Holding the state directly liable for educator-on-learner sexual abuse

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Despite legislative interventions aimed at improving the protection of children, educator-on-learner sexual abuse persists, and is even on the increase. Focussing on prosecuting educator offenders and holding the state vicariously liable clearly does not have the desired effect. The author considered the prospect of holding the state directly liable when it fails to prevent and respond to educator-on-learner abuse, by basing liability for certain cases not only on the wrongful conduct of educators as employees, but also on the state's own omission of its constitutional or statutory duties. In this article, the author investigates the feasibility of such a strategy within the South African legal framework.

***Keywords**: accountability; direct liability; educator-on-learner sexual abuse; state liability; vicarious liability*

INTRODUCTION

In spite of legislative developments to provide enhanced protection to children against crimes (*Director of Public Prosecutions North Gauteng v Alberts* [2016] [9]), educator-on-learner sexual abuse[i] persists, and is even on the increase.[ii] De Wet (2016: 4) concludes after an in-depth literature review that educator-on-learner violence manifests mainly in the form of corporal punishment and sexual abuse. Based on complaints received, the South African Council for Educators (SACE) indicated that from 1 April 2015 to 31 March 2016, there was a slight increase in educator-on-learner sexual abuse, both on and off school property. It further indicates that this form of misconduct was one of the three most common offences they had to investigate during this period (SACE, 2015/2016: 28, 30-34).

One of the main reasons offered for why educator-on-learner sexual abuse is not eradicated is the fact that the state and its organs and functionaries are not held accountable for their failure to prevent and respond to educator-on-learner abuse (University of the Witwatersrand, Centre for Applied Legal Studies, Cornell Law School. Avon Global Center for Women and Justice & Cornell Law School. International Human Rights Clinic 2014: 1). Chamallas (2013: 133) argues that the high incidence of sexual abuse tells the story not only of an abusive individual, but also of institutional failure.

Research conducted by Beninger (2013: 284) across sub-Saharan Africa has shown that gender-based sexual violence in schools is not only widespread; it is also tolerated. Meyersfeld, in an interview with Govender (2016), maintains that the focus of dealing with educator-on-learner sexual abuse is currently on not ruining the career of the educator, rather than on supporting the victim. More often than not, the alleged perpetrator receives support from the district, the principal, and other educators. For example, Moshidi J concluded in *S v Zothile* [2008] [18-19] that the evidence of the witnesses, including that of the principal, was "clearly and essentially biased in favour of the accused". He expressed concern that the principal had failed to respond to, assist and protect the learner. He further described as disturbing the fact that co-learners had threatened to assault the complainant, that some of the educators had tried to protect the accused when the police arrived to arrest him, and that the school did not have a programme to assist educators in handling sexual abuse cases – especially since this was not the first rape case at this school. In *NAPTOSA obo Isaacs and Department of Education Western Cape* (PSES 24-15/16 WC [15]), the arbitrator described the principal's concealment of an educator's sexual misconduct as "wholly improper" and "a serious dereliction of his duties". Not only was the principal involved in an attempted private settlement, allowed the educator to continue teaching; he also had not reported the matter until he was threatened with media exposure (*NAPTOSA obo Isaacs and Department of Education Western Cape* (PSES 24-15/16 WC [15])).

It is not only the educator's career that is put before the protection and support of the learner victim, but also the "good name" of schools and departments. Masehela and Pillay (2014: 29) concluded after a study conducted in six Limpopo Province schools that sexual abuse cases are regarded as closed cases, that is, as cases to be dealt with internally and with secrecy. Principals as well as trade union and departmental

representatives tend to handle sexual abuse cases in secrecy. They arrange exchange transfers for educators against whom sexual abuse allegations have been made, accept bribes, and arrange for the parents to be paid off (Masehela & Pillay, 2014: 30). Child (2017), reported that screening applicants against the National Register for Sex Offenders, the Child Protection Register, and the SACE Register seldom takes place. If screening does take place, the departments of basic education rely on the SACE Register. Yet, SACE has admitted that its register is not up to date.

The question is whether focussing on the state's failure to fulfil its constitutional and statutory obligations would not be a good strategy to add to those strategies that focus on the educator sexual perpetrators, and, if so, whether the legal framework supports such a strategy. Scholars such as Hoyano (2010: 154) and Thompson (2012: 211) support the notion that holding the state directly liable may ensure better justice for child sexual abuse victims. According to Boonzaier (2013: 358), direct state liability is particularly suitable and should find application in instances where the state's failures are organisational or institutional and cannot be attributed to one employee.

HISTORICAL CONTEXT

Because of the strong influence of English law, and importation of the maxim *rex non potest peccare* (the King can do no wrong), the state was historically immune from delictual (tort) liability (Lenel, 2002: 8). Following on the criticism of common law immunity in *Binda v Colonial Government* [1887] [290], the various South African colonies enacted vicarious state liability into law (Boonzaier, 2013: 331). When South Africa became a union, the colonial enactments were consolidated into the Crown Liabilities Act 1 of 1910 (*Nyathi v MEC for the Department of Health Gauteng and Another* [2008] [16]). The Crown Liabilities Act 1 of 1910 and section 3 of the State Liability Act 20 of 1957 (before the 1993 amendment) in effect provided that "the state and, by parity of reasoning, its officials, could not be held accountable for their actions" (*Nyathi v MEC for the Department of Health Gauteng and Another* [2008] [44]). Thus, the "state", that is, the executive branch of the state only, could be held vicariously liable for delicts committed by its employees in the same way that any private employer could (Boonzaier, 2013: 333, 335; Du Bois, 2010: 149; Price, 2015: 317). While state liability took the form of vicarious liability only, local authorities, such as municipalities, could be held directly liable for omissions, because they were not considered part of the state, but as having corporate status (Boonzaier, 2013: 334; Loubser & Gidron, 2011: 756).

