meyer, Transcript at 183.22 - 183.24.
232 Weisner, Transcript at 232.29. Whilst I have made this finding concerning direct liability (and vicarious liability), it is not be seen as indicative of a finding of negligence against the School. The plaintiff failed to adduce sufficient evidence for me to make such a finding in negligence in relation to supervision.
233 Weisner, Transcript at 236.7 - 236.8.
234 Bromberg, Transcript at 487.25 – 488.9.

is also, in my opinion, indicative of the nebulous governance of the School in general.

101 Mr Ernst was subpoenaed by the plaintiff and gave evidence. His evidence both in chief and in cross-examination predominantly concerned the purchase of airline tickets for Leifer's departure from Australia and counselling arrangements for the victims of her sexual abuse. In cross-examination, Mr Ernst agreed with Mr Blanden that as of March 2008, he had been on the 'School committee' (the Board) for two years and over that period he had no dealings with Leifer, nor did he have any knowledge of her performance generally in the School.[235]

102 Thus, at the conclusion of the plaintiff's case, there was evidence that, in effect, Leifer ran the School, exercising control in an unrestrained manner, that persons involved with the School were scared to cross her and that a member of the Board had no idea of the way in which she functioned or operated within the School. Leifer's Duty Statement demonstrates that she was involved in every aspect of the School's operation. The evidence of the plaintiff and witnesses Meyer and Weisner concerning Leifer's control of the School was not challenged in cross-examination.

103 The evidence led by the second defendant does not in any substantive way contradict the plaintiff's case.

104 I have referred to the contradictory evidence concerning the role of Leifer at the School given by the current Principal of the School, Professor Herszberg. Professor Herszberg, at one stage of his evidence, described Leifer as having been in overall charge of the girls' campus,[236] and supported by Mrs Spigelman.[237] I consider this description is entirely accurate.

105 I also note that Professor Herszberg was not closely associated with the conduct of the girls' campus or the School generally over the period that Leifer held the position

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235 Ernst, Transcript at 271.30 – 272.4. It is admitted by the second defendant that the Board operated the School. See Second Further Amended Defence at [1].

236 Herszberg, Transcript at 416.28 - 416.30.

237 Herszberg, Transcript at 334.17 - 334.20 and 341.5 - 341.7.

of headmistress. He was not in a position to directly observe the day to day administration of the School or the manner in which Leifer discharged the requirements of her Duty Statement or interacted with the girls at the School. In evidence-in-chief, he provided the following evidence:

> In terms of then the way the School operated from the time that Mrs Leifer was given that position, do you have any knowledge yourself, did you have any day to day or week to week involvement with the School or the running of the School in that period, so this is through the early 2000s up until early 2008?---Not on a day to day manner or week to week.[238]

106 I turn to the evidence of Mrs Spigelman and Mrs Bromberg. Mrs Spigelman is the Head of General Studies (or secular) education at the School. She joined the School in 2003. It is difficult to comprehend the actual role of Mrs Spigelman in the School. Although Head of General Studies, her function was apparently limited to administration. It was not until cross-examination that it was revealed Mrs Spigelman is not a registered teacher. Her own evidence demonstrated a confusion of roles. Despite at one stage describing herself as a teacher, she then apologised and stated she had not taught for the past ten years: 'I stopped teaching when I entered Adass. I'm in a school, so that's why I made the mistake of saying I'm teaching because I'm part of the school. But I'm actually no longer teaching since I came to Adass because I'm not qualified in Australia'.[239]

107 Mrs Spigelman, even though not a qualified teacher, described herself as head of the girls' campus at the School.[240] She said she would liaise with Leifer as head of religious studies and that each would not do anything without letting the other know.[241] Mrs Spigelman rejected the proposition put to her in evidence-in-chief that Leifer ran the School, she stated this was untrue: 'we always ran the School together'.[242]

108 Two copies of the Adass Israel Staff Handbook for 2008 were tendered during the

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238 Herszberg, Transcript at 342.23 -.29.

239 Spigelman, Transcript at 468.21 - 468.27. Evidence suggests concerns had previously been raised with the School by the VRQA as to the role and function of unregistered teachers at the School.

240 Spigelman, Transcript at 469.5 - 469.6.

241 Spigelman, Transcript at 429.13 - 429.23.

242 Spigelman, Transcript at 454.1 - 454.4.

cross-examination of Mrs Spigelman. One copy of the handbook named Leifer on the girls' campus general staff as Menahales sitting above Mrs Spigelman, who was described as Assistant Principal. The other copy of the 2008 Handbook made no reference to Leifer as a member of staff at all; which was likely the result of it being prepared after Leifer had departed the School.[243] Mrs Spigelman said the word 'Menahales' meant Leifer 'was head of the girls' college – Jewish studies school'.[244] In my opinion, the document sets out the hierarchy of positions within the girls' campus, with Leifer holding the senior position in the girls' campus. Her position in the document is consistent with what I have found to be the preeminent purpose of the existence of the girls' campus – to educate the girls in Jewish Studies. The position of Leifer as set out in the document is consistent with the evidence of Professor Herszberg that Mrs Spigelman assisted Leifer.

109 Concerning a lack of any mechanism which allowed students to make complaints, Mrs Spigelman was asked in examination-in-chief: 'If a girl at the School had a concern of any sort, who could they go to?'[245] She provided a number of names in evidence, including herself, Mrs Measey, Head of the Girls' Primary School, and Rabbi Greenfeld.[246] This evidence is of limited value. A 'problem of any sort' could well relate to the most minor of student concerns. The question did not address the plaintiff's evidence regarding the difficulty of complaining about Leifer's sexual abuse because of Leifer's position of power in the School and the fear of 'crossing' her.[247] It is apparent there was no education of students or teachers, nor was there any proper mechanism for complaints within the School, concerning the serious issue of sexual misconduct by teachers.[248] 'Concepts of protection of the child' were not addressed at the School until 2008. The provocateur for the introduction was apparently a VRQA organised review, which came about as a consequence of the

243 PX-51.
244 Spigelman, Transcript at 465.8 - 465.10.
245 Spigelman, Transcript at 453.20 - 453.22.
246 Spigelman, Transcript at 453.20 - 453.29.
247 Plaintiff, Transcript at 133.20 - 133.29.
248 Bromberg, Transcript at 456.3 - 456.10.

reported misconduct of Leifer.[249]

110 The plaintiff's inability to stop Leifer's sexual abuse and inability to understand the nature of Leifer's conduct demonstrates her naivety and immense vulnerability. In my opinion, this naivety and vulnerability was the product of her Ultra Orthodox Jewish upbringing and schooling. The primary purpose of the School was to preserve the Ultra Orthodox Jewish traditions responsible for the plaintiff's naivety and vulnerability. In these circumstances, supervision of staff and a well-developed mechanism for student and teacher complaints was necessary within the School to ensure this naivety and vulnerability was not abused. I am satisfied that such supervision or an adequate system for complaints did not exist at the School at this time. The position of power held by Leifer in the School was enhanced by this situation.[250] The marked contrast with the way complaints concerning teachers were handled prior to 2008 and since 2008 is apparent from the evidence of Mrs Bromberg. Mrs Bromberg stated she now knows she could report the potential misconduct of a teacher to other teachers and that there is a specific protocol in place to identify grooming behaviour.[251] Professor Herszberg stated that since the exposure of Leifer as a sexual abuser, an inquiry had been held within the School as to how it happened and why it went unnoticed. He said, as a consequence of that inquiry, certain processes and procedures have been adopted within the School; every room and office now has a window, areas of the School, including offices, are now under video surveillance and regular talks are now given to staff about looking over the shoulders of others so that staff are capable of picking up unusual practices.[252]

111 Mrs Bromberg stated she was, at the time of giving evidence, a teacher, head of support and a chaplain at the School.[253] Her teaching was restricted to Jewish subjects, as she also is not a registered teacher.[254] Mrs Bromberg began teaching at

249 Bromberg, Transcript at 456.17 - 456.29 and 457.20 – 458.28.
250 See Third Further Amended Statement of Claim at [9](b), (c) and (d).
251 Bromberg, Transcript at 514.21 – 515.3.
252 Herszberg, Transcript at 397.17 – 398.18.
253 Bromberg, Transcript at 483.13.
254 Bromberg, Transcript at 524.22.

the School shortly after 1981. She stated despite her involvement in Jewish Studies, Leifer made decisions concerning this area of education without consulting her.[255]

112 I do not consider the evidence of Mrs Bromberg contradicts the evidence led in the plaintiff's case of the control and power exercised by Leifer in the School and, for that matter, her significant standing in the Adass community.

113 Nothing in the case put on behalf of the School attempted to address the role or function of the Board in the overall administration and supervision of the girls' campus, or of Leifer in particular. The evidence of Mr Ernst as to his lack of knowledge as to how Leifer functioned and operated in the School indicates that the Board had no role in receiving any reports or in any way overseeing Leifer's performance as headmistress. Adass Israel School Inc – the School, admits it operated the School,[256] but the School adduced no proper evidence as to the nature, extent or involvement of its Board in its operation. The unexplained failure of the School to call the Chair of the Board, Mr Benedikt, and the administrator of the School, Mr Nussbacher, leads me to draw an inference that their evidence would not have assisted the School's case in relation to the oversight of Leifer and her role in the School. I more readily accept the evidence of the plaintiff's witnesses regarding Leifer's power within and control of the School.

114 Rabbi Greenfeld was Principal of the School over this period of time. There is no evidence to suggest Leifer reported to Rabbi Greenfeld in any meaningful way or that he had some oversight of her actions and her conduct as headmistress of the girls' campus.

115 Mr Blanden, in submissions, referred me to the Strategic Plan of the School as updated to January 2014.[257] I have referred to this document in my reasons.[258] It was submitted the Strategic Plan made clear that Leifer did not have a position on the Board. Leifer's status vis-à-vis the Board is not explained by this document. The

255 Bromberg, Transcript at 486.11 - 486.13.
256 Second Further Amended Defence at [1].
257 DX-8.
258 See Reasons at [1].

terms of reference for the Board in this document are taken from what is described as 'the Adass Israel School Inc The Council Governance Charter 6 April 2008 – Modified 15 May 2009' (the 'Governance Charter').[259] The Governance Charter for the Board was drafted after Leifer's departure from the School. Whether Leifer had a place on the Board or the extent of her involvement with the Board was not the subject of evidence, nor were the terms of reference of the Board, if there were any, prior to April 2008, produced in evidence. I again note the absence of the President of the Board, Mr Benedikt, and administrator of the School, Mr Nussbacher, as witnesses in this case. I infer their evidence would not have assisted the School's case concerning Leifer's involvement with the Board.

