IN THE HIGH COURT OF AUSTRALIA
ADELAIDE OFFICE OF THE REGISTRY

No. A20 of 2016

BETWEEN

PRINCE ALFRED COLLEGE INCORPORATED
Appellant

and

A, DC
Respondent

APPELLANT'S SUBMISSIONS

PART I PUBLICATION

10 1. This submission is suitable for publication on the Internet.

PART II CONCISE STATEMENT OF ISSUES PRESENTED BY THE APPEAL

2. In the context of vicarious liability for intentional wrongdoing by an employee, does or should liability extend beyond the two kinds of case identified by Dixon J in *Deatons v Flew* (1949) 79 CLR 370 (***Deatons***) and referred to by Gummow and Hayne JJ in *New South Wales v Lepore* (2003) 212 CLR 511 (***Lepore***) at [239], namely, where the conduct complained of:

   2.1 was done in the intended pursuit of the employer's interests or in the intended performance of the contract of employment; or

   2.2 was done in the ostensible pursuit of the employer's business or the apparent execution of the authority which the employer held out the employee as having?

20 3. If liability is so limited (or if one looks to the "sufficiency" or "closeness of connection") was the Full Court correct to reverse the trial judge's finding that Mr Bain's conduct was not relevantly in the course of employment?

4. Did the Full Court err in overturning the trial judge's decision not to grant an extension of time for the institution of the proceedings?

PART III SECTION 78B OF THE JUDICIARY ACT 1903 (CTH)

5. Notice pursuant to s 78B of the *Judiciary Act* 1903 (Cth) is not required.

PART IV CITATION

6. Both decisions are unreported: [2015] SASCFC 161 (**FC**), and [2015] SASC 12 (**TJ**).

PART V NARRATIVE STATEMENT OF FACTS FOUND OR ADMITTED

30 **Introduction**

7. In 1962, the respondent, then aged 12 years old, was enrolled as a boarder at Prince Alfred College (**the school**). A teacher and assistant boarding housemaster of one year's standing, Mr Dean Bain (**Bain**), sexually assaulted the respondent at the school and elsewhere over some months. Immediately after the abuse was reported Bain was dismissed (TJ [1]-[3]).

8. For many years the respondent experienced a range of difficulties, and in 1996, his various symptoms intensified and he was diagnosed with PTSD. He experienced difficulties which pervaded relationships and his business (TJ [5]).

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9. The respondent was required to institute proceedings within 3 years of attaining the age of 21 years, on 17 July 1970 (TJ [9]). The respondent instituted the proceedings on 4 December 2008. The Court ordered that the extension of time and liability be tried first.

10. The trial judge rejected claims in negligence and for breach of a non-delegable duty (TJ [108]), and found that the school was not vicariously liable (TJ [180]). The appeal in relation to the first two bases failed[1], but each member of the Full Court allowed the appeal on vicarious liability (FC [2], [130], [262]).

11. The trial judge found that the respondent suffered PTSD before the date asserted by him (1996), in all likelihood in 1962, that an extension of time[2] was required (TJ [105], [106]), but she was not persuaded that it was just to grant an extension of time (TJ [231]). The Full Court reversed this ruling (FC [7], [148], [264]).

Facts relevant to liability

12. There was no issue but that the abuse occurred as described by the respondent. Bain was not called by either party. He was convicted and imprisoned in 2007 on two counts of indecent assault against the respondent, as well as for offences relating to two other students (TJ [13]).

13. Many of the individuals who might otherwise have been expected to be called by the school had died. They included the headmaster in 1962, Mr Dunning, the then senior master, Mr Smith, and the then school chaplain, the Rev Waters. Additionally, the principal boarding house master in 1962, Mr Prest, was unwell and unable to give evidence (TJ [15]). The respondent's evidence about his first year in the boarding house in 1962 was as follows.

    13.1 Mr Prest was the senior housemaster in charge of the boarding house. Bain and two others were assistant housemasters. The housemasters were present during meal times (TJ [21]). One of the other housemasters, Mr Connell, was a member of the teaching staff, like Bain, and the other, Mr Hamley, was a university student who resided in the boarding house (TJ [141]). Mr Prest and Bain had quarters in close proximity to each other on the first floor of the boarding house; Mr Connell had an attic room on the floor above (TJ [142]).

    13.2 The prefects supervised the day-to-day activities of juniors including study, showering and "lights out" in the evenings and they also disciplined them when rules were broken. The prefects would send boys to Mr Prest for discipline if they were considered "out of control" (TJ [21]). The trial judge accepted that the prefects would supervise the boys' showering and would supervise preparations for bed and "lights out", and sometimes would walk through the dormitories after lights out to ensure that the boys were in their beds and not talking (TJ [143]).