When constitutional supremacy replaced parliamentary supremacy, the state's status as being above the law changed. To understand the meaning of "state", one needs to rely on the definition of "organ of state' in section 239 of the Constitution of the Republic of South Africa (1996) (hereafter, "the Constitution"). As such, "'state' should be understood broadly to encompass all entities or functionaries (whether or not part of the traditional institutional core of government) which 'exercise a public power or perform a public function' whether in terms of the Constitution, a provincial constitution, legislation, other law, or a contract" (Price, 2015: 313, footnote 2). Public schools, as organs of state, are by law empowered to perform specific functions in conformity with the Constitution and empowering legislation (*Minister of Education (Western Cape) v Mikro Primary School Governing Body* [2005] [20]). The acts of entities should be treated as the state's own acts (Baxter, 1982: 226).

Currently, the State Liability Act regulates the state's strict, secondary or vicarious liability (Boonzaier 2013: 332). Section 1 of the State Liability Act reads:

> *Any claim against the state which would, if that claim had arisen against a person, be the ground of an action in any competent court, shall be cognizable by such court, whether the claim arises out of any contract lawfully entered into on behalf of the State or out of any wrong committed by any servant of the State acting in his capacity and within the scope of his authority as such servant.*

Section 60(1)(a) of the South African Schools Act (1996) (hereafter, "the Schools Act") regulates state liability with regard to public schools. It places statutory vicarious liability on the state for "any delictual or contractual damage or loss caused as a result of any act or omission in connection with any school activity conducted by a public school". As confirmed by Streicher JA in *MEC for Education and Culture, Free State v Louw* [2005] [12-13], this section also applies to delicts committed by additional educators appointed in terms of section 20(4) of the Schools Act, where the employer is the respective school, and not the state.

It is evident from the above that statutory state liability is vicarious only. The relationship between the employer and the employee at the time the employee committed the act is important when determining

vicarious liability, and courts have developed tests to determine this relationship (Botha & Millard, 2012: 226). The standard test in terms of which the state may be held vicariously liable is whether its employee's wrongful act falls *within the scope of his or her employment* (Wagener, 2008: 674, 677, 678). This test was extended in *Minister of Police v Rabie* [1986] [7-8], it was further extended and modified by the Constitutional Court in *K v Minister of Safety and Security* [2005] [9], and it was confirmed in *F v Minister of Safety and Security* [2011] [41]. The current situation is explained by Rogers J:

> *In terms of these cases, the general test that now applies where an employee has deviated from the [sic] his or her authorised duties (an adaptation of the approach in Minister of Police v Rabie 1986 (1) SA 117 (A)) is the following: [a] If an employee is seeking, albeit improperly, to advance his or her employer's interests, the employer may be vicariously liable. This is a subjective test. On the subjective test there would be no vicarious liability if the employee were acting solely in his or her own interests. [b] Even if there is no vicarious liability on the subjective test, the employer may still be liable if objectively there is a sufficiently close link between the employee's act and the purposes and business of the employer (the K case para 44; the F case paras 49-50). It is the second of these tests that in particular allows a court to have regard to normative and policy considerations (Pehlani v Minister of Police [2014] [23]).*

The extended test finds application in so-called deviant cases, where wrongdoing takes place outside the course and scope of the employment (Botha & Millard, 2012: 232), and it is used to accommodate cases where the state employee committed intentional wrongful criminal acts (Scott, 2013: 348). The extended test applies *mutatis mutandis* to all public relationships where the state has positive constitutionally mandated protective duties (Boonzaier, 2013: 337; Scott, 2013: 361), such as the relationship between educators and learners.

Although the legislature stepped in to address the problematic "Crown immunity", and this legislation has since undergone amendments to keep abreast of the times, the current situation in South Africa is that developments in common law state liability have overtaken developments in statutory state liability such as the State Liability Act and section 60(1) of the Schools Act. Common law state liability and statutory state liability are not in step with each other. Current statutory state liability does not support direct state liability, while common law state liability can. The author contends that in so-called deviant cases, even when interpreted within the constitutional context, the statutory provisions regulating state liability will most probably result in the state not being held vicariously liable for educator-on-learner sexual abuse, because they only support the subjective part of the common law test. Without question, educator-on-learner abuse would never be within the scope of educators' authority as public servants. However, if the second part of the extended test is applied, as is evident from case law (see above), the outcome will be different. It is evident that finding in favour of vicarious liability on the part of the state when the extended test is applied always hinges on the second question, which begs the question whether it is really an extension of the 'within the scope of employment' test or a new test disguised as an extension, so as to give it credibility.