116 An administrative diagram of the structure of the School and Congregation was also included in the Strategic Plan.[260] That plan, noted as 'last updated MAR 2013', demonstrates that the Principal of the School reported to the Board and was responsible for the School. This is to be contrasted with an administrative diagram of the structure of the School attached to the resume of Leifer prepared in or about September 2002 (earlier referred to). This plan details the Board at the apex of the administrative structure, with Leifer as Principal of Jewish Studies and Rabbi Greenfeld as Principal of Secular Studies, having equal status and both reporting directly to the Board.[261] In my opinion, having regard to the evidence in this case, I think the diagram in Leifer's resume is a more accurate depiction of Leifer's position within the administration of the School. As stated above, the manner in which she reported to the Board, if she did at all, and the supervision of the Board over Leifer, if there was any, was not the subject of evidence.

117 In any event, it is not relevant that Leifer did not have a position on the Board. The evidence indicates she had a position of seniority and power within the girls' campus and operated independently of the Board. The responsibilities and power of Leifer was such that she was 'the mind and will', the 'embodiment' of the School.

259 DX-8 at 2-3.
260 Ibid at 2-2.
261 DX-2.

Whether she held a position on the Board or not does not affect this finding.[262]

118 The power, control and authority of Leifer within the School was unrestrained and unrestricted. Leifer committed sexual abuse against the plaintiff both inside and outside the School, but at all times Leifer's appalling misconduct with the plaintiff was built on this position of unrestrained power, control and authority that had been bestowed upon her by the Board. Leifer, in the day to day running of the School, up until the time of the exposure of her sexual abuse, was the embodiment of the School. It is not a question of whether Leifer was or was not acting in the course of or within the scope of her employment. I find she was acting 'within her appropriate sphere', which was the day to day administration and operations of the School. In that sense, her misconduct was the misconduct of the School and thus the School is directly liable for damages arising from the plaintiff's injuries caused as a consequence of Leifer's serious criminal conduct.

Non-delegable duty of care/vicarious liability

119 Despite the admission that the School owed the plaintiff a non-delegable duty of care, the conduct of Leifer is to be approached through the framework of vicarious liability as established by the High Court in *State of New South Wales v Lepore* ('*Lepore*').[263]

120 In *Lepore*, it was recognised that school authorities owe students a non-delegable duty of care and that that duty has arisen in cases involving negligence. Where a non-delegable duty of care exists, intentional wrongdoing, such as sexual abuse, however 'introduces a factor of legal relevance beyond mere failure to take care':[264]

> As will appear, courts of the highest authority in England and Canada, and courts in other common law jurisdictions, have analysed the problem of the liability of a school authority for sexual abuse of pupils by teachers in terms of vicarious liability. If the argument based on non-delegable duty, said to be supported by *Introvigne*, is correct, their efforts have been misdirected, and the conclusions they have reached have unduly restricted liability. If the proposition accepted in the Court of Appeal of New South Wales is correct,

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262 *Nationwide News* (2007) 71 NSWLR 471, 505 [235] - [236] (Beazley JA).
263 [2003] 212 CLR 511 ('*Lepore*').
264 Ibid, [31] (Gleeson CJ).

> and represents the law in Australia, then the liability of school authorities in this country extends beyond that which has been accepted in other common law jurisdictions. Moreover, in this country, where a relationship of employer and employee exists, if the duty of care owed to a victim by the employer can be characterised as personal, or non-delegable, then the potential responsibility of an employer for the intentional and criminal conduct of an employee extends beyond that which flows from the principles governing vicarious liability. It is unconstrained by considerations about whether the employee was acting in the course of his or her employment. It is enough that the victim has been injured by an employee on an occasion when the employer's duty of care covered the victim. The employer's duty to take care, or to see that reasonable care was taken, has been transformed into an absolute duty to prevent harm by the employee. It is similar to the duty owed by the owners of animals known to have vicious propensities.[265]

121 In *Lepore*, this 'absolute duty' position was determined to be too broad and 'on the assumption that there has been no fault on the part of the school authority, the question to be addressed is whether the authority is vicariously liable for the wrongdoing of its employee'.[266]

122 Thus, in Australia, an employer may be vicariously liable for the unauthorised acts of an employee; the difficulty arising out of the judgments in *Lepore* is distilling the actual manner of application of the test of vicarious liability to the particular case in question.

123 In *Sprod v Public Relations Oriented Security Pty Ltd* ('*Sprod*'),[267] Ipp JA recognised the difficulty of tracing 'a certain and secure path' through the dicta of the judgments in *Lepore* and stated: 'The safest course is to attempt to apply all of them to the facts of the particular case'.[268] In *Blake v JR Perry Nominees Pty Ltd* ('*Blake*'),[269] Harper JA (with whom Robson AJA agreed) highlighted the variation on the tests on the issue of vicarious liability from each of the judgments in *Lepore*.[270] His Honour observed, '*Lepore* and the similar decisions of the House of Lords in *Lister*[271] and of the Supreme Court of Canada in *Bazley*[272] have been explained by some commentators

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265 *Lepore* [2003] 212 CLR 511, [32].
266 Ibid, [39] (Gleeson CJ), [129] - [131] (Gaudron J), [238] - [239] (Hayne and Gummow JJ) and [309] (Kirby J).
267 [2007] NSWCA 319 ('*Sprod*').
268 Ibid, [54]. A task easier said than done.
269 (2012) 38 VR 123 ('*Blake*').
270 Ibid, [59] - [61].
271 *Lister v Hesley Hall Ltd* [2002] 1 AC 215.
272 *Bazley v Curry* (1999) 174 DLR (4th) 45.

on the basis that teachers (and others in equivalent positions) are often placed in a position of power and responsibility over children or other vulnerable people in their care'.[273] In *Withyman v State of New South Wales and Blackburn* ('*Withyman*'),[274] Allsop P (with whom Meagher and Ward JJA agreed) stated the guiding principles set out by Gleeson CJ in *Lepore*[275] were uncontroversial: 'The relevant principles were fully and pellucidly stated'.[276] Vanstone J, in *A, DC v Prince Alfred College Incorporated* ('*Prince Alfred*'),[277] relied on the general principles of vicarious liability taken from the judgment of Gleeson CJ in *Lepore*.

124 What is highlighted by the approach of these various cases is the necessity of examining the particular circumstances of the teacher/student contact, the responsibilities of the teacher involved and the relationship existing between the teacher and student:

> Some teachers may be employed simply to teach; and their level of responsibility for anything other than the educational needs of pupils may be relatively low. Others may be charged with the responsibilities that involve them in intimate contact with children, and require concern for personal welfare and development.[278]

125 So it is that 'teaching may simply involve care for the academic development and progress of a student'. On the other hand,

> …where the teacher-student relationship is invested with a high degree of power and intimacy, the use of that power and intimacy to commit sexual abuse may provide a sufficient connection between the sexual assault and the employment to make it just to treat such contact as occurring in the course of employment. The degree of power and intimacy in the teacher-student relationship must be assessed by reference to factors such as the age of students, their particular vulnerability if any, the tasks allocated to teachers, and the number of adults concurrently responsible for the care of students… the nature and circumstances of the sexual misconduct will usually be a material consideration.[279]
>
> …

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273 *Blake* (2012) 38 VR 123, [59] - [61] (Harper JA).
274 [2013] NSWCA 10 ('*Withyman*').
275 [2003] 212 CLR 511, [40] – [74].
276 [2013] NSWCA 10, [134] (Allsop P).
277 [2015] SASC 12, [168] - [169] ('*Prince Alfred*').
278 *Lepore* [2003] 212 CLR 511, [53] (Gleeson CJ).
279 Ibid, [74] (Gleeson CJ).

> If there is sufficient connection between what a particular teacher is employed to do, and sexual misconduct, for such misconduct fairly to be regarded as in the course of the teacher's employment it must be because the nature of the teacher's responsibilities, and of the relationship with pupils created by those responsibilities justifies that conclusion.[280]

126 I have already identified the responsibilities of Leifer in the girls' campus and I have found she held a preeminent position of power.[281] The power was accentuated by her unique authority in the education of girls in their religious beliefs, lifestyle and everyday behaviour. This was no ordinary school; at the time the plaintiff attended it, her final year was devoted solely to Jewish Studies. The girls were effectively closed off from the rest of the world. They were naïve concerning matters of sex. Thus was generated within the School a highly unusual situation where Leifer's responsibilities and her relationship with students, including the plaintiff, concerned the very core of their beliefs, values and everyday living – ensuring the Ultra Orthodox Jewish traditions and practices were passed on to the next generation.[282]

127 The nature of the Adass community that supported the School is another important consideration in assessing Leifer's relationship with students at the School. The Adass community is bound together in an incredibly tight, enveloping way:

> The same people are my neighbours, the same peoples are my family, and the same people are the people I go to school, and even I will socialise with. If I go outside of school or like outside at night to visit friends it will be the same people, and the kids will actually always will be surrounded by the same people, from morning until night, from the day you are born until literally the day you are gone.[283]

The School is an integral component of this community. The School's Strategic Plan emphasises the importance of the consistent alignment between home and School of the values and attributes of Orthodox Judaism – 'it is therefore imperative that the school maintains strict adherence to this philosophy'.[284] Leifer, as a result of her position in the School and the absolute importance of religious studies within the school, held a privileged and esteemed position within the Adass

280 *Lepore* [2003] 212 CLR 511, [74] (Gleeson CJ).
281 Reasons at [32].
282 Bromberg, Transcript 534.7 - 534.18.
283 Spigelman, Transcript at 427.21 - 427.29.
284 DX-8 at 1-1.

community.[285] It is because of this position that Leifer could telephone the plaintiff's mother to tell her the plaintiff should be allowed to participate in school camps (where the plaintiff was abused): 'She was Mrs Leifer my mother listened to her'.[286] The private lessons (where the plaintiff was also abused) occurred in circumstances of Leifer telephoning the plaintiff's mother '… who thought it a big privilege for Mrs Leifer to be giving me attention'.[287]