    13.3 The respondent said that in 1962 Bain was "rostered on" two to three times a week and that the respondent saw "quite a bit" of Bain at shower time (T37.5). He often told stories to the boys in the dormitory after lights out (TJ [21]). The other housemasters did not supervise lights out and did not come into the dormitory[3] (TJ [21]). **None of the other**

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1 In relation to non-delegable duty, the Full Court was unanimous: FC [6], [32], [114], [263]. Gray J would have found negligence (FC [106]), but Kourakis CJ (FC [32]) and Peek J (FC [263]) disagreed.

2 The judge found that the respondent had demonstrated the a "fact material" to his case, namely, the prognosis of Dr Kelly to the effect that he would never fully recover or manage a business again, was ascertained by him within a period of twelve months prior to the institution of proceedings in December 2008, thus enlivening the discretion to grant an extension of time under s 48 of the *Limitation of Actions Act* 1936 (SA) (***Limitations Act***) (TJ [204]). She said it was easy to overstate the importance of this fact (TJ [222]).

3 The respondent's dormitory, which accommodated 12 boys, was on the top floor of the main building. The other juniors were split between two other dormitories on that level. The showers and toilets were adjacent to the respondent's dormitory. Bain's private bedroom was on the floor below (FC [153]).

boarders who gave evidence suggested that any housemaster, apart from Bain, was present in the dormitories after lights out (TJ [143]).

13.4 The abuse started in about April 1962 while Bain was telling a story in the dormitory after lights out: he sat on the respondent's bed and placed the respondent's hand around his penis. On a subsequent occasion, Bain fondled the respondent's genitals under the bedding while telling a story after lights out. Then, throughout the year, he visited Bain's room at Bain's request and was there molested by him. There was also an incident of a sexual nature but not involving physical abuse which occurred away from the school's premises (TJ [22]).

13.5 In October 1962 the respondent disclosed the abuse to another boarder who reported it to Rev Waters, and Bain was summarily dismissed (TJ [23]).

Facts relevant to extension of time (see also the appellant's chronology)

14. The salient facts relating to the question of an extension of time were as follows.

14.1 The respondent married in 1972, and had a child in 1980, and another child in 1982. During the early 1980's he suffered anxiety and had a drinking habit (in respect of which he received counselling). He felt anxious and out of place, more so when mixing with friends from the school. In the 1980's he commenced to use the services of a prostitute. In around 1990 he commenced attending AA meetings (TJ [26], [27], [28], [31]).

14.2 In 1996, the respondent's son enrolled at the school in accordance with family tradition and this led to difficulties for the respondent. In late 1996 he began consulting with Mr Coats, a psychologist, with whom he discussed the abuse (TJ [32], [33], [35]).

14.3 In February 1997, after hearing Bain's voice on the radio, he felt panicky and shaky, and later that year he resumed drinking to numb himself (TJ [36]). He sought legal advice, and on 21 August 1997 he commenced civil proceedings against Bain. Earlier that year, he had meetings with his solicitor and a barrister during which the need for an extension of time within which to bring a claim was discussed and he was warned about the risk that time would not be extended and of the costs involved in litigation. The advice was that his chances of success against the school were less than 50%. **He decided not to sue the school at that time as he considered it had done the right thing by dismissing Bain** (TJ [37]-[38]).

14.4 He had dealings with the school, including with its lawyers. He said it was not then his intention to sue the school; he was seeking the school's acceptance of what happened and some financial assistance (TJ [39]). The school agreed to review the systems in place to educate and protect boys. The school agreed to pay his medical and legal fees to that point, as well as to meet his son's school fees of about $10,000 per year for the following three years. The respondent wrote to the school accepting its offer (TJ [40]-[41]).

14.5 In September 1999 the respondent reached a financial settlement with Bain and he received some compensation (TJ [44]). After this time the respondent's depression got worse (TJ [45]). By 2002 the respondent felt very debilitated and inflicted physical pain on himself to distract from his mental torment (TJ [46]). He spent time in a psychiatric facility. His alcoholism had become a real problem, and late in 2002 he decided to challenge the settlement with Bain (TJ [48]). By August 2003 the respondent was feeling suicidal and was readmitted to psychiatric care (TJ [50]). He stopped going to work at his business in November 2004 and his marriage was deteriorating (TJ [51]).

14.6 In 2004 he again made contact with the school seeking further assistance (TJ [52]). By this time he felt angry and considered suing the school (TJ [54]). After another period in

care, in 2005, he received a psychology report to the effect that he would never work full-time again (TJ [55]). His business went into voluntary administration and he sold his family home to ease growing debt (TJ [56]). He asked the school for $1m plus a refund of his school fees (TJ [57]). During that year he moved out of the family home and started a relationship with another woman (TJ [59]).