CONSIDERING DIRECT STATE LIABILITY FROM A CONSTITUTIONAL PERSPECTIVE

Boonzaier (2013: 343) confirms that direct liability is most appropriate in "cases which deal with omissions and involve the breach of a legal duty resting (at least in origin) on the state itself". Negligent conduct in the form of an omission is only wrongful if there was a legal duty to act positively (*Hawekwa Youth Camp and Another v Byrne* [2009] [21-22]). To determine whether the legal framework supports direct state liability, one needs to determine whether the state, according to *boni mores*, has a public legal duty, objectively determined, to act positively (*F v Minister of Safety and Security* [2011] [119, 133]) to prevent educator-on-learner sexual abuse. Such determination has to start with the Constitution.

The Constitution (1996: ss1(c), 1(d), 2, 237) requires adherence to constitutionalism, which enshrines its supremacy as well as the rule of law, accountability, and the Bill of Rights (Currie & De Waal, 2013: 5-6). The obligations that the Constitution imposes must be fulfilled diligently and without delay.

Constitutional imperatives

Before the advent of constitutional supremacy, there was a common law presumption that the state is not bound by its own enactments (Burns, 2003: 330). This changed with the adoption of a Constitution, with a Bill of Rights and founding values of the democratic South Africa, such as accountability and the rule of law. The Constitution and the justiciable constitutional imperatives decreed elimination of state

immunity (Loubser & Gidron, 2011: 728). As Davis J emphasised in *Faircape Property Developers (Pty) Ltd v Premier, Western Cape* [2000] [64E-I],

> *[t]he principle of public accountability is central to our new constitutional culture, and there can be no doubt that the accord of civil remedies securing its observance will often play a central part in realizing our constitutional vision of open, uncorrupt and responsive government.*

Moosa J confirms the notion of state accountability in *Jacobs v Chairman of the Governing Body of Rhodes High School and Others* [2010] [15]:

> *A public authority or a public functionary has a positive constitutional duty to act in the protection of the constitutional rights that are enshrined in the Constitution. This duty is in line with the principle that Government and State actors must be accountable for their conduct. The conduct of a State functionary which is at variance with the State's duty to protect the rights in the Bill of Rights, would be an important factor to be considered in determining whether a legal duty ought to be recognised in a particular case.*

In *Minister of Safety and Security v Van Duivenboden* [2002] [19-20], Nugent JA referred to the fact that the state's accountability is grounded in sections 2 and 7(2) of the Constitution. Section 2 obliges the state (and its organs and functionaries) to fulfil its constitutional obligations, such as the obligation in section 7(2), which requires the state to "respect, protect, promote and fulfil the rights in the Bill of Rights". Following the argument of Makau (2013) on the Kenyan Constitution, which contains a similar section, it can be argued that this section adds to the statutory obligations placed on public servants and imposes a higher standard on public servants (than on citizens) to uphold human rights in the performance of their duties. The nature of the state's positive protective duties puts it in a unique and different position compared to ordinary employers (*Hirsch Appliance Specialists v Shield Security Natal (Pty) Ltd* [1992] [652B]). The Constitution thus imposes *due diligence* on all state representatives. The author argues that in the light of this, educators' status as *in loco parentis* should be reconsidered. *In loco parentis* should no longer form the only basis of educators' legal obligation to be models of acceptable moral behaviour, to provide learners with safe learning environments, and to protect them against sexual abuse (see, for example, *Carstens and Department of Education Western Cape*; *Williams v LUK van Gauteng, Departement van Onderwys en Andere* [2004]). *In loco parentis* is not suitable to be used as the sole indicator of a legal duty, and it is not adequate as the sole determinant of the standard of reasonableness for negligence. In the Australian High Court case of *Commonwealth v Introvigne* [1982] [275], Justice Murphy emphasised that "the notion that a school teacher is *in loco parentis* does not fully state the legal responsibility of a school, which in many respects goes beyond that of a parent". Educators' constitutional obligations in terms of section 7(2), and their specific statutory obligations, emphasise the difference between the standard of reasonableness expected of educators and that expected of parents.

Because international law (duly adopted) and customary international law are recognised as part of national law (Constitution, 1996: ss231(2), 232), these protection duties extend to those imposed by international law and international common law. Member states have the duty to adopt measures not only to prevent human rights violations, but also to ensure that those who violate human rights do not go unpunished (Makau, 2013). The European Court of Human Rights held in *O'Keeffe v. Ireland* (28 January 2014) ECtHR [14-15, 18, 176]) (1) that states have a positive duty to ensure that those within their jurisdiction are free from torture or inhumane or degrading treatment, (2) that sexual violence constitutes torture in terms of article 3, and (3) that common carelessness is not a sufficient basis for finding a transgression of article 3, but that a culpable moral wrong on the part of a state is required.

The principle currently endorsed by the South African courts is that the state is subject to the rule of law in the same way that private citizens are, especially with regard to its constitutional duties (Du Bois, 2010: 171). The rule of law requires that the state complies with the law and the general requirement that the state's conduct must be rationally related to a legitimate government purpose (*Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex parte President of the Republic of South Africa and Others* [2000] [85]). The Pretoria High Court declared section 3 of the State Liability Act constitutionally invalid in *Nyathi v MEC for the Department of Health Gauteng and Another* [2008], because it, in effect, places the state above the law, by prohibiting attachment, execution, or any similar process against state property for a judgment debt sounding in money (Portfolio Committee on Justice and Constitutional Development, 2011).