128 In my opinion, 'the teacher-student relationship' between Leifer and the plaintiff 'was invested with a high degree of power and intimacy' and Leifer used 'that power and intimacy to commit sexual abuse'. The 'connection between the sexual assaults and the employment' is such 'to make it just to treat such contact as occurring in the course of employment'.[288]

129 A further consideration is that the plaintiff was particularly vulnerable. As I have stated above, she was completely closed off from the world, ignorant in matters of sex, unaware of the inappropriateness of Leifer's conduct towards her.[289]

130 Gaudron J, considering the other judgments in *Lepore*, stated:

> The only principle basis upon which vicarious liability can be imposed for the deliberate criminal acts of another, in my view, is that the person against whom liability is asserted is estopped from asserting that the person whose acts are in question was not acting as his or her servant, agent or representative when the acts occurred.[290]

The circumstances of this case are such, in my opinion, to estop the School asserting Leifer was not acting as the servant or agent of the School when she committed the sexual abuse of the plaintiff: 'There is a close connection between what was done and what the person was engaged to do'.[291]

131 Kirby J, in *Lepore*, stated:

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285 Bromberg, Transcript at 536.11 - 536.12.
286 Plaintiff, Transcript at 127.20 - 127.21.
287 Plaintiff, Transcript 128.14 - 128.18.
288 *Lepore* [2003] 212 CLR 511, [74] (Gleeson CJ).
289 Plaintiff, Transcript at 129.6.
290 *Lepore* [2003] 212 CLR 511, [130].
291 Ibid, [131].

> Yet how is the relevant connection to be determined? As McHugh J stated, in the passage from *Hollis* referred to above, vicarious liability must be determined "consistently with the principles that have shaped the development of vicarious liability and the rationales of those principles". The "connection" which satisfies the imposition of liability must, therefore, comply with the risk analysis considered above. Thus, it has been expressed as where the employment "*materially* and *significantly* enhanced or exacerbated the risk of [the tort]" or where there is a significant connection between the creation or enhancement of the risk and the wrong that it occasions within the employer's enterprise; or alternatively, where the conduct may "*fairly and properly be regarded* as done [within the scope of employment]".[292]

Kirby J recognised the connection between employers' acts and the employment was a question of fact and degree:

> Liability might extend to incidents outside the school premises occurring on sports days, vacations and other events involving potential intimacy, made possible by the employment relationship.
>
> The potential breadth of possible liability does not detract from its existence where it is just and reasonable that it should apply. That is why the determination of liability, on the basis of the connection between the enterprise and the wrong, is inescapably a question of fact and degree.[293]

As I have found above, it is my opinion on the circumstances presented in this case there is a close connection 'between the enterprise and the wrong'.

132 Gummow and Hayne JJ recognised the authority of a teacher over the pupil and the vulnerability of students to that authority. Their Honours recognised sexual abuse of students was usually associated with an abuse of the teacher's power and authority.[294]

133 Despite referring to 'the attributes of employment (control, authority, trust, access to persons or premises)'[295] often being responsible for such abuse, their Honours expressed a concern that the inquiry concerning vicarious liability in such circumstances '…would be about *how* the wrongdoer carried out the wrong, regardless of what he or she was employed to do'.[296]

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292 *Lepore* [2003] 212 CLR 511, [318].
293 Ibid, [321] – [322].
294 Ibid, [216].
295 Ibid, [223].
296 Ibid.

134 In my opinion, what Leifer 'was employed to do' (as well as 'the attributes of [her] employment') were matters intimately involved in her sexual abuse of the plaintiff, but I recognise the stricter test propounded by Gummow and Hayne JJ[297] is unlikely to see the plaintiff successful in this proceeding on the issue of vicarious liability. However, the judgments of Gleeson CJ, Gaudron and Kirby JJ in *Lepore* (and noting an appellate court's specific approval of the judgment of Gleeson CJ)[298] are, I consider, the appropriate tests for vicarious liability for me to apply.

135 The relationship of Leifer, as headmistress of the School, with the plaintiff is to be distinguished from the circumstances in *Withyman*.[299] Referring to the particular circumstances of that case, Allsop P stated: 'The enterprise of teaching and guiding the young, even using gentle and forgiving familiarity does not create a new ambit of risk of sexual activity', and thus his Honour decided, 'the connection and means was not such as to justify imposition on the State for [the teacher's] apparently out of character, sexual misconduct'.[300] In this case, the nature of Leifer's power and control in the School was based on her position as Head of Jewish Studies (the instruction of which justified the very existence of the girls' campus), the students were vulnerable and Leifer was able to conduct herself with unrestrained power and control within the School.

136 Thus I conclude that the School is vicariously liable for the sexual abuse committed by Leifer upon the plaintiff. I turn now to the question of whether the School itself was negligent.

Negligence of the School

137 In her Third Amended Statement of Claim, the plaintiff alleged that the School owed a duty of care to her and that it breached that duty of care. The plaintiff particularised this breach as follows:

a) Failing to properly vet the employment of the First Defendant and

297 *Lepore* [2003] 212 CLR 511, [239].
298 *Withyman* [2013] NSWCA 10, [134] (Allsop P).
299 Ibid, [134].
300 Ibid, [143].

Principal at the school.

b) Failing to properly supervise the First Defendant when she held private sessions with students at the school or at her home.

c) Failing to have any protocols or systems by which students could complain about perceived misconduct to them including sexual assaults by other students or teachers at the school.

d) Failing to make publicly known protocols or systems for students to use to complain about perceived misconduct to them including sexual assaults by other students or teachers at the school.

e) Failing to take any steps to investigate the activities of the First Defendant when it was known or suspected or ought to have been known or suspected by the Second Defendant that the First Defendant was spending an inappropriate and inordinate amount of time alone with students including the Plaintiff.

f) Employing an unregistered teacher.

g) Employing a teacher who had not reached the standards required by the Victorian Institute of Teaching Act 2001.[301]

138 The alleged breach of duty of care by the School was not the subject of any final submission by Mr Hore-Lacy, oral or written. It is not clear whether this aspect of the claim is still pursued on the plaintiff's behalf.

139 The failure to make submissions underscores my analysis of the evidence in this case; there is no satisfactory evidence as to the content of the duty and the breach alleged.

140 That a School may be liable in negligence in these circumstances was specifically addressed by Gleeson CJ in *Lepore*:

> One potentially important matter is fault on the part of the school authority. The legal responsibilities of such an authority include a duty to take reasonable care for the safety of pupils. There may be cases in which sexual abuse is related to a failure to take such care. A school authority may have been negligent in employing a particular person, or in failing to make adequate arrangements for supervision of staff, or in failing to respond appropriately to complaints of previous misconduct, or in some other respect that can be identified as a cause of the harm to the pupil. The relationship between school authority and pupil is one of the exceptional relationships which give rise to a duty in one party to take reasonable care to protect the other from the wrongful behaviour of third parties even if such behaviour is

301 Third Further Amended Statement of Claim, particulars to [9].

> criminal. Breach of that duty, and consequent harm, will result in liability for damages for negligence.[302]

141 The School did owe a duty to take reasonable care for the safety of the plaintiff, including to protect against harm caused by the wrongful behaviour of third parties. But this does not take matters very far in determining the scope of the duty and whether or not the School breached this duty.

142 In *The Trustees of the Roman Catholic Church for the Diocese of Bathurst v Koffman & Anor*,[303] Mahoney P stated:

> When a school accepts a pupil, it owes to him a duty of care, in the sense that it assumes obligations towards him. Those obligations involve that it do various things: one of them is to take appropriate care for his safety. *It is the determination of what that obligation requires the school to do which is here in question.*
>
> What that obligation, the obligation of the school to do things for the safety of the pupil, *will require to be done will depend upon the circumstances*. Thus, if it is plain to the school that, immediately outside the school premises, there is a busy and therefore dangerous road, the school will ordinarily have an obligation to shepherd pupils of a young age across the road. But if, in the course of walking from school to home, the student has reason to cross a busy road two kilometres from the school, it does not follow that the obligation of the school to take precautions for the safety of the student will involve that it shepherd the student across the road. I do not mean by this that a school may not have some obligations in respect of pupil safety even two kilometres from the school. Thus, if the school was made aware that, at that place, the student was habitually molested, it might arguably have an obligation, inter alia, to draw that matter to the attention of the parents, the police or others. I have referred to these examples to illustrate that what the obligation to take precautions in respect of a pupil's safety will require the school to do *will vary according to the circumstances of time, place and otherwise*.
>
> In summary, a duty of care in the formal sense arises from the relationship of master and pupil. From that duty of care arises an obligation to take precautions for, inter alia, the pupil's safety. *What precautions are to be taken depends, as I have indicated, upon the circumstances, including the time, place and otherwise at which it is suggested that the precautions should be taken*.[304]
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> (Emphasis added).

143 In *Wyong Shire Council v Shirt*,[305] Mason J explained how the Court is to answer these

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302 *Lepore* (2003) 212 CLR 511, [2] (Gleeson CJ).

303 (Unreported, New South Wales Court of Appeal, Mahoney P, Priestley and Sheller JJA, 9 August 1996).

304 Ibid, 6 – 7 (Mahoney P).

305 (1980) 146 CLR 40.

questions:

> In deciding whether there has been a breach of the duty of care the tribunal of fact must first ask itself whether a reasonable man in the defendant's position would have foreseen that his conduct involved a risk of injury to the plaintiff or to a class of persons including the plaintiff. If the answer be in the affirmative, it is then for the tribunal of fact to determine what a reasonable man would do by way of response to the risk. The perception of the reasonable man's response calls for a consideration of the magnitude of the risk and the degree of the probability of its occurrence, along with the expense, difficulty and inconvenience of taking alleviating action and any other conflicting responsibilities which the defendant may have. It is only when these matters are balanced out that the tribunal of fact can confidently assert what is the standard of response to be ascribed to the reasonable man placed in the defendant's position.[306]

144 It is the obligation of the plaintiff in such a case to plead and then lead evidence as to what the defendant should have done, the reasonableness of what should have been done, and it is for the Court to decide this question. As is clear from the above authorities, I am not expected to make this decision in a vacuum. Duty and breach of duty must be determined by consideration of the evidence going to the magnitude of the risk, the foreseeability of the harm, the expense and inconvenience (or alternatively, the ease) of taking alleviating action, in order to be able to balance these factors and, ultimately, determine the question of liability.