14.7 In 2005, after the removal of a statutory limitation, Bain was arrested and charged with offences committed against the respondent. The respondent attended the various court hearings and read a victim impact statement (TJ [63]). Bain was sentenced to a term of imprisonment after pleading guilty in December 2007 (TJ [64]).

14.8 The respondent engaged in part-time work at Bunnings until his employment was terminated in September 2011 because he had been stealing money and gift cards for some time (which he said gave him a 'buzz') TJ [66]). The respondent agreed that he told a psychiatrist engaged by the school's solicitors that the proceedings were about loss of money and that if his business had not failed, he might not have taken action (TJ [68]). When it was put to him in cross-examination that his current claim simply represented his "change of mind" about suing, he replied: "Yes, change of situation" (TJ [68]).

Trial judge's decision

15. As noted earlier, the trial judge rejected the respondent's case that, having regard to standards applicable in 1962, the school was negligent in employing or failing to supervise Bain (TJ [149]):

> I find that the primary supervision of the Year 8 boarders was performed by the boarding house prefects. I do not infer that Bain's particular practice of telling stories to the boys in their dormitories after lights out was either in accordance with the practices of other boarding house masters, or sanctioned by Mr Prest. I find that on most occasions when Bain abused either the plaintiff or other boys, he did so under the cover of darkness and in the presence of a number of boys, yet in a manner which meant that other boys were not aware of his activities.

16. After noting the differences between the judgments in *Lepore*, the trial judge concluded as follows (TJ [172]-[180], emphasis added):

> The plaintiff argues that there is "ample evidence" of the close connection between the sexual abuse of the plaintiff by Bain and what Bain was employed to do in the boarding house. ...
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> However, the plaintiff's arguments about Bain's role and the scope of what was expected from him by the school in carrying out his duties as housemaster, **proceed on the basis of an assumption that the things Bain did were the things that he was required to do. That assumption seems to me to be fallacious.** As has already been outlined, the evidence from the three boarders including the plaintiff about the routines in the boarding house made it clear that the primary responsibility for supervising the younger boarders lay with the prefects. It was their responsibility to ensure that the younger boarders attended breakfast in a timely manner, completed their homework and were in bed ready for "lights out" at the appointed time. **There was no mention of the other housemasters either supervising the boys' showering activities or attending in the dormitories after "lights out". Indeed, the plaintiff said that it was only Bain who came into the dormitories after "lights out" and only Bain who told the boys stories at that time.** The only mention of Mr Prest being in the boys' dormitories at all was before "lights out" and then, only rarely.
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> The fact that the abuse happened, not only in the boarding house, but also off campus and including during an exeat weekend when Bain took the plaintiff to a house at Beaumont (after a weekend spent at the plaintiff's home), would not have inclined me against a finding of vicarious liability. However, **I consider that there is simply insufficient evidence of a reliable nature about Bain's designated role – as opposed to assumed role – upon which to base a conclusion that what he did was done in the course of employment.**

> In any event, although it may be accepted that when rostered on duty overnight Bain had a role which involved responsibility for and overall supervision of the boarding house, that is **very far from amounting to a duty to engage in intimate physical behaviour with a student**. ...
>
> I am unable to find that Bain's conduct in the boarding house conformed to the role which the defendant assigned to him. In a number of respects, including his supervision of showering of the boys and his presence in their dormitories after "lights out", I am inclined to think that those activities were unauthorised. However, there is no direct evidence on this point and a conclusion based on inherent likelihood or general knowledge remains speculative; especially in view of the fact that practices have inevitably changed markedly in the ensuing years.
>
> Even so, were I to assume that Bain acted in accordance with the defendant's instructions in these activities, it would make no difference to my conclusion that the defendant is not vicariously liable for Bain's abusive conduct.
>
> I find that notwithstanding that the relationship between boarding house master and boarding student would likely be a closer one than that of a day student and teacher of like age, **the ordinary relationship was not one of intimacy and the sexual abuse was so far from being connected to Bain's proper role that it could neither be seen as being an unauthorised mode of performing an authorised act, nor in pursuit of the employer's business, nor in any sense within the course of Bain's employment**. I find that the defendant did not, by means of any proven requirement of Bain, create or enhance the risk of Bain sexually abusing the plaintiff.