Currie and De Waal (2013: 8) argue that in South Africa constitutionalism prescribes that the Constitution structure and constrain state power, by providing protection against the abuse of state power, through the Bill of Rights. Section 8(1) provides that the legislature, the executive, the judiciary, and all

organs of state are bound by the Bill of Rights (Constitution, 1996). The Bill of Rights thus has direct vertical application, and the conduct of any state institution may be challenged as a breach of its duties (Currie & De Waal, 2013: 42). In instances where the state fails to safeguard learners' personal rights, there is no need to attach liability to its employee first in order to hold the state liable. The Constitutional Court declared in *De Lange v Smuts NO* [1998] [31] that "[i]n a constitutional democratic state […] citizens as well as non-citizens are entitled to rely upon the state for the protection and enforcement of their rights". In *S v Williams and Others* [1995] [77], it was emphasised that

> *[t]he Constitution has allocated to the State and its organs a role as the protectors and guarantors of those rights to ensure that they are available to all. […] It is therefore reasonable to expect that the State must be foremost in upholding those values which are the guiding light of civilised societies.*

In McGee and Gaventa's words (2010: 21), accountability is the "cornerstone of human rights law". It is, in fact, one of the key requirements for governance that is conducive for the promotion and protection of human rights in terms of article 1 of Resolution 2000/64 of the Commission on Human Rights (OHCHR, 2000):

> *[T]ransparent, responsible, accountable and participatory government, responsive to the needs and aspirations of the people, is the foundation on which good governance rests, and […] such a foundation is a sine qua non for the promotion of human rights.*

In line with this, section 38 (Constitution, 1996) endorses accountability and enforces the rights in the Bill of Rights (Van Aswegen, 1995: 65). The state's duty to protect cannot affect its vicarious liability, only its direct liability, because the Bill of Rights can only affect personal liability (Wagener, 2008: 674). Enforcement of rights (including children's rights) can take the form of a delictual claim (Du Bois, 2010: 145; *Loureiro v iMvula Protection* [2014] [33]). Van Aswegen (1995: 63) states that "an ordinary delictual claim will lie at the instance of an aggrieved person against the state […] who infringes such right, provided that all the usual requirements for delictual liability are met". Notwithstanding the fact that the constitutional imperatives form "an objective, normative value system" (*Carmichele v Minister of Safety and Security* [2001] [54]; *K v Minister of Safety and Security* [2005] [15]), they cannot be conclusive of a legal duty, and other statutory, common law and normative factors should support the more general legal duty (Makau, 2013; Neethling, 2005: 582).

Children enjoy special constitutional protection

The Constitutional Court in *Centre for Child Law v Minister for Justice and Constitutional Development and Others* [2009] [26] emphasised children's need to be protected because they have greater physical and psychological vulnerability, have a more limited ability to make choices, and "are less resourceful in self-maintenance than adults". Sexual crimes against children constitute a violation of, in the words of Mogoeng J, "a cluster of interlinked fundamental rights treasured by our Constitution" (*F v Minister of Safety and Security* [2011] [55]). Those rights include learners' rights to human dignity (section 10), life (section 11), freedom and security of the person (section 12) and a safe environment (section 24(a)), and their rights guaranteed in section 28 (Constitution, 1996). If the child is still a learner of compulsory schoolgoing age, their right to a basic education is also impacted on (Constitution, 1996: s29(1)).

Sloth-Nielsen (2015: 7-3) describes section 28(1)(d) of the Constitution, which guarantees children protection against "maltreatment, neglect, abuse or degradation", as the "primary locus of the constitutional responsibility for the protection of children". Entrenchment of this specific right over and above entrenchment of the right to freedom and security of the person in section 12(1) of the Constitution is indicative of the importance of the normative consideration that children are regarded as vulnerable and in need of greater protection, especially with regard to sexual abuse. Entrenchment of the right to their corpus (rights to be free from violence, not to be tortured, and to have their bodily and psychological integrity protected) (Constitution, 1996: s12(1)) is indicative of a legal duty resting upon the state to take reasonable steps to prevent violence (assault) against children by third parties. It is well documented that child sexual abuse has severe psychological effects, such as fear, helplessness, guilt, shame, and feelings of betrayal, responsibility, aggression, and sadness (Astbury, 2013; *H v S* [2014] [63]; South Eastern CASA, 2015).

Human dignity is the source of a learner's innate right to physical integrity, and infringement of a learner's bodily integrity will invariably also affect the learner's dignity (Currie & De Waal, 2013: 251; Malherbe, 2009: 426; *Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Constitutional Development an Another* [2014] [55]). Electing to prioritise protection of the accused

educator's job, or the school's or the education department's good name, above a child victim constitutes a negation of the value and worth of the child as a human being, and a violation of the child's right to dignity. Spilg J refers to the fact that the right to human dignity complements the right to life (*S v Makwanyane and Another* [1995] [326-327]). As such, the right to life is interpreted as more than merely the right to an existence, it is the right to a dignified life (*H v S* [2014] [51, 62]). For children this includes the right to have the "possibility to grow, to develop and become adults" (Humanium, 2016). Furthermore, educator-on-learner sexual abuse can never be in the best interests of the child, and it will always constitute a violation of section 28(2) of the Constitution. Direct state liability for intentional delicts will give better effect to child sexual abuse victims' vulnerability and best interests (Wangmann, 2004: 169; Thompson, 2012: 169).