145 In this case, I have not been assisted with evidence or submissions that provide a basis to permit me to give proper consideration to these questions. The allegations of breach against the School were not properly advanced at trial. Other than the bare particulars in the Third Further Amended Statement of Claim, no evidence was led or submissions made as to how a reasonable school authority in the position of the School would have at the relevant time prevented or reduced the risk of such harm occurring. There is no evidence of any form of standard that is said to represent what could be expected of a reasonable school authority.

146 Evidence was led as to what the School did after discovering the misconduct of Leifer in order to prevent such misconduct in the future, including the installation of windows in offices and classrooms and increased awareness of staff. However, I

306 *Wyong Shire Council v Shirt* (1980) 146 CLR 40, 47-48.

find this of limited assistance in determining the scope of the School's duty in the circumstances in which the harm occurred. That some steps have been taken in the wake of Leifer's conduct does little to assist determining what steps should have been previously introduced. What 'protocols' or 'systems' could reasonably have been expected to be in place at the School over the period 2002 – 2006 which may have prevented or reduced the risk of Leifer's conduct vis à vis the plaintiff was not addressed in the plaintiff's case with any form of precision. It seems to me that the 'protocols' and 'systems' the plaintiff alleges should have been in place would require very careful consideration and some sophistication in their application to achieve successful implementation; but this is speculation. Proper evidence upon which to make findings, let alone assess the reasonableness of what I consider to be vague pleadings of alleged breach put forward on behalf of the plaintiff is a necessary precursor to any finding.

147 I now turn to briefly consider the particulars of breach relied upon by the plaintiff in pleading negligence against the School. Firstly, there is no evidence to support the proposition that the School failed to properly vet the employment of Leifer but, importantly, in addition, there is no evidence to demonstrate what the proper vetting (if there was failure to properly vet) would have found or demonstrated of the history or character of Leifer. There is no evidence to suggest, for example, that Leifer was unsuitable for employment because of some prior history of misconduct. As held by Starke J in *Davis v Bunn*,[307] it is necessary for the plaintiff to 'establish by evidence circumstances from which it may fairly be inferred that there is reasonable probability that the accident resulted from want of some precaution to which the defendant might and ought to have resorted.'[308]

148 The plaintiff further alleges that the School breached its duty of care in failing to properly supervise Leifer and failing to implement or make publicly known any protocols or systems to allow for complaints to be made in relation to sexual misconduct at the School. As is set out above in relation to direct liability and

307 (1936) 56 CLR 246.
308 Ibid, 255 (Starke J).

vicarious liability, I have found that there was a lack of supervision of Leifer within the School and no system for allowing complaints of this nature to be made. However, such conclusions are insufficient of themselves to form the basis for a decision that the School breached its duty of care. The Court must determine whether the School, in failing to do these things, failed to act reasonably in the circumstances. In the plaintiff's case there was a failure to lead evidence that would allow me to make such a finding. For example, no evidence was led or submissions made as to the nature of the supervision, the feasibility of such supervision and how it would have curtailed Leifer's conduct.

149 As was held by Taylor and Owen JJ in *Neill v NSW Fresh Food & Ice Pty Ltd*,[309] there must be evidence to enable the court to find that there existed a reasonably practicable means of avoiding the risk or reducing the consequences of an injury.[310] The plaintiff has failed to adduce evidence that would permit such findings against the School. It is not for me in some way to manufacture such 'practicable means'.

150 Similarly, it is pleaded that Leifer was an unregistered teacher,[311] and that Leifer 'had not reached the standards'[312] required of teachers in Victoria. There is no evidence to link Leifer's non-registration or alleged lack of teaching qualifications with the sexual abuse. I am unable to determine that registration as a teacher or further qualifications as a teacher in some way or another would have avoided or reduced the risk of Leifer sexually molesting the plaintiff.

151 Finally, there is no evidence that the Board or any member of the Board was aware or suspected Leifer was spending an inappropriate or inordinate amount of time with students, including the plaintiff.[313]

152 The plaintiff has failed to prove that the School breached the duty of care it owed to the plaintiff to take reasonable care.

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309 (1963) 108 CLR 362.
310 Ibid, 369 – 370.
311 Third Further Amended Statement of Claim at [9](f).
312 Ibid at [9](g).
313 Ibid at [9](e).

153 With the entry of judgment against Leifer in default of appearance on 19 December 2014 Leifer is taken to admit all allegations in the Statement of Claim.[314]

Causation and damages – non-economic loss

154 After her marriage in September 2006, the plaintiff and her husband resided in Jerusalem, Israel, for two years. The plaintiff undertook some part-time work in elderly care, babysitting and some sales work.[315] The plaintiff stated that in November 2006, she started experiencing nightmares, anxiety, sleeplessness and flashbacks: 'It was all about the sexual abuse of Mrs Leifer'.[316]

155 Approximately 12 months after her arrival in Israel, the plaintiff consulted Ms Chana Rabinowitz, a counsellor/social worker, concerning her symptoms. The plaintiff saw Ms Rabinowitz on five or six occasions and then ceased seeing her. The plaintiff said she stopped seeing Ms Rabinowitz because she did not appear to believe that she was sexually abused by Leifer. Eventually, the plaintiff resumed sessions with Ms Rabinowitz after she confirmed the plaintiff's allegations with the plaintiff's sister and a person at the School.[317]

156 The plaintiff returned to Melbourne in January 2009. She became pregnant at the end of 2009. During pregnancy, the plaintiff self-harmed, cutting herself on her upper arm. The plaintiff described difficulties with her sexuality and depression. She exhibited symptoms of post-traumatic stress disorder (PTSD). The plaintiff commenced counselling sessions with Ms Mary Mass of the South-Eastern Centre Against Sexual Assault during her pregnancy. The plaintiff attended 15 sessions with Ms Mass from May 2010 to July 2011.[318] In August 2012, the plaintiff again started attending these sessions and she has attended over 50 counselling sessions with Ms Mass since that time.[319] The nightmares and flashbacks about the sexual

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314 See *Parkville Court Pty Ltd v Salvaris* [1975] VR 393, 395 (Anderson J).
315 Plaintiff, Transcript at 149.24 - 149.26.
316 Plaintiff, Transcript at 150.19.
317 Plaintiff, Transcript at 151.1 – 151.9.
318 PX-20 (Report of Ms Mary Mass dated 19 March 2015).
319 Ibid.

assaults continue.[320] Ms Mass considered that the plaintiff's sexual abuse was responsible for her inability to develop emotional intimacy and intense problems with her own sexuality, dissociative episodes, invasive flashbacks and nightmares.[321]

157 With the birth of her baby, Leah, in September 2010, the plaintiff described difficulty bonding with her child: 'cognitively … I loved her but, as I was cut off from a lot of my emotions at the time, I couldn't emotionally feel that I loved her'.[322] In particular, breastfeeding brought back flashbacks of sexual abuse.[323] The plaintiff said her mental state spiralled out of control during this time. She became suicidal.

158 On 1 April 2011, the plaintiff was admitted to the Albert Road Clinic. She had sexual fantasies leading to aberrant behaviour, suicidal thoughts and self-harm. Two months after this admission, the plaintiff was re-admitted to the Albert Road Clinic for about seven weeks. A third admission for six weeks in January 2012 was also necessary for similar reasons.

159 Throughout this time, the plaintiff struggled with her religion: 'I was struggling with my belief in what I thought religion was and what had happened to me, and my relationship with my husband suffered because of that'.[324]

160 The plaintiff has been prescribed a variety of medications, including Valium, Serequel, Stillnox and Panadol Topomax. She currently takes Pristiq, an antidepressant medication.[325]

161 The plaintiff for many years has attended the Elsternwick Medical Centre. General practitioner Dr Simon Zalman Rosenblum gave evidence in the this proceeding. He described the plaintiff's ongoing symptoms as severe, including 'flashbacks, anxiety, depression, poor self-esteem, weepiness, insomnia, headaches and constant

320 Plaintiff, Transcript at 154.11.
321 PX-20.
322 Plaintiff, Transcript at 155.18 - 155.21.
323 Plaintiff, Transcript at 155.24.
324 Plaintiff, Transcript at 157.17 - 157.19.
325 Plaintiff, Transcript at 163.25 - 163.30.

tiredness'; all primarily caused by Leifer's sexual abuse.[326]

162 Dr Rosenblum stated that he believed the plaintiff will need ongoing treatment for a long time by way of psychiatric and psychological assistance. He was of the opinion that, over time, there may be a partial resolution of her symptoms. In his written report, Dr Rosenblum stated: 'The road to recovery [from the sexual abuse] will be long, difficult and a rocky one with many hurdles'.[327]

163 The plaintiff was referred to Dr Samuel Margis, psychiatrist, regarding her depression in March 2011. He described the plaintiff as at times suffering from periods of major depression.[328] He diagnosed her with personality disorder and sexual addiction (which has elements of power and hierarchical imbalance).[329] The reports of Dr Margis are directed at the ability of the plaintiff to care for her daughter, which was then the subject of Family Court proceedings between the plaintiff and her husband. In July 2014, Dr Margis provided the opinion that his diagnosis was of major depressive disorder, currently in full remission.[330] Dr Margis noted that the plaintiff was complying with the recommended treatment regime, including both medication and psychological follow-up.[331] In evidence, Dr Margis stated that stressors on the plaintiff's personal life could, in extreme circumstances, return her to the state where she was at the time of her first presentation in 2011.[332] He believed the plaintiff had a guarded prognosis and he was of the opinion that the plaintiff required the continuing support of her general practitioner, psychologist and counsellors.[333]

164 Professor Lorraine Dennerstein examined the plaintiff on three occasions between May 2012 and March 2015 at the request of the plaintiff's solicitors. Professor Dennerstein diagnosed the plaintiff with 'post-traumatic stress disorder in response

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326 PX-44 (Report of Dr Rosenblum dated 10 February 2015) at 2.
327 Ibid.
328 PX-43 (Report of Dr Margis dated 8 July 2012) at 1.
329 PX-43 (Report of Dr Margis dated 19 September 2012) at 1.
330 PX-43 (Report of Dr Margis dated 9 July 2014) at 1.
331 Ibid. See also PX-43 (Report of Dr Margis dated 5 December 2014) at 1.
332 Margis, Transcript at 287.25 - 287.27.
333 PX-43 (Report of Dr Margis dated 3 May 2013).

to the abuses she suffered'.[334]

165 Professor Dennerstein was of the opinion the plaintiff had suffered from bouts of severe depression. She noted the plaintiff had demonstrated diagnostic features of borderline personality disorder, including 'dissociative symptoms, an unstable sense of self, impulsivity, self-mutilating behaviour and suicidal ideation'.[335] While some of these features have resolved with treatment, she 'continues to suffer from chronic post-traumatic stress disorder and features of borderline personality disorder'.[336] Professor Dennerstein opined that these conditions have a major impact on the plaintiff's ability to experience intimate relationships. Professor Dennerstein stated the plaintiff 'is functioning although she continues to be symptomatic'.[337] Professor Dennerstein was of the opinion that the plaintiff should continue to see a psychiatrist every six months and continue with psychotherapy on a weekly basis for some years.