17. Further, although enlivened by the discovery of a material fact within the twelve months immediately prior to the institution of the action[4], the discretion to extend time was not exercised because:

17.1 the proceedings were instituted significantly out of time (TJ [105]-[106]) and the length of the delay was extraordinary (TJ [216]);

17.2 there was no suggestion that the school's conduct after 1962 had contributed to the respondent's delay in instituting proceedings (TJ [216]) and the delay of 12 years following the diagnosis of PTSD told further against a favourable exercise of the discretion (TJ [221]);

17.3 in the decade prior to the institution of his proceedings, the respondent had made a conscious and well informed choice not to engage the school in litigation. The respondent's decision to bring proceedings against the school was the product of his parlous financial position and the exhaustion of all other options to stabilise his financial circumstances (TJ [217]-[220]);

17.4 Dr Kelly's report and opinion of December 2007, whilst "material" in the requisite sense, was of limited significance and was little more than a recapitulation of facts already known to the respondent (TJ [222]);

17.5 the school had suffered "actual prejudice" and a "marked disadvantage" on account of the delay. Critical witnesses were dead or unavailable; documents had been lost or destroyed, including those of the psychologist responsible for the respondent's diagnosis in 1996; and the passage of time had denied the school the capacity to present a positive case in answer to a number of limbs of the respondent's action (TJ [223]-[229], [234]);

17.6 the degree of prejudice was not diminished by the allegation of vicarious liability as the unavailability of evidence concerning the role played by Bain in the Boarding House meant the school was "left in a position of warding off inferences and being unable to call evidence on that issue" (TJ [228]).

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[4] Section 48(3)(b)(i) of the *Limitations Act*; see footnote 2.

Full Court

18. Each member of the Full Court allowed the appeal on the question of vicarious liability. It is convenient to focus upon the reasons of Peek J. Kourakis CJ said he agreed with the statements of principle on the question of vicarious liability in the reasons of Peek J (FC [1])[5].

19. Peek J referred to the different judgments in *Lepore*, noting that whereas Gleeson CJ had described the "course of employment" inquiry as involving a consideration of the sufficiency of the connection between the employment and the misconduct, Gummow and Hayne JJ considered that vicarious liability would only arise when the wrongful conduct was done in the intended pursuit of the employer's interests or in the ostensible pursuit of the employer's business, or the apparent execution of the authority which the employer held out the employee as having. Peek J also referred to the approach of Gaudron J (focusing on estoppel), Kirby J (whether it was just and reasonable to impose vicarious liability having regard to the closeness of the connection), McHugh J (who resolved the appeals by reference to non-delegable duty) and Callinan J (who held that intentional criminal wrongdoing is not properly to be regarded as connected with an employee's employment) (FC [173]-[181]).

20. Having noted the different approaches, and that, as Rush J had recently observed in *Erlich v Leifer* [2015] VSC 499, the stricter test propounded by Gummow and Hayne JJ was unlikely to result in vicarious liability in the case of sexual abuse in an educational institution (FC [183], [202]), Peek J decided to apply what he considered to be the approach of Gleeson CJ (FC [184]). He said that the judgment of Gleeson CJ (which he said was supported by relevant aspects of the judgments of Gaudron and Kirby JJ) should be preferred to the stricter test propounded by Gummow and Hayne JJ (FC [203]). Gleeson CJ's approach, which he earlier characterised as "a call to Australian courts not to shirk or evade the difficult task of analysing and developing the issues concerning vicarious liability in such factual situations" (FC [187]) was, he said, "the right one" (FC [212]). His Honour seemed to endorse analogies between children and "a fur coat" and "a sack of potatoes", before describing developments in England as "encouraging" (FC [210], [214]).

21. Peek J held that the trial judge erred in several respects.

    21.1 First, he held that the judge's inclination that Bain's presence in the dormitories after "lights out" was unauthorised was incorrect because one could not limit Bain's authority by reference to the conduct of the prefects who were (a) not much older than the boarders themselves and (b) were subject to the supervision of the masters (including Bain), such that the power to walk through the dormitories after lights out "could not have been the sole prerogative of the temporary prefects" (FC [228]). Nor, held Peek J, was there any basis to limit Bain's authority by reference to the conduct of other housemasters; Peek J said that the masters had a duty to supervise the activities of the prefects, and how individual masters might carry out those duties might vary greatly (FC [230], [231]).

    21.2 Secondly, he held that the judge had misdirected herself at TJ [175] by positing as an essential component of vicarious liability that Bain had a duty to engage in intimate physical behaviour with a student, and it was said that in any event intimacy involves a spectrum, and that Bain's relationship with the students including the respondent was relevantly "intimate" (FC [239]-[241]).

    21.3 Thirdly, he found that the judge erred by failing to consider, except in so far as she rejected, the proposition that the school created or enhanced the risk of sexual abuse by

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5 Gray J's reasons on this issue may be put to one side, because they are largely predicated on a conclusion, not agreed in by the other members of the Court, that the school had not appropriately supervised Bain, and that the school "created and enhanced the risk that Bain could abuse students" (FC [128]).

running the enterprise of a boarding school in which masters were not supervised and where a degree of trust necessarily operated (FC [250]-[252]).