STATUTORY IMPERATIVES SUPPORTING DIRECT STATE LIABILITY

If there is a statutory duty to perform specific actions, failure to do that is *prima facie* wrongful, and direct liability can attach (Thompson, 2012: 171). Various statutory provisions bind schools to protect the rights of learners as children, to ensure their safety, and to protect them against sexual abuse. These include general legislation, such as the Children's Act and the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, as well as education-specific legislation, such as the Employment of Educators Act.

The constitutional obligation to act positively in relation to the protection of children's rights is given effect in the Children's Act. The rights in the Act supplement those in the Bill of Rights, and organs of state and their representatives are obliged "to respect, protect and promote the rights of children" guaranteed in the Act (Children's Act, 2005: s8(1)-(2)). Furthermore, children enjoy enhanced protection against sexual abuse, as chapter 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, criminalises specific sexual offences against children. In some instances, failure to respond to an allegation of educator-on-learner sexual abuse can constitute a sexual offence, in itself. Principals, educators, or district or departmental officials who take part in a settlement and keep in their post an educator who has committed a sexual offence, as happened in the cases of *S v Zothile* and *NAPTOSA obo Isaacs and Department of Education Western Cape*, referred to above, could be charged with "aiding and abetting a sexual offender" (Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007: s55(c)).

The Employment of Educators Act places a legal duty on educators to refrain from any form of sexual abuse. In fact, two of the forms of serious misconduct for which an educator *must be dismissed* are forms of educator-on-learner sexual misconduct, namely "committing an act of sexual assault on a learner" and "having a sexual relationship with a learner of the school where he or she is employed" (Employment of Educators Act, 1998: s17(1)(b), (c)). Furthermore, in terms of section 18(1)(e), an educator commits misconduct if he or she "wilfully, intentionally or negligently endangers the lives of himself or herself or others by disregarding set safety rules or regulations". Principals and educators who protect an educator who has allegedly committed sexual misconduct commit misconduct, in that they misuse their position to promote or to prejudice the interests of others (Employment of Educators Act, 1998: s18(1)(g)). Educator-on-learner sexual misconduct will always constitute a transgression of section 18(1)(q) (because sexual abuse is improper, disgraceful and unacceptable conduct) as well as section 18(1)(ee) (because child sexual abuse is prohibited by common law, and it is a statutory offence) of the Employment of Educators Act.

Failing to report a sexual offence committed against a child is an offence in terms of section 110(1) of the Children's Act and section 54(1) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007. Recently, learners from a secondary school in the Western Cape shut the school down in protest to the fact that complaints about an educator who had sexually abused a learner were not taken seriously by the department. The departmental spokesperson said the department had investigated the case but had dismissed it because there was not enough evidence to support the allegations (Hlati, 2017). The author contends that the fact that the department had investigated the case and had concluded that there was not enough evidence does not absolve it from the statutory obligation to report. The department investigated whether the educator had committed misconduct; it did not investigate a possible criminal sexual offence (see Coetzee, 2011). Delictual action that would arise in terms of these provisions relates to omission on the part of the state to protect the learner from sexual abuse and to protect and

enforce the learner's rights, not failure to comply with the statutory obligation itself. Butler, Mathews, Farrell and Walsh (2009: 4) correctly argue that legislation creates a private right of action for a person who suffers damage because of non-reporting. This is because omission to report may put other learners in harm's way. The fact that one case is reported should be interpreted as being indicative of a reasonable possibility that all children are in danger and need protection against that particular educator (Nance & Daniel, 2007: 39). This view corresponds with that of Savage AJA in *Grey v Education Labour Relations Council* [2015] [16], who concluded that dismissal for educator-on-learner sexual abuse is an appropriate sanction, because it is a "sensible operational response to risk management" to ensure that the sexual predator will not come in contact with more learners.

In terms of section 45(1)(c) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, an employer must immediately terminate employment of an employee that has failed to disclose either a conviction or an allegation of a sexual offence committed against a child. Furthermore, section 45(1)(d) of the same Act obliges the employer to

> *take reasonable steps to prevent an employee whose particulars are recorded in the Register from continuing to gain access to a child […] in the course of his or her employment, including, if reasonably possible or practicable to transfer such person from the post or position occupied by him or her to another post or position: Provided that if any such steps to be taken will not ensure the safety of a child […] the employment relationship, the use of services or access, as the case may be, must be terminated immediately (Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007).*

Before an educator can be appointed, the employer must ensure that the candidate was not deregistered by SACE and that they are not included in the National Register for Sex Offenders or in Part B of the National Child Protection Register (SACE Act, 2000: s21(2); Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007: s45(1)(b); Children's Act, 2005: s126). An educator who has been found guilty by SACE of a sexual transgression must be deregistered, and SACE must keep a record of such persons, so that schools and provincial departments of basic education can enquire whether a candidate for a post is registered (SACE Act 2000: s23(c)). Persons who are included in the National Register for Sex Offenders may not be employed "in a manner that places them in a position to work with or have access to or authority or supervision over or care of children" or "be employed to work with a child in any circumstances" (Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007: s41(1)(a)). This provision will also apply to the appointment of, for example, people rendering gardening or cleaning services, sports coaches, scholar patrollers, choirmasters, and school photographers (Criminal Law, Sexual Offences and Related Matters) Amendment Act, 2007: s40). The Children's Act (2005: s123(1)(b)) places an obligation on schools and the departments of basic education not to appoint any person who is included in Part B of the National Child Protection Register, and who has thus been declared "unsuitable to work with children". Persons convicted of a sexual offence against a child are prohibited from working with children. Such persons may not hold positions where they may have "authority, supervision or care of a child" or where they may "gain access to a child or places where children are present or congregate" (Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007: s41(1)(a), (b)). Failure of these organs of state to comply with statutory requirements exposes the state to delictual claims. Any learner who has been sexually abused by an educator whose name appears in any of these registers or whose name should reasonably have been included in them will have a claim, and they should be able to show causation between the omission on the part of the state and the sexual abuse.