166 In evidence, Professor Dennerstein stated the plaintiff is vulnerable to depressive episodes. She said the plaintiff has a reduced ability to manage the stressors of life, but with continuing treatment she may learn coping skills.[338] Professor Dennerstein described 'a real disconnect between her emotions and her ability to describe them … which goes with a borderline personality disorder'.[339] Professor Dennerstein was of the opinion that although the symptoms of PTSD, nightmares and flashbacks will decrease in time, they will not go away completely and will always be distressing.[340]

167 Professor Dennerstein provided a slightly different perspective concerning the origins of the PTSD to that given by general practitioner Dr Rosenblum and counsellor Ms Mass. Professor Dennerstein was of the opinion the PTSD began with the abuse by the plaintiff's mother, but was exacerbated and perpetuated by the

334 PX-45 (Report of Professor Dennerstein dated 6 March 2015) at 8.
335 Ibid at 9.
336 Ibid.
337 Ibid at 10.
338 Dennerstein, Transcript at 319.28 – 320.1.
339 Dennerstein, Transcript at 319.18 – 320.2 - 319.4.
340 Dennerstein, Transcript at 306.19 – 306.25.

abuse of Leifer.[341]

168 Overall, the evidence demonstrates the plaintiff, as a consequence of Leifer's sexual abuse, has suffered a major psychiatric illness. The impact of that illness on her life has been profound. The self-harm, lengthy in-patient admissions at the Albert Road Clinic and the need for antidepressant medication are markers of the significance of that injury. It is difficult for one who has not experienced it to comprehend the emptiness of depression: the inability to control the nightmares, flashbacks, weeping and insomnia associated with the degrading abuse suffered as a teenager; the inability to breastfeed her baby; contested Family Court proceedings concerning the ability of the plaintiff to be able to care for her child; the inability to properly feel and express her emotions; and a compulsive sexual disorder.

169 The plaintiff impressed me as a witness. I observed the emotional disconnect described by Professor Dennerstein, I observed the stoicism, but also great vulnerability. The plaintiff's injury was aggravated by the fact that the abuse occurred in circumstances of a massive breach of trust, of the complete sexual innocence of the plaintiff and of the fear that Leifer could disclose the plaintiff's family situation to those within the Adass community.

170 The injury will remain with the plaintiff, fluctuating in its intensity for the remainder of her life. As noted, she is at risk of major relapse depending on 'triggers' in her life.

171 Mr Blanden on behalf of the School submitted that in assessing damages the Court needed to consider three matters that he contends have contributed to the plaintiff's injury:

(a) a family background of abuse;

(b) sexual abuse as a student of the School; and

(c) sexual abuse as an employee of the School.[342]

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341 Dennerstein, Transcript at 315.26 - 315.30.

172 Mr Blanden submitted on behalf of the School that in assessing damages, the Court had to account for factors that caused the injury but that are not compensable in this claim, being the family background of abuse and sexual abuse as an employee.

173 Mr Blanden referred me to the evidence of Professor Dennerstein, in cross-examination:

> You agreed with Dr Shan's assessment that Ms Erlich also suffered from a personality disorder that could be attributed to the family environment she suffered in which she experienced emotional and physical abuse by her mother throughout her development?---Yes.
>
> That was a point you agreed with?---Mm-hm.
>
> And then towards the bottom of the page, about six lines from the bottom, you say this, "Thus the post-traumatic stress disorder began with the abuse by her mother but was exacerbated and perpetuated by the abuse by the School principal, Mrs Leifer"?---Exactly.[343]

174 Importantly, the cross-examination of Professor Dennerstein continued as follows:

> So it is a difficult thing to work out quite what's – it is all relevant to the production of the end result; is that essentially what you are saying?---Yes. Given that the principal knew about the abuse, you have a duty of care to someone who is especially vulnerable and this is the very person who you should be providing care and nurture and making sure that they are getting counselling and whatever else it takes to become a healthy adult. Instead this person goes ahead and abuses that trust and perpetuates her likelihood of having quite severe psychiatric disorders.[344]

175 Concerning the period of abuse when the plaintiff was a teacher at the School compared to the abuse as a student at the School, Professor Dennerstein in examination stated as follows:

> MR HORE-LACY: Would you like to comment about the significance of the first period compared to the second?---Well, it is of much greater significance of the first period [sic]. But I think we really have to see it it's a continuum for this person. It's not like her status really changed. She's still at the whim and mercy of this all-powerful person. I really don't want to digress into other cases, but you know that I have seen thousands of cases of people who have been sexually abused as children by their teachers, and sometimes it has continued afterwards as an adult and they will say to me that it's like they feel completely powerless. They feel extremely bad about it, but they feel like they are frozen and there is nothing they can do. I think you have to look at

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342 Blanden, Address, Transcript at 668.10 – 668.13.
343 Dennerstein, Transcript at 315.20 – 315.30.
344 Dennerstein, Transcript at 315.31 – 316.9.

> the real power hierarchy here and that this person at 18 was really still a child. She had no contact with the external world; hadn't seen television even, which is hard to imagine in our society, but it has happened; didn't even understand sex until her older sister tried to explain it to her just before marriage, despite being sexually abused and so-called 'prepared for marriage', in inverted commas, by this principal throughout that time. It is a continuum of abuse. It is really silly of the law to try to separate – I understand you may have to do it – but this person was still in control of her.
>
> HIS HONOUR: As difficult as it is, I think the question Mr Hore-Lacy is putting to you is that, having regard to the four years against the one year, which has the most significance?---Oh, definitely the abuse as the child and the longer period of time and happening at the formative time in which you are forming all your ideas of trust et cetera in the world. You have to remember the brain is developing structurally during this time. The brain sitting there in your heads now as adults is not the same as the brain you had in your childhood and adolescence. So during those formative years there is a paring down of networks, because we sort of have too many as children, which is why children can't make informed decisions like adults can. All that structural change is going on at the same time as this terrible abuse is going on. So it affects the whole brain's structure.
>
> MR HORE-LACY: If she left school at the age of 18 and didn't become a teacher and just went and joined the workforce, for example, assuming her life followed the same path as it did after that anyway, would she be in the same place in any event?---Yes. Given the long history of abuse that she had already, it would have made no difference to the post-traumatic stress disorder and borderline personality disorder and risk of depression. She already had enough abuse for all of that to have occurred.[345]

176 I accept the evidence of Professor Dennerstein that the sexual abuse by Leifer during the course of the plaintiff's employment at the School has made no difference to the injury she has sustained. I accept that the years of sexual abuse sustained prior to 2006 established the nature and course of the plaintiff's injury.

177 In determining these matters, I also have regard to the evidence of Dr Rosenblum. Dr Rosenblum, who has regular contact with the plaintiff, was of the opinion that the sexual abuse was primarily responsible for the plaintiff's psychiatric injury:

> In my opinion, the events described above [the sexual abuse] occurred at the School/work were the primary cause of her current condition and symptoms, which were compounded by her situation at home.[346]

178 Dr Rosenblum provided the assessment that her psychiatric symptoms had

345 Dennerstein, Transcript at 317.23 – 319.10.
346 PX-44 at 2.

improved by 50% over time.[347]

179 In assessing the contribution of her home life to the plaintiff's psychiatric injury, I note the history provided to Professor Dennerstein:

> She described psychic and somatic anxiety (heart racing, shaking, sweating) especially after nightmares or when trying to fall asleep. She does have anxiety at other times.
>
> She has difficulty falling asleep most nights. She continues to have nightmares 3 or 4 times a week. Malka Leifer is often in the dreams. The dreams may include the sexual abuse. She wakes startled and upset and has difficulty getting back to sleep after this.
>
> The flashbacks have increased in frequency. Flashbacks are triggered by reminders such as certain smells or reference to the case but also occur spontaneously.
>
> Intrusive thoughts about the abuse are triggered by reminders.[348]

180 It is apparent from the medical reports and the plaintiff's evidence that the significant cause of the plaintiff's psychiatric injury is the abuse by Leifer. Whilst Professor Dennerstein said the PTSD started with the abuse of the plaintiff's mother, the weight of the evidence points to this being a minor contributing factor; the symptoms of PTSD predominately revolve around the sexual abuse of Leifer. The history obtained by Professor Dennerstein underscores that the primary driver of the plaintiff's problems, including nightmares particularly about sexual abuse, sexual problems, depression and a loss of faith are due to the sexual abuse inflicted upon her by Leifer, who was the head of her religious community and School.[349] Over time, the sexual abuse by Leifer has become the exclusive theme of her continuing nightmares.[350] When Professor Dennerstein states that the sexual abuse exacerbated the PTSD and perpetuates the likelihood of quite severe psychiatric disorders, I understand her to be saying that the sexual abuse was the primary cause of the plaintiff's continuing injury. This was also the opinion of Dr Rosenblum.

181 The plaintiff remains on antidepressant medication and is vulnerable to depression,

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347 PX-44 at 2.
348 PX-45 (Report of Professor Dennerstein dated 6 March 2015) at 7.
349 See PX-45 (Report of Professor Dennerstein dated 17 May 2012).
350 See PX-45 (Report of Professor Dennerstein dated 11 April 2014).

anxiety and stress. The abuse has impacted on her marriage and her religious beliefs. The plaintiff will suffer the symptoms associated with her injury indefinitely.