21.4 Fourthly, he found that the trial judge erred by failing to have regard to the element of disciplinary power exercised by Bain as a master (FC [254]-[259]).

22. Peek J relied on a number of factors (FC [261]) to find vicarious liability was established.

23. Despite agreeing with the statements of principle of Peek J (FC [1]), Kourakis CJ allowed the appeal only as to the abuse committed when Bain sat on the respondent's bed at night (FC [2]). In short, he found that the evidence showed that Bain's duties as a housemaster included responsibility for residential care of the boarders, and he concluded:

23.1 that necessarily allowed Bain a discretion as to how to settle the boarders at night;

23.2 the sexual touching of the respondent whilst Bain sat on his bed took place in the ostensible discharge of his responsibility for the care of the boarders at night;

23.3 conduct is within the scope of an employee's duty if it falls within a range of alternative forms of performance allowed an employee in his or her discretion and it was 'necessarily implicit' in Bain's responsibility as housemaster that he was authorised to enter and remain in the dormitory after lights out for the purpose of settling the boarders as he saw fit;

23.4 the trial judge erred by limiting the enquiry to whether Bain had specifically been directed to settle the boarders after lights out, whereas the legally relevant question was whether, in the absence of an express direction to the contrary, settling the boarders down for the night was within the scope of Bain's employment duties and whether Bain sexually abused the respondent in the ostensible performance of those duties (FC [2]-[5]).

24. Kourakis CJ in effect reasoned from the proposition that Bain's role involved responsibility for and overall supervision of the boarding house, and that it must therefore have been permissible, and there was no evidence that it was expressly prohibited, to tell them stories or talk to the children whilst sitting on their beds (FC [13]-[15]). He concluded that (FC [16]-[18]):

> The natural and probable inference arising from the entrustment of the care of boarders to PAC, and PAC's employment of housemasters, is that the housemasters were given ultimate responsibility for the care of the boarders at night even though they made use of prefects to reduce their workload. To my mind the extensive use of the prefects does not detract from, or limit, the responsibility with which PAC charged its housemasters. The natural and strongly probable inference is that housemasters remained ultimately responsible for the care of the boarders at night. Very obviously if a fight broke out between the junior boarders and the prefects, or if there was an incident beyond the prefects' capacity to manage, it would be the duty of the housemaster to enter the dormitory and take charge. It is very likely then that it was also within the scope of a housemaster's duty to forestall any such situation by directly and personally attending to the bedtime routine of the boarders.
>
> Indeed in modern times, and I think even in 1962, a housemaster who left the supervision of the bedtime routine exclusively to the prefects could properly be said to have neglected his duty. I observe here that the evidence that no housemaster other than Bain was present in the dormitory at night does not show that his presence was an unauthorised "frolic". The more probable and strong inference is that he was the housemaster who had been charged with supervision of the junior dormitory.
>
> The passages I have underlined in the Judge's reasons limit the enquiry to what Bain was "required to do" and to his "designated role". The first question was that identified in the last paragraph of the cited passages: did Bain have overall responsibility for supervising the boarders. As the Judge correctly observed, he did. The next question was whether that responsibility included the intimate physical contact in which Bain engaged. Plainly the answer to that question in this case was no: his conduct was criminal. That negative answer does not, however, complete the enquiry. Finally it is necessary to ask whether the offending was engaged in during the ostensible performance of that responsibility. This

question must be answered in the affirmative. Sitting on A's bed to relate bedtime stories was in performance of Bain's employment responsibility and it was that conduct which cloaked his offending.

25. Peek J simply stated that he would grant the extension of time (FC [264]). Gray J approached the extension of time on a different basis[6].

26. Kourakis CJ considered that the trial judge had erred in the adverse exercise of her discretion on this point because her consideration of prejudice to the school had been premised on the basis that vicarious liability was only made out if Bain had been expressly directed to settle the boarders (FC [21]). He went on to re-exercise the discretion, and in doing so, reasoned:

26.1 on the "more general question" of whether performance of his duties extended to going into the dormitory and settling children "there could be no real dispute" and there was no material possibility that the passage of time had affected the school's capacity to lead evidence on the issue (FC [22])[7];

26.2 in so far as the lapse of time made it more difficult to assess the extent and depth of the respondent's PTSD, that difficulty "could sufficiently be addressed by taking a conservative approach to the assessment of damages rather than by denying [the respondent] any redress at all" (FC [23]);

26.3 the fact that the respondent had accepted compensation from the school in 1997, and had not instituted proceedings, was not to be given "much weight" because a reluctance to bring proceedings is symptomatic of the very injury caused[8], and because the school was in a position to protect itself from a change of mind by seeking to gather and preserve evidence in admissible form (FC [24]);

26.4 although money was ultimately what motivated the respondent this did not weigh heavily against an extension because his poor financial position was in part a product of the alleged wrongdoing (FC [25]).