CONSIDERING DIRECT STATE LIABILITY FROM A DELICTUAL LAW PERSPECTIVE

Vicarious liability and non-delegable duty of care are measures used to attach delictual liability. In this section, the author investigates the suitability of vicarious liability and non-delegable duty of care as measures to attach liability for intentional criminal delicts.

Vicarious liability vs direct state liability

Using the flexibility of the common law of delict to develop the test used to determine vicarious liability for intentional delicts of state representatives has paved the way for direct state liability. Not only did it begin the process of interpreting the law of delict in terms of the Constitution, it gave expression to the constitutional founding values of accountability and the rule of law, and it also moved the law further away from the maxim *rex non potest peccare* (see Barnes, 2014: 34; Botha & Millard, 2012: 252).

Froneman J identified four reasons why it is important to move beyond vicarious liability as applied in *K v Minister of Safety and Security* (*F v Minister of Safety and Security* [2011] [90]). The first reason relates to the fact that the Constitutional Court has brought state liability within the ethos of the constitutional framework, and it has given expression to constitutional norms and values, such as the rule of law and accountability, but it has done so within the traditional framework of vicarious liability. The court stopped short of full accountability for the state and subjecting the state completely to the rule of law, on equal footing with private persons.

The second reason relates to the difficulties arising from using the language of vicarious liability where the state's constitutional and statutory duties are concerned. Cockrell (1993: 235, 243) questions the practice of modifying and superimposing private-law rules of liability on cases where an organ of state needs to be held liable. Likewise, Boonzaier (2013: 338) argues that the private-law doctrines lack the conceptual basis for holding public authorities liable. Commenting on a similar development in England (*Lister v Hesley Hall Ltd* [2002] 1 AC 215), Canada (*Bazley v Curry* [1999] 2 SCR 534), and Australia (*New South Wales v Lepore* (2003) 212 CLR 511; 195 ALR 412; [2003] HCA 4; BC200300126), Giliker (2009: 35-36) argues that this development compromises the integrity of the already contentious doctrine of vicarious liability. Furthermore, in these instances the courts have extended vicarious liability to intentional criminal activities by employees, by developing the "within the scope or course of employment test" (Giliker, 2009: 36).

To require a secondary breach of a legal duty on the part of the state to establish vicarious liability, as was done in *F v Minister of Safety and Security* [2011] [103], is contrary to the basic premise of vicarious liability, where liability for the wrongdoer's delict is imputed to another person based on the relationship between the defendant and the wrongdoer (Boonzaier, 2013: 330, 340). Giliker (2009: 42), in fact, states that it is not clear whether the court in *Lister v Hesley Hall Ltd* based its judgment on vicarious liability or non-delegable duty of care. Dickinson and Nicholson (2015) seem to support direct liability in such instances: "Where the damage suffered may equally be attributed to some obvious fault on the part of the 'employer' then little searching is needed to find the necessary personal duty and breach."

The third reason why direct state liability should be preferred over vicarious liability in so-called deviant cases relates to the fact that the state acts through its departments and employees. Reflecting on *Van Duivenboden* and *Carmichele*, Du Bois (2010: 174) commends the Supreme Court of Appeal on the progress made in developing the common law of delict, but criticises the court for failing to recognise the state as having its own distinctive character and social mission, as well as for utilising the individual employee to hold the state liable. Du Bois (2010: 175) argues that since our legal system already "recognizes the state as having its own distinctive character and social mission, a distinct notion of governmental liability appears to be needed in order to adequately reflect the implications of such an understanding of the state". Boonzaier (2013: 330, 337) argues that due to the state's positive protective duties, vicarious liability is insufficient when the state fails to perform its constitutional duties, and that the state should be held directly liable for its own omissions.

The fourth reason is that wrongfulness as a delictual requirement is more suited to limit state liability than the 'sufficiently close link' test is. For the sake of vicarious liability, the duties of the state are irrelevant to determine liability for a positive delict on the part of the tortfeasant employee; only the employee's own duties are relevant (Boonzaier, 2013: 349). Furthermore, the fact that there is a legal duty to take positive steps and a failure to comply with that duty does not mean that a delict was committed (Fagan, 2008: 671). A delictual claim can only arise if the omission was culpable and wrongful. Froneman contends that "the normative considerations expounded in *K v Minister of Safety and Security* are also capable of supporting a similar outcome based not on vicarious liability, but on direct liability" (*F v Minister of Safety and Security* [2011] [88]). If the sexual abuse can be linked to a simultaneous omission on the part of the state, the state can be held directly liable for its omission, but not vicariously liable for the representative's intentional criminal delict (*F v Minister of Safety and Security* [2011] [109]).