182 I have been urged on behalf of the School to reduce the plaintiff's damages, as I understand it, pursuant to the principles set out in *Malec v Hutton*.[351]

183 Mr Blanden contended that the family background of the plaintiff is a major component of her psychiatric injury.[352] I disagree. As I have previously indicated, Professor Dennerstein merely gave evidence that the family situation made the plaintiff more susceptible to psychiatric injury. Professor Dennerstein did not state that it was 'a major component' of the psychiatric injury. As I have set out above, Professor Dennerstein stated that 'Leifer's conduct perpetuated [the plaintiff's] likelihood of having quite severe psychiatric disorders'.[353] In her report of 11 April 2014, Professor Dennerstein states: 'Hadassa Erlich developed post-traumatic stress disorder in response to the abuses she suffered. She had been repeatedly exposed to threat to her physical integrity by sexual abuse and responded with intense fear, helplessness and horror'.[354] Professor Dennerstein's opinion more accurately reflects the overall evidence in the case.

184 In the same report, Professor Dennerstein attributed the plaintiff's relationship difficulties to the sexual abuse she experienced as a student, including difficulties with trust, being close to others, establishing a bond with her daughter, relationships with partners and withdrawal from intimacy and sexual relationships.

185 There is evidence of some personality disorder affecting the plaintiff due to her mother's treatment of her in the home environment. There is nothing to indicate this disorder was of any considerable significance. The family environment and treatment by her mother is, in the context of her overall psychiatric condition, in my opinion, of minor importance.

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351 (1990) 169 CLR 638 (Deane, Gaudron and McHugh JJ).
352 Blanden, Address at Transcript 666.15 - 666.16.
353 Dennerstein, Transcript at 316.79.
354 PX-45 (Report of Professor Dennerstein dated 6 March 2015) at 8.

186 Further, on the evidence, I do not consider that the period when the plaintiff was employed as a teacher at the School has made any material difference to the nature and gravity of her injury.

187 The sexual abuse committed by Leifer when the plaintiff was a student at the School is the pervading, recurrent experience that has and continues to negatively and severely impact upon the plaintiff's health and wellbeing. The plaintiff's familial background may have exposed her to a higher level of vulnerability, but it was Leifer who exploited this vulnerability, significantly causing, contributing to and compounding the plaintiff's ongoing injury. The evidence does not justify any reduction on *Malec v Hutton* principles.

188 I assess general damages for pain and suffering, loss of enjoyment of life, past, present and future at $300,000.

Damages – economic loss

189 The plaintiff's primary claim for economic loss was based upon her evidence that she had a desire, since childhood, to pursue a career as a child psychologist.

190 The plaintiff's secondary education at the School did not provide a platform for entry into a child psychology course because of the restrictive syllabus at the School and consequent lack of qualifications for tertiary education. There is no evidence to suggest the plaintiff's marriage and move to Israel would have in any way advanced opportunity for study in that particular field. In fact, with marriage and that move, the plaintiff continued a life within the Adass community that would not have facilitated such a career.

191 In the report of Ms Lorraine Craven, an occupational therapist,[355] it is stated that a minimum of six years sequential training is required for registration as a psychologist. Of those six years, four years full-time tertiary study is a requirement. In my opinion, it is most unlikely the plaintiff would have obtained a qualification in

355 PX-42 (Report of Ms Lorraine Craven dated 2 April 2015).

psychology. Her background and education did not provide the relevant and necessary foundation to enable her to fulfil her ambition.

192 Upon returning to Australia in 2010, the plaintiff undertook two units of study towards a Bachelor of Sociology with Open Universities Australia. She received a distinction in the two units she completed, but withdrew from the course due to the onset of further psychological symptoms. She explained that she felt she was 'broken at the time'.[356]

193 Since ceasing those studies, the plaintiff has commenced a Nursing Diploma. To date, she has not obtained the Diploma as she has struggled to satisfactorily complete components of the coursework due to PTSD and the stress of litigation. As I understand her evidence, the plaintiff intends to complete the Diploma. At this stage, the plaintiff does not believe she could work more than 20 hours per week.[357]

194 In submissions, Mr Hore-Lacy relied on the evidence of Professor Dennerstein, who provided the opinion that at the moment the plaintiff has the ability to work 20 hours per week in her current role as a carer.[358] Professor Dennerstein did not believe that these hours would increase until civil and criminal legal proceedings were concluded, at which point 'she may be able to return to study and subsequently to related employment'.[359]

195 The medical evidence I have previously referred to and summarised demonstrates the high vulnerability of the plaintiff to recurrence of depression, that the plaintiff continues to suffer from significant symptoms of PTSD and sleep deprivation, and that these symptoms will not resolve. The evidence indicates a continuing need for antidepressant medication, counselling and treatment. Whilst the plaintiff may attempt to increase her working hours in the future, any increase is likely to be matched by periods when, because of her injuries, she will be unable to work at all.

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356 Plaintiff, Transcript at 160.11.
357 Plaintiff, Transcript at 161.28 - 162.9.
358 PX-45 (Report of Professor Dennerstein dated 6 March 2015) at 10.
359 Ibid.

That the plaintiff has returned to work in her current situation is to her credit.[360] The opinion of the plaintiff's general practitioner, Dr Rosenblum, best summarises her likely future: there may be a partial resolution of her symptoms, but 'the road to recovery will be long, difficult and a rocky one with many hurdles'.[361] In my opinion, the plaintiff's injury will prevent her from resuming full-time employment. The ups and downs of her illness lead to a conclusion that part-time work is the most suitable option. The submission on behalf of the plaintiff that the plaintiff has sustained a 50% loss of earning capacity is an appropriate way of taking into account the various future contingencies. Based on her wage records[362] and the report of Ms Margaret Leitch,[363] that net loss is approximately $600 per week.

196 The plaintiff has undertaken part-time work since December 2013. Her child is at kindergarten until 4.00pm. She usually finishes work by 11.30am or 12.30pm. The plaintiff stated that it was not the care of her daughter that was preventing her from working longer hours,[364] but rather that she did not believe she could work more than 20 hours per week as a result of her injuries.[365]

197 I am advised the 5% multiplier until age 65 for the plaintiff is 902 and allowing a loss of $600 per week, I calculate a sum of $541,200. I consider 15% as an appropriate discount for vicissitudes and, applying that figure, I reach a sum of $460,020. Allowing 9% for superannuation based on the figure of $460,020, $41,402, I reach a total of $501,422 for future economic loss.

198 In my opinion, it is appropriate to allow the plaintiff's claim for past economic loss. As previously indicated, the plaintiff has worked since late 2013, the plaintiff's daughter is cared for on a daily basis and there is evidence that the plaintiff has been

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360 The plaintiff in fact returned to a job undertaking secretarial work at a Jewish school a couple of months after the birth of her daughter in the hope that employment would ameliorate the symptoms of her injuries. She could not manage and was subsequently admitted to the Albert Road Clinic. Plaintiff, Transcript at 156.14 - 156.21.

361 PX-44 at 2.

362 PX-59 (Absolute Care payslips of plaintiff).

363 PX-46 (Report of Ms Margaret Leitch dated 1 May 2013) at 11 (Addendum C– Average Gross Weekly Earnings of an Enrolled Nurse).

364 Plaintiff, Transcript at 171.28 – 172.2.

365 Plaintiff, Transcript at 162.7 - 162.9.

financially strained. I am satisfied if the plaintiff had been able she would have worked longer hours. I calculate from 1 January 2014 until 30 June 2015, a period of 77 weeks, at $600 per week for a total of $46,200 for past economic loss. Allowing 9% for superannuation based on the figure of $46,200, I reach a total of $50,358.

Damages – medical expenses

199 During the plaintiff's case, details of Medicare and Medibank payments for medical expenses associated with the plaintiff's injury were tendered. The Medicare repayment is $17,095.55.[366] I have perused the Medibank printout of payments.[367] The total Medibank charge is $138,911.05. In my opinion, it is appropriate to allow these sums in their entirety.

200 There was no evidence tendered or led to support a claim concerning the cost of past counselling or medication. Thus, I allow a total of $156,007 for past medical and like expenses.

201 In relation to future medical expenses, I have already referred to the evidence indicating the need for the plaintiff to continue with treatment, counselling and medication.

202 Professor Dennerstein stated an allowance of $60 per month should be allowed for medication 'and she will likely to remain on this for the foreseeable future'.[368] Professor Dennerstein recommended a six monthly review with a psychiatrist at a cost of $350 per hour.[369]

203 No evidence was adduced in the plaintiff's case as to the cost of counselling. Professor Dennerstein raised the question in her report as to whether there is any cost associated with attending sessions with Ms Mass. No evidence was adduced to support any such claim. In addition, no evidence was adduced to support the cost of attending a psychologist.

366 PX-60 (Notice of past benefits concerning the plaintiff issued by Medicare Australia).
367 PX-61 (Documents from Medibank concerning payments for medical expenses for the plaintiff).
368 PX-45 (Report of Professor Dennerstein dated 6 March 2015) at 10.
369 Ibid.

204 The submissions on behalf of the plaintiff contended I should allow the cost of medication and psychiatric review for five years. This, so it was contended, would not necessarily be for 'consecutive weeks but across the plaintiff's lifetime to meet the needs from time to time'.[370] This submission, in my opinion, does not properly represent the evidence that I have previously referred to and underestimates the likely future needs of the plaintiff. That evidence supports a finding that many of the symptoms the plaintiff now experiences will remain with her for the rest of her life. The plaintiff has now been on medication for a number of years and continues to take antidepressant medication, even though the severe symptoms of depression are in remission. The likelihood of continuing symptoms and the real vulnerability of the plaintiff to relapse into depression, in my opinion, make a figure of 25 years more appropriate. Thus, my calculations on this basis are as follows - $60 a month for medication converts to $13 a week; $700 a year for psychiatrist consultations converts to $13 per week. Thus, I allow $26 a week for 25 years. The 5% multiplier for 25 years is 753, and the multiplication equals $19,578. I discount this figure by 15% to reach a total figure of $16,641.