PART VI: SUCCINCT STATEMENT OF APPELLANT'S ARGUMENT

27. The appellant submits that, in the context of vicarious liability for intentional criminal wrongdoing, the "course of employment" is confined to conduct of the two categories described by Dixon J in *Deatons* and by Gummow and Hayne JJ in *Lepore*.

28. Applying that approach, or applying a sufficiency or closeness of connection approach, Bain's employment provided him with the *opportunity* to commit intentional wrongdoing, but he was relevantly engaged in an independent and unauthorised act which was not in the intended pursuit of the school's business, in the apparent execution of authority which the school held out that he had, or otherwise sufficiently connected with any tasks shown on the evidence to be actually allocated to him.

29. The Full Court erred by finding that the trial judge had erred in exercising the extension discretion adversely to the respondent. Indeed, the trial judge's decision was plainly correct.

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6 That the school's conduct or representations in 1962 were a cause of the respondent's failure to institute the proceedings (FC [147]): s 48(3)(b)(ii) of the *Limitations Act*.

7 Respectfully, this overlooked his own finding that the school led no evidence that housemasters were prohibited from sitting on the beds of boarders (FC [5], [14]-[15]).

8 This notwithstanding that the respondent did in fact pursue civil proceedings against Bain at that time.

Vicarious liability

Introduction

30. The basic principle is that an employer is vicariously liable for a tort committed by an employee in the course or scope of his or her employment[9], reflecting Salmond's classic statement that "[a] master is not responsible for a wrongful act done by his servant unless it is done in the course of his employment"[10].

31. 'Course of employment', or 'scope of employment', has been described as a limiting or controlling concept (*Lepore* at [40]). But, as Pollock observed, 'course of employment' should not be seen as some limitation upon what would otherwise be a more general liability of an employer; rather it is a necessary element of the definition of the extent of the liability. It belongs to "the nature of the case"[11].

32. The phrases 'course of employment' and 'scope of employment' are used "to indicate the just limits of a master's responsibility for the wrongdoing of his servant", and "the law recognises that it is equally unjust to make the master responsible for every act which the servant chooses to do"[12].

33. In examining the extent to which the law regards it as just to hold the employer liable, policy considerations inevitably intrude. Vicarious liability derived originally from mediaeval notions of headship of a household, including wives and servants, and their status in the law was absorbed into that of master[13], and the modern doctrine was adopted not by way of an exercise in analytical jurisprudence but as a matter of policy[14]. However, a fully satisfactory rationale for the imposition of vicarious liability in the law of employment relationships has been slow to appear in the case law, with a number of reasons said to be persuasive to some degree, but none independently satisfactory for all cases, particularly having regard to the diversity of conduct that may require to be dealt with by the concept[15].

34. In the particular context of intentional wrongdoing, the essential difficulty is to determine whether an act which may be unlawful and even expressly contrary to the employee's obligations may nevertheless be in the course of, or within the scope of, employment.

35. Accepting that there may be cases where unlawful acts in breach of the employment contract are nevertheless considered to have taken place within the course of employment, the task is to identify *why* that is so, and to articulate the content of the 'course of employment' test in terms which assist in the resolution of cases. For reasons to be advanced, liability should not be extended beyond the two categories identified by Dixon J in *Deatons,* and by Gummow and Hayne JJ in *Lepore*, because it is in those cases that considerations of policy would justify the

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9 See, eg, *Deatons* at 378 (Latham CJ), 379 (Dixon J), 382 (McTiernan J), *Lepore* at [40] (Gleeson CJ), [226] (Gummow and Hayne JJ), [307] (Kirby J).

10 Salmond, *The Law of Torts* (1907), p 83. Salmond went on to say that this included unauthorised acts if so connected with the authorised acts that they may be regarded as modes – although improper modes – of doing them.

11 Pollock, *Essays in Jurisprudence and Ethics* (1882), p 126, referred to with approval in *Lepore* at [202] (Gummow and Hayne JJ).

12 *Bugge v Brown* (1919) 26 CLR 110 at 117-118 (Isaacs J), referred to with approval by the plurality (Gleeson CJ, Gaudron, Kirby and Hayne JJ) in *Hollis v Vabu Pty Ltd* (2001) 201 CLR 27 (***Hollis***) at [38].

13 *Scott v Davis* (2000) 204 CLR 333 (***Scott***) at [230] (Gummow J), *Hollis* at [33] (plurality).