Non-delegable duty of care

Non-delegable duty of care is a measure to attribute liability. It applies in situations where tasks are delegated but the delegator remains liable for the delegatee's failure to take care (Amirthalingam, 2017: 510). In *New South Wales v Lepore* [2003] 212 CRL 511 [291], it was stated that non-delegable duty of care is intended to bring home liability in instances where it would otherwise have fallen outside vicarious liability. In this section, the author investigates the possibility of using non-delegable duty of care as a

measure to attach liability. Booysen J stated in *Hirsch Appliance Specialists v Shield Security Natal (Pty) Ltd* [1992] [650]) that

> *some tort duties are formulated so as to encompass responsibility for the conduct not only of oneself, but also of certain people varying in range. […] For example, the responsibility of schools to their pupils and of hospitals to their patients is no longer limited to vicarious liability for servants, but is complemented by a "non-delegable personal" duty to assure that reasonable care is taken for their safety.*

A non-delegable duty of care on the part of educators makes sense in the light of section 7(2) of the Constitution and the *due diligence* expected of the state. School authorities' non-delegable duty was confirmed in the Australian cases *Watson v. Haines* (1987) ATR 80-094 and *Commonwealth v Introvigne* [1982] 150 HCA 40 [270]. The United Kingdom Supreme Court in *Woodland v Swimming Teachers Association* [2013] UKSC 66 [29] (Hale B) set out guidelines for when non-delegable duty would arise:

> *(1) the claimant is especially vulnerable or dependent on the defendant's protection against risk or injury; (2) there is an antecedent relationship between the two which puts the claimant in the defendant's custody, charge and care and from which it is possible to say that the defendant has assumed a duty to ensure care is taken; (3) the claimant has no control over how the defendant chooses to perform its obligations; (4) the defendant has delegated a function which is an integral part of the positive duty it assumed, such that the defendant now exercises custody, charge or care over the claimant on the defendant's behalf; (5) the defendant has delegated its duty to a third party, who has performed it negligently.*

In *Kondis v. State Transport Authority (formerly Victorian Railways Board) (1984) 154 CLR 672* [32], the court held that a non-delegable duty is recognised in cases where there is some element in the relationship between the parties that makes it appropriate to impose on the defendant a duty to ensure that reasonable care and skill is taken for the safety of the persons to whom the duty is owed. The relationship of proximity giving rise to the non-delegable duty of care in such cases is marked by special dependence or vulnerability on the part of that person (*Commonwealth v Introvigne* (1982) 150 CLR 258 [271]). Moosa J in *Jacobs v Chairman of the Governing Body of Rhodes High School and Others* [2010] [23] describes the relationship between a learner and the school as a relationship where the school accepts responsibility and duty to care for and exercise control over the learner, and it is thus expected to take reasonable measures to prevent harm to the learner. Moosa J further stated: "[W]here one is in control of a potentially dangerous situation, thing or person, one would normally be under a duty to take care to prevent the risk from materializing."

The distinctive nature of the state-public school/state-educator relationship should be considered (Botha & Millard, 2012: 227). Because of educators' authoritative position, a duty of care will exist whenever there is an educator-learner relationship; the basic subordination and helplessness of children within authoritarian relationships makes this duty non-delegable (Verma, 2002: 18). As Wangmann (2004: 200) reasons, the non-delegable duty of care "more accurately captures the position of children vis-à-vis the teacher *and* the school authority, given its recognition of power disparities and the special vulnerability of children". In such an unequal relationship, the adult bears sole responsibility for sexual activity with a minor (*Grey v Education Labour Relations Council* [2015] [2]).

A non-delegable duty of care is usually also present when there is a fiduciary relationship. A fiduciary is a person that stands in a position of trust towards another and has the obligation to act in the best interests of that person (Zuker, 2002: 20). The fiduciary relationship between educators and learners of the same school is presumed to be ongoing (Zuker, 2002: 20). An educator continues to act in their capacity as educator in relation to learners, and they remain so in the eyes of their learners when they are not on the school grounds. As mentioned in *F v Minister of Safety and Security* [2011] [68]), "[t]he perception of the victim and the breach of trust are of importance here". This is important, because a disturbing number of educator-on-learner sexual abuse incidents take place outside school hours and off the school grounds, that is, in deviation of the normal duties of educators. For example, an educator raped a learner during an 'after-party' at his house following the farewell function for matric learners (*Sekobo v MEC Department of Basic Education (Gauteng) and Others* [2015]). Another educator raped a learner who babysat for him at his home (*Molete and Department of Education Gauteng* PSES 355-14/15GP). Yet another educator raped a learner whom he had asked to clean his house (*Ramokgopa and Department of Education, Limpopo* PSES 745-03/04 LP).

In sexual abuse cases such as the above, breach of trust is a major factor. DeMitchell (2002: 18) correctly states that "no harm betrays the trust between educator and student more than the sexual abuse of the student". Because educators play such an important role in the formation of children, and they work so

closely with them, parents, learners, society at large, and the employer must be able to trust them unconditionally (*Gwe and Department of Education Western Cape* PSES 708-16/17WC; *Molete and Department of Education Gauteng* PSES 355-14/15GP). Furthermore, since it is required that all educator applicants must be screened against the Register of Sexual Offenders, the National Child Protection Register, and the SACE Register, it is reasonable for parents and learners to expect that there will be no educator sexual predators in schools.