Exemplary/aggravated damages

205 The plaintiff claims exemplary/aggravated damages against both Leifer and the School. During the course of final submissions, Mr Hore-Lacy sought leave to amend the particulars of exemplary/aggravated damages 'by adding in effect what's set out in the [final] submissions'.[371] During the course of submissions, this application was refined to a request to add one particular that concerned the School facilitating Leifer's removal from the jurisdiction. As this issue had been the subject of evidence and Mr Blanden could not point to any prejudice, I permitted the amendment.

206 The Third Further Amended Statement of Claim provided particulars of exemplary damages only. The pleading is as follows:

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370 Submissions on Behalf of the Plaintiff at [7], 20.

371 Hore-Lacy, Address, Transcript at 674.8 - 674.9.

14. And the plaintiff claims damages including aggravated and exemplary damages.

PARTICULARS OF EXEMPLARY DAMAGES

The first defendant's breach of trust and exploitation of the plaintiff, when she was a parent herself, was a disgrace which demanded condign punishment. Her behaviour was predatory and was compounded by the fact that the abuse by the first defendant was systematic. The plaintiff was one of a number of young girls who had been corrupted in the same [sic] was with catastrophic repercussions. The first defendant took advantage of the plaintiff's background by insinuating herself into the plaintiff's trust. The second defendant's lack of any supervision and control of the first defendant is deserving of condign punishment.

Facilitating or organising the hasty removal of the first defendant from the country within 48 hours of the second defendant being apprised of allegations concerning the first defendant's sexual abuse of children at the school.

207 The submission of the School concerning exemplary/aggravated damages is that its conduct could not be described as deliberate, intentional or amounting to a reckless disregard of the plaintiff's rights.[372]

208 The nature and purpose of exemplary damages were described by the Victorian Court of Appeal, summarising relevant authorities, as follows:

> Exemplary damages are damages over and above those necessary to compensate the plaintiff. They are awarded to punish the defendant. They are intended to act as a deterrent to the defendant, and to others minded to behave in a like manner. They are also intended to demonstrate the court's disapprobation and denunciation of such conduct. Such damages may be awarded in respect of any tort that is committed in circumstances involving a deliberate, intentional, or reckless disregard of the plaintiff's rights.[373]

209 In *Backwell v AAA* ('*AAA*'), Ormiston JA, with whom Brooking JA agreed, commented on the need for restraint in any award of exemplary damages.[374] Ormiston JA then considered whether, in awarding exemplary damages, the award of compensatory damages should be taken into account. His Honour determined that compensatory damages should be taken into account:

> In this respect there seems nothing in the authorities which would deny consideration of the amount which the defendant will have to pay by way of compensatory damages, if they are sufficient to inflict adequate punishment.

372 Blanden, Transcript at 671.1 - 671.4.
373 *Carter & Anor v Walker & Anor* [2010] VSCA 340, [284] (Buchanan, Ashley, Weinberg JJA).
374 [1997] 1 VR 182, [205] ('*AAA*').

> Such a principle may be seen to be more apposite where the damages are wholly or in part at large, such as in defamation, trespass, false imprisonment and the like and it may be less easy to apply where the ordinary damages are not at large, as in the present case. But in each case the question emphasised in all the authorities is that exemplary damages must be calculated by considering what is appropriate to *punish the defendant*, whereas compensatory damages are calculated upon the basis of what is sufficient to satisfy *the plaintiff's* claim. It is recognised that the plaintiff obtains a windfall benefit but that that is not inappropriate if it is necessary to punish the defendant for his or her conduct. It is said to act as a general deterrent but nevertheless a deterrent which is appropriate to the defendant's own behaviour and situation. If the ordinary damages already awarded are sufficient to impose a punishment, then the plaintiff cannot fairly complain if no more is added.[375]

210 It is convenient to deal with the plaintiff's claim for exemplary damages as it concerns the School. There is no evidence that the Board was aware of Leifer's sexual abuse of the plaintiff or other students at the School until the very end of Leifer's tenure when the allegations were first raised by Mrs Bromberg.

211 Whilst I have determined that the Board invested in Leifer great power and control in her position as headmistress of the girls' campus, that conduct was not such that it could be described as deliberate, contumelious or, within the context of punitive damages, reckless. However, the conduct of the Board in arranging for Leifer to leave the jurisdiction falls into a different category. I have set out the circumstances concerning the departure of Leifer to Israel at [39] – [63] of these reasons.

212 I summarise as follows. Leifer departed Australia in circumstances where representatives of the Board appreciated there was a case for her to answer concerning allegations of serious criminal conduct, being the sexual abuse of students at the School. At the time of her departure, the President of the Board, Mr Benedikt, was aware of at least eight separate allegations of sexual misconduct involving Leifer and girls at the School, in addition to the initial complaint. The allegations amounted to Leifer being a serial sexual abuser.

213 The misconduct of Leifer was reported on Friday evening, 29 February. Leifer was stood down or resigned from her position at the School during the course of a

375 *AAA* [1997] 1 VR 182, [207] - [208].

meeting on the evening of Wednesday 5 March. The travel agent, Ms Koniarski, was asked to arrange airline tickets to allow Leifer and members of her family to depart Australia urgently between 9.00pm and 10.00pm that evening. Mrs Ernst, the wife of the Board member Mr Ernst, was involved in purchasing these tickets. Leifer and members of her family departed from Melbourne Airport at 1.20am on Thursday 6 March.

214 The meeting of Wednesday 5 March was held at the home of Mr Izzy Herzog. Mr Ernst was at the meeting with Mr Benedikt. Barrister Mr N. Rosenbaum was also in attendance. Current School Principal, Professor Herszberg, stated that Messrs Benedikt and Ernst were acting on behalf of the Board at this meeting. Mr Benedikt was not called to give evidence and his absence was not explained. The School reimbursed an Adass community member, Mr Klein, and a company associated with Mr Benedikt for the costs of the travel of Leifer and her family members.

215 The police were not informed of the allegations of sexual abuse prior to Leifer's departure from the country. In fact, it is likely that the police initiated contact with the School after The Age newspaper published a report on 14 March 2008 concerning allegations that Leifer had sexually abused girls at the School.

216 If the evidence of Mr Rosenbaum is to be believed, he was not informed or consulted concerning the decision to urgently arrange for the departure of Leifer, even though he was in attendance at the meeting on 5 March when this decision was made.

217 There can be no more serious charge levelled against the headmistress of a girls' school than that such headmistress has abused the trust reposed in her by sexually abusing those in her charge. The urgency of Leifer's departure was not explained in any satisfactory way. I do not accept the evidence of Professor Herszberg, who was not directly involved in the decision to stand Leifer down or pay for her airfares to Israel, that the decision to fund her airfares was consistent with a 'legal obligation' owing to her. Any legal obligation (and I do not accept there was one) to pay for her departure from the country does not defeat an obligation to ensure allegations of the

commission of serious criminal offences are properly investigated. Further, in such circumstances, the alleged perpetrator should not be assisted to urgently flee the jurisdiction. The failure of the Board to report the allegations to police prior to arranging Leifer's urgent departure is deplorable.

218 The conduct of the Board is deserving of the Court's disapprobation and denunciation. I have no doubt that the conduct was deliberate; as Mr Ernst said in evidence, the seriousness of the allegations against Leifer were such that there was a need to stand her down 'as quick as possible'.[376] The speed in standing her down was matched by the speed of the arranged departure. The conduct of Messrs Benedikt and Ernst on behalf of the Board in facilitating the urgent departure of Leifer was likely motivated by a desire to conceal her wrongdoing and confine and isolate the conduct and its consequences to within the Adass community. I am reinforced in this view by the apparent failure of Messrs Benedikt and Ernst to obtain any legal advice from Mr Rosenbaum, despite his proximity, as to the appropriateness of organising Leifer's urgent departure from this jurisdiction.

219 It is apparent that either it was not a priority for Messrs Benedikt or Ernst that Leifer answered to the criminal law of this State or that this State's jurisdiction was deliberately flouted; upon consideration of the manner in which the School arranged for Leifer's departure from the country I find the deliberate flouting of jurisdiction the most likely motivation. The unexplained failure of the School to call Mr Benedikt entitles me to draw this inference and make conclusions on this aspect with greater certainty. The conduct amounts to disgraceful and contumelious behaviour demonstrating a complete disregard for Leifer's victims, of which the plaintiff was one. The conduct demonstrates a disdain for due process of criminal investigation in this State.

220 I have awarded the plaintiff $1,024,428 in compensatory damages. Whilst damages for pain and suffering, loss of enjoyment of life are 'at large' in the sense referred to

376 Plaintiff, Transcript at 266.23.

by Ormiston JA in *AAA*,[377] I do not consider that the compensatory damages sufficiently impose a punishment on the School for the conduct I have previously described as deplorable. The assessment of compensatory damages may be considered substantial, but that sum is appropriate in my view because of the significant injury sustained by the plaintiff and much of that total sum is made up of 'ordinary damages' which are 'not at large'.[378] I also take into account that an award of exemplary damages is directed at deterring this defendant and others from similar conduct. I consider the circumstances of this case, both for this defendant and for others in similarly responsible positions, mean that deterrence is an important factor for me to take into account. I do not consider the award of compensatory damages is sufficient for the purpose of deterrence. Further, in determining a sum appropriate for punitive damages, I bear in mind that I have found the School directly liable for Leifer's serious misconduct. In so far as this finding may be seen as incorporating an element of punishment, it does not adequately address the School's misconduct in respect of this matter. In my opinion, a figure of $100,000 appropriately reflects the considerations of punishment and deterrence in relation to the School's disgraceful conduct.

221 I turn now to consider the claim for exemplary damages against Leifer.

222 The evidence overwhelmingly demonstrates that Leifer had a contumelious disregard for the plaintiff's rights. I have described Leifer's conduct previously as a massive breach of trust, yet this description does not adequately set out the destructive and evil nature of her sexual abuse of the plaintiff over a period of years. The evidence discloses the sole motivation of Leifer in her dealings with the plaintiff was for her own sexual gratification. Leifer used her position of control, power and authority within the School to manipulate the plaintiff's sense of vulnerability concerning her family situation so as to create the opportunity for further abuse. The conduct of Leifer can be described as wanton, carried out in complete disregard of the plaintiff's rights and welfare. It is conduct deserving of this Court's

377 [1997] 1 VR 182, [207] - [208].
378 Ibid.

disapprobation; it is conduct that is deserving of damages to punish Leifer and deter others from similar conduct.