14 *Darling Island Stevedoring and Lighterage Co Ltd v Long* (1957) 97 CLR 36 at 56-57 (Fullagar J), referred to by the plurality in *Hollis* at [34] (plurality). See also *Sweeney v Boylan Nominees Pty Ltd* (2006) 226 CLR 161 (***Sweeney***) at [11] (plurality). See also *Imperial Chemical Industries Ltd v Shatwell* [1965] AC 656 at 685 (Lord Pearce), cited in *Lister v Hesley Hall Ltd* [2002] 1 AC 215 (***Lister***) at 232 (Lord Clyde).

15 *Hollis* at [35] (plurality), *Sweeney* at [11] (plurality).

imposition of liability upon an employer notwithstanding that the employer may not have been itself negligent. Liability cannot be shown to be just on any broader basis.

36. To inquire whether there is a sufficiently close connection between the conduct and the employment, or to inquire whether the connection is such as to render it "fair and just" to impose liability, is simply to restate the inquiry without providing elucidation of its content. Further, a test which requires a comparison of the closeness of the conduct and the employment duties is prone to depend upon the degree of specificity at which each is stated.

Context and coherence

37. In the appellant's respectful submission, in order to consider the appropriate scope of vicarious liability for intentional wrongdoing by employees, a number of contextual matters must be noted.

    37.1 Even in the sphere of fault based liability, the law does not generally recognise 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 criminal, a proposition relating to the common law's reluctance to impose liability for omissions[16].

    37.2 The relationship of school and pupil is an exceptional category in which one party has a duty to take reasonable care to protect the other from criminal behaviour[17]. However, a discharge of that duty will only require reasonable conduct according to the calculus of negligence, and having regard to the state of knowledge and awareness that the employer school ought reasonably to have had at the time (*Lepore* at [224]).

    37.3 In relation to the tortious conduct of an employee of a school, vicarious liability will become critical where, as was the case on the concurrent findings of the trial judge and the majority in the Full Court, the school was not negligent in failing to avoid the harm. The operation of vicarious liability in such a case is akin to a form of strict liability[18]. The policy of the law may generally be said to be restrictive toward the categories of strict liability[19].

    37.4 Particular circumstances may give rise to duties which are non-delegable but that does not transform the nature of a duty to take reasonable care into a duty to ensure a particular result (see, eg, *Lepore* at [20], [22], [105], [340]), and a clear majority of the Court in *Lepore* recognised that it was inappropriate to resolve questions of intentional wrongdoing through the prism of a non-delegable duty owed by a school.

38. Against these limits upon primary and non-delegable liability, it is respectfully submitted that cogent reasons of policy or principle must be identified if an employer who has not been negligent is to be held liable for an act which also involves a serious contravention of the employee's duties to the employer. That is, there is no onus to demonstrate a basis for some

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16 *Modbury Triangle Shopping Centre Pty Ltd v Anzil* (2000) 205 CLR 254 (***Modbury Triangle***) at [26]-[28] (Gleeson CJ), referring, inter alia, to *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 at 477-479 (Brennan J). See the observations of Callinan J in *Lepore* at [342] and *Modbury Triangle* at [136].

17 *Modbury Triangle* at [26] (Gleeson CJ), referring to *Trustees of the Roman Catholic Church for the Diocese of Bathurst v Koffman* [1996] Aust Tort Reports ¶81-399.

18 *Lister* at 243 (Lord Millett).

19 See, eg, *Stevens v Broadribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16 at 29-30 (Mason J), 42-43 (Wilson and Dawson JJ), *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520, *Scott* at [250] (Gummow J).

limitation upon vicarious liability. On this analysis there are two victims and the essential questions are whether one should compensate the other, and if so, why[20].

Possible rationales for recognising liability for unauthorised and criminal acts

Prevention and deterrence

39. Deterrence cannot be regarded as a reason for the imposition of liability in this context. As Gleeson CJ observed in *Lepore* (in respect of non-delegable duty) at [36]:

> First, the problem only arises where there has been no fault, and therefore no failure to exercise reasonable care to prevent foreseeable criminal behaviour on the part of the employee. Secondly, it is primarily the function of the criminal law, and the criminal justice system, to deal with matters of crime and punishment. (Most Australian jurisdictions also have statutory schemes for compensating victims of crime.) Thirdly, by hypothesis, the sanctions provided by the criminal law have failed to deter the employee who has committed the crime.

40. And as Gummow and Hayne JJ observed, with reference to Pollock's writings, because vicarious liability is imposed regardless of the fault of the party who is held vicariously responsible, it is imposed regardless of the capacity of that party to avoid the harm that occurs. In many cases, then, the deterrent effect of holding the party responsible is at best indirect, remote and speculative (at [199], see also [218]-[219]).

'Deep pockets' and loss distribution

41. This Court has noted the "cynical conclusion of the late Dr Baty ... that the real reason [for finding vicarious liability] is that the damages are taken from a deep pocket"[21]. Reference has also been made in the context of the development of vicarious liability to what Fleming described as "the pressure of finding a means to reach financially responsible defendants"[22]. While those influences may be hard to deny as historical fact, that is not to say they provide a unifying or sufficient justification[23].