There are, however, various reasons offered why the non-delegable duty of care is not an appropriate mechanism to attach delictual liability to the state in instances of intentional criminal delicts committed by educators:

- the elements that must be present before a non-delegable duty can be used as a mechanism to attach liability are all factors that could be used to establish wrongfulness for direct liability (see Neethling, 2005: 583-586);
- the mechanism of non-delegable duty of care to attach liability is not widely accepted, especially not to attach liability with regard to intentional delicts (Giliker, 2009: 45; Thompson, 2012: 173; Scott, 2009: 676);
- non-delegable duty of care is regarded as type of vicarious liability. Similar to the extended test, non-delegable duty of care was invented to circumvent the limitations of vicarious liability in cases involving independent contractors (Giliker, 2009: 45-46; Todd, 2016: 132);
- it would lead to conceptual confusion similar to that of the extended test for vicarious liability (see below). Scott (2009: 676), supporting the argument of Ponnan JA in *Kondis v. State Transport Authority* (1984) 154 CLR 672 687, refers to non-delegable duty of care as an "unpalatable concept", which forces action to lie where it reasonably does not lie;
- it requires equating intentional wrongdoing with a failure to take reasonable care and to see to it that care is taken (Giliker, 2009: 46; Thompson, 2012: 201); and
- it would be too onerous to expect the state to take responsibility for deliberate sexual offences committed by educators (Todd, 2016: 135).

CONCLUSION

A constitutional perspective of state liability not only allows but also requires abandonment of the English law maxim *rex non potest peccare*. Constitutional imperatives, such as state accountability, constitutional supremacy, adoption of the rule of law, and inclusion of the Bill of Rights in the Constitution, decree elimination of state immunity. Both the Constitutional Court and the Supreme Court of Appeal have emphasised the importance of holding public servants accountable. Accountability grounds democracy, the rule of law, and a human rights culture. It is essential to hold the state directly liable when it fails to protect learners against sexual abuse and to promote and respect learner victims' right to human dignity, their right to freedom and security of the person, their children's rights, their right to life, their right to a safe environment, and their right to an education. Neither vicarious liability nor the non-delegable duty of care are suitable measures to attach liability to the state in instances where educators have committed intentional criminal delicts, such as sexually abusing learners.

Current statutory laws regulating state liability provide only for vicarious state liability, not for direct state liability. The author contends that the constitutional imperatives do not merely require interpreting the State Liability Act and the state's vicarious liability in terms of the Constitution. They require an amendment of the Act, to give expression to these imperatives. The legislature should address the fact that the State Liability Act only focusses on the vicarious liability of the state as employer, and it is silent on the state as a unique legal entity with constitutional obligations. This will hopefully allow the courts to revert to traditional application of the 'within the scope of employment' test, and to deal with deviant, intentional delicts through either statutory liability or direct liability.

Holding the state directly liable should be reserved for instances where an omission on the part of the state can be proven. In such instances, victims could allege both direct state liability and direct liability on the part of the offender, precisely because there are actually two delicts. For example, if the governing body recommends the appointment of a convicted sexual offender without screening the candidate, the head of the provincial department of basic education supports such recommendation, and the sexual offender then commits another sexual offence, the state should be held directly liable for its omission to protect the learners.

Determining causation should be used to ensure liability in instances where a state representative has committed a wrongful, culpable, intentional delict (such as where an educator rapes a learner) which simultaneously constitutes an omission on the part of the state, in that it has failed in its constitutional and statutory duties. The representative cannot be said to have represented the state if they have committed sexual abuse. It is suggested that direct state liability can only attach if there was an omission on the part of the state that left the learner unprotected and created the risk of them being sexually abused. The state can also be held directly liable when a delict cannot be linked to one individual representative but is the result of institutional failure.

The legal framework does not support holding the state directly liable in cases where vicarious liability will attach.

The strategy of focussing on the state's failure to fulfil its constitutional and statutory obligations could encourage the Department of Basic Education and the provincial departments of basic education to act more proactively to prevent the state from being held directly liable. This can be done by laying charges of 'abetting' and failure to report principals, SMT members, educators, or other education officials who do not act on an allegation of educator-on-learner sexual misconduct, who allow the alleged perpetrator to teach, who do not report educator-on-learner sexual misconduct, or who are involved in arranging private settlements and bribes. In such instances, not only should criminal charges be laid, employers should also bring misconduct charges, such as dereliction of duty in terms of the Employment of Educators Act.

It can be argued that if SACE, the provincial departments of basic education, and public schools have complied with the statutory requirements (namely reporting, screening, and keeping records), there should not be sexual perpetrators employed to work with children. The mere presence of a sexual perpetrator can thus be taken as failure to comply with a legal duty. Should a school be able to show that it complied with the statutory requirements, this can also be used to show that the sexual abuse was not foreseeable.

Arbiters, or judges, should be encouraged to, where they become aware of a state representative's transgression of the law, for example where a principal has failed to report, where a sexual predator was appointed because they were not screened, or where an incident was reported but not investigated, order that the offence be reported to the police for further investigation.

Endnotes

i In this article, "learners" refers to those schoolgoing children who are still children in terms of section 28(3) of the Constitution. Legislative developments include, *inter alia*, section 28 of the Constitution, the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, and the Children's Act 38 of 2005.

ii In this article, the author uses the phrase "educator-on-learner sexual abuse" as an umbrella term to indicate all sexual offences committed by educators against learners. See the explanation of why sexual abuse should be preferred as an umbrella concept in Coetzee, S.A. 2012. Law and policy regulating educator-on-learner sexual misconduct. *Stellenbosch Law Review*, 23(1): 76-87.

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