223 As stated, the award of compensatory damages in this case, in my view, does no more than provide adequate compensation to the plaintiff. I do not consider the amount of compensatory damages carries with it any substantial element of deterrence, or punishment. As Ormiston JA stated, '[i]n truth each case must be looked at on its own merits'.[379] In considering the merits of the case against Leifer I consider her conduct warrants punishment; in awarding exemplary damages against Leifer I have particular regard to deterrence, both deterrence to Leifer but also importantly to others in like positions of authority and trust minded to act in a similar manner. I consider the circumstances of this matter warrant the making of an award of exemplary damages against Leifer. I fix the sum of $150,000.

224 It is clear on the authorities that it is appropriate for me to enter judgment for different awards of exemplary damages against each of the defendants.[380] As to aggravated damages, it is appropriate in this case because 'the aggravation of the harm done, and the humiliation caused to the [plaintiff]' is different as regards each defendant.[381]

Mitigation of damages

225 On 15 May 2015, the final day of hearings, I granted leave to the School to amend its defence to plead that the plaintiff has failed to mitigate her loss. The School submits that if I was to determine that the plaintiff, in the circumstances, has failed to act as a reasonable person should to ensure she minimised her loss, that failure will be reflected in a reduction of the plaintiff's award of damages.

226 The Second Further Amended Defence pleads mitigation of loss as follows:

> 16. Further the second defendant says that the plaintiff has failed to mitigate her loss.

379 *AAA* [1997] 1 VR 182, [209].

380 *De Reus & Ors v Gray* [2003] VSCA 84, [27] (Winneke P, with whom Ormiston and Charles JJA agreed).

381 Ibid, [32] (Winneke P, with whom Ormiston and Charles JJA agreed).

PARTICULARS

> The plaintiff lodged a claim for compensation under the Accident Compensation Act 1985 which was received on 4 April 2014.
>
> The plaintiff was eventually notified her claim for weekly payments and medical and like expenses was accepted by letter from CGU Workers Compensation dated 10 April 2014.
>
> That letter noted that the plaintiff's employer was Adass Israel Congregation Talmud Torah and that the date of injury was 1 November 2006.
>
> By a further letter dated 7 May 2014 the plaintiff was notified that CGU Workers Compensation had calculated her entitlement to weekly payments based on the information provided by Adass Israel Congregation and that her pre-injury average weekly earnings was $128.
>
> The plaintiff has not taken any other steps such as submitting accounts to CGU Workers Compensation to enable payments to be made to her for medical and like expenses or weekly payments.
>
> No explanation has been given by the plaintiff for her failure to take these steps.

227 It is to be noted that this pleading does not in any way go to the manner, methodology or basis upon which it is apparently suggested an entitlement to statutory compensation is to be taken into account in this proceeding if it be found the plaintiff failed to mitigate her loss.

228 The School subpoenaed a file from CGU Insurance and tendered documents from that file.[382] These documents included:

(a) letter from CGU to the plaintiff dated 10 April 2014 indicating CGU has accepted the plaintiff's claim for weekly payments and medical and like expenses. The date of injury is noted as 1 November 2006;

(b) letter from CGU to the Congregation – Mr Nussbacher – dated 10 April 2014 indicating that CGU has accepted the plaintiff's claim for weekly payments and medical expenses;

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382 See DX-12 (Various documents from CGU Workers Compensation file dated 10 April 2014 and 7 May 2014).

(c) letter from CGU to the plaintiff dated 7 May 2014 stating CGU has calculated the plaintiff's entitlement to weekly payments based on pre-injury average weekly earnings taken from the payroll for the period 22 January 2006 to 30 November 2006 supplied by the Congregation. The weekly sum was calculated at $130 gross per week; and

(d) letter from CGU to the Congregation – Mr Nussbacher – dated 7 May 2014 advising of the calculation of the plaintiff's weekly payment entitlement.

229 I granted leave to Mr Hore-Lacy to call Mr Thomas McCredie, the plaintiff's solicitor, with knowledge of the compensation claim after the tender of the above material on 13 May 2015, the last day of evidence in the trial. Mr McCredie stated that the claim was suspended pending this Supreme Court claim being determined.[383] He had no knowledge of the plaintiff receiving any payments of compensation.[384] The suspension of the claim occurred in a conversation between Mr McCredie and the CGU Case Manager.[385]

230 The School contends these documents, taken with medical evidence before me in this proceeding:

> … establishes that part of [the plaintiff's] psychiatric injury arose during her period of employment as a religious studies teacher by the Congregation. Section 82(2C) of the *Accident Compensation Act* establishes that a person who suffers an aggravation of pre-existing injury where employment was a significant contributing factor will be entitled to compensation under the Act. The medical evidence adduced by the plaintiff supports this proposition. If the plaintiff submitted receipts to CGU Workers Compensation, it is likely that both medical expenses and loss of earnings payments will be made to the plaintiff. The medical expenses to be submitted are the same expenses that the plaintiff is claiming payment for in this proceeding, that is treatment for psychological injuries.[386]

231 A fundamental problem with the pleading and submissions of the School is that, even if I were minded to accept on a general basis that the plaintiff has failed to mitigate her loss, I have no basis to determine on the particulars or the evidence

383 McCredie, Transcript at 608.13 - 608.15.
384 McCredie, Transcript at 606.28.
385 McCredie, Transcript at 607.8 - 607.9.
386 Second Defendant's Outline of Closing Submissions at [42].

what that loss amounts to. The submissions of the School fail to address this point, apart from the vague assertion that 'medical expenses and loss of earnings payments will be made to the plaintiff. The medical expenses to be submitted are the same expenses that the plaintiff is claiming payment for in this proceeding, that is treatment for psychological injuries'. It is not for me to speculate whether CGU would accept any or all of the medical expenses claimed in this proceeding. Past medical expenses total $156,007. The claim goes back to 2010. I was not addressed in any way on this issue.

232 The tendered materials upon which the School's pleading and submission is based do not identify 'the work-related injury or illness' for which CGU admitted a liability for weekly payments and medical and like expenses.[387] No claim form has been tendered, no medical report concerning any injury or illness said to have arisen as a consequence of the employment and supporting the claim has been produced. In the correspondence tendered, the date of injury is referred to as 1 November 2006. There is no evidence of what that injury is or how it was sustained. It is not possible to determine what 'part' of the plaintiff's psychiatric injury, to use the words of the School's submission, can be attributed to employment with the School. The particulars in the Second Further Amended Defence do not refer to the nature and cause of the injury at all. Section 82(2C) of the *Accident Compensation Act* relevantly states:

> (2C) There is no entitlement to compensation in respect of the following injuries unless the worker's employment was a significant contributing factor to the injury –
>
> …
>
> (c) a recurrence, aggravation, acceleration, exacerbation or deterioration of any pre-existing injury or disease.

233 The School contends that the medical evidence adduced by the plaintiff in this case supports the proposition that the plaintiff's employment was a significant contributing factor to an aggravation of her pre-existing psychiatric injury. This

387 DX-12.

submission does not properly represent the evidence of Professor Dennerstein. I have set out the opinion of Professor Dennerstein as to the contribution of the sexual abuse committed by Leifer on the plaintiff during the course of the plaintiff's employment in 2006. Professor Dennerstein, in her final answer reproduced above,[388] stated the abuse over the year of employment made no difference to the plaintiff's psychiatric injury. Rather than support the proposition that the period of employment was a significant contributing factor to an aggravation of the plaintiff's psychiatric injury (if that be that injury which is the subject of the WorkCover claim), the evidence of Professor Dennerstein in fact provides a basis for the WorkCover Agent, CGU, to contest any entitlement to compensation under the statutory scheme because that employment was not 'a significant contributing factor'.

234 Mr Blanden referred me to the New South Wales Court of Appeal decision of *Downes v Amaca Pty Ltd* and specifically to the judgment of Campbell JA:

> In my view, it remains the law that if a worker has a legal right to apply for to a benefit under the *Workers Compensation (Dust Diseases) Act*, but has not applied for that benefit, the present value of that benefit can be deducted from damages only if either:
>
> (i) there is a finding that the worker is likely to apply for the benefit and *would then obtain it*, or
>
> (ii) there is a finding that the failure of the worker to apply for the benefit is, or would be, an unreasonable failure to mitigate damages.[389]

235 I accept the view of his Honour was applicable to the circumstances of the case before him, which concerned benefits under the *Workers Compensation (Dust Diseases) Act 1942* (NSW); but the circumstances of the matter before me do not enable a finding under either limb. I have no basis on the evidence to establish the 'present value' of any benefit to be deducted from any award of damages, no evidence to base a finding that the plaintiff is likely to apply for the benefit and, in the context of the medical evidence before me, in the current proceeding, which undermines any entitlement the plaintiff may have under s 82(2C) of the *Accident Compensation Act*, I cannot find it is unreasonable not to have pursued the claim.

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388 See Reasons at [175].

389 (2010) 78 NSWLR 451, [116].

236 Insofar as the authorities relied upon by Mr Blanden suggest I apply *Malec v Hutton* principles to the hypothetical events around the payment of compensation,[390] the absence of any evidence concerning the nature of the claim made by the plaintiff to CGU, the absence of any evidence concerning what entitlements over what period of time the plaintiff may be entitled to and for what injury does not allow any proper basis for the assessment of contingencies.

237 The onus of proof in relation to failure to mitigate loss lies with the School. The School has failed to discharge the onus required.

Conclusion

238 To summarise, I find that the School is:

(a) Directly liable; and

(b) Vicariously liable

for the conduct of Leifer.

239 I award damages:

(a)	Non-economic loss:	$300,000
(b)	Economic loss, past:	$50,358
(c)	Economic loss, future:	$501,422
(d)	Medical expenses, past:	$156,007
(e)	Medical expenses, future:	$16,641

240 I award exemplary damages:

(a)	Against Leifer:	$150,000

390 *Downes v Amaca Pty Ltd* (2010) 78 NSWLR 451, [22] (Basten JA). Such a course was not part of the School's submissions.

(b) Against the School: $100,000