42. Care is required in translating to modern society any assumptions regarding deep pockets that may have been made in the infancy of the doctrine. As Gleeson CJ said (in the context of non-delegable duties) in *Lepore* at [36]:

> It would be wrong to assume that the persons or entities potentially subject to this form of tortious liability have "deep pockets", or could obtain, at reasonable rates, insurance cover to indemnify them in respect of the consequences of criminal acts of their employees or independent contractors. Whether the organisation providing care is public or private, commercial or charitable, large or small, religious or secular, well-funded or mendicant, its potential no-fault tortious liability will be extensive.

43. Any consideration of "financial pressures" would also now need to take account of the widespread statutory schemes for compensating victims of crime[24].

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20 In *Lepore* at [128], Gaudron J accepted that the ordinary application of existing principles such as agency or ostensible authority might provide a justification.

21 Dr T Baty, *Vicarious Liability* (1916), p 152, referred to in *Soblusky v Egan* (1960) 103 CLR 215 at 229 (Dixon CJ, Kitto and Windeyer JJ), *Scott* at [300] (Hayne J), *Lepore* at [197] (Gummow and Hayne JJ).

22 Dr J G Fleming, *The Law of Torts* (1957), p 476, referred to in *Soblusky v Egan* (1960) 103 CLR 215 at 229 (Dixon CJ, Kitto and Windeyer JJ), and in *Scott* at [283].

23 *Scott* at [300] (Hayne J), citing Pollock & Maitland, *History of English Law* (1898, 2nd ed), vol 2, p 533.

24 *Scott* at [309] (Hayne J), *Lepore* at [36] (Gleeson CJ). The relevant legislative regimes comprise: *Victims of Crime Act* 2001 (SA), *Victims of Crime Act* 1994 (WA), *Victims of Crime Assistance Act* (NT), *Victims of Crime (Financial Assistance) Act* 1983 (ACT) to be repealed by *Victims of Crime (Financial Assistance) Act 2016* which will commence on 1 July 2016 or another day as fixed by the Minister, *Victims of Crime Assistance Act* 2009 (Qld), *Victims of Crime Assistance Act* 1996 (Vic), *Victims Rights and Support Act* 2013 (NSW), *Victims of Crime Compensation Act* 1994 (Tas).

Creation or enhancement of risk

44. It has been recognised that in modern times the doctrine of vicarious liability derives support from the notion that a party who engages others to advance that party's economic interests should be placed under a liability for losses incurred by third parties in the course of the enterprise, and that an employer is a suitable means for passing on those losses either through insurance or higher prices[25].

45. This proposition is not a resort to "deep pockets". Nor is it to be equated with the proposition that a causal link between the creation of employment and the causing of harm is a sufficient justification for the imposition of liability.

46. The latter is simply too broad a principle and is inconsistent with the authorities. Not everything that an employee does at work is sufficiently connected with the duties and responsibilities of the employee to be regarded as within the scope of employment (*Lepore* at [40]), even though, but for the employment, the conduct may not have occurred in the way that it did (or at all). It is widely accepted that the employment must represent more than the *occasion* for the performance by the teacher of his or her individual criminal and civil wrongs[26]. It is therefore not permissible to reason that because the running of a boarding school creates the risk of sexual abuse, vicarious liability must follow.

47. One reason why a broad causal link, or an enterprise analysis approach, is not appropriate, is that the court will usually be ill-equipped to examine the factual premise that is assumed by a statement, for example, that the running of a boarding school creates or enhances a risk[27] of sexual abuse[28]. To examine that premise it would be relevant to ask whether, but for the establishment of such institutions, the level of risk of abuse would have been relevantly reduced[29]. To attribute liability where employment materially increases the risk inappropriately introduces considerations relevant to primary liability[30].

48. An enterprise risk approach may also act as a disincentive[31] to the provision of services which, while involving the opportunity for abuse, provide an important social function and, as in this case, often on a not-for-profit basis[32].

The criteria recognised in Deatons and the approach of Gummow and Hayne JJ in Lepore

49. It is accepted that the fact that an employer seeks to advance its economic (or other) interests through the engaging of employees is a reason for the imposition of vicarious liability.

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25 *Scott* at [253] (Gummow J), citing *Bugge v Brown* (1919) 26 CLR 110 at 117.

26 See, eg, *Deatons* at 381-382 (Dixon J), *Lister* at 235 (Lord Clyde), 241 (Lord Hobhouse), 250 (Lord Millett), *Lepore* at [84]-[85] (Gleeson CJ), [326] (Kirby J).

27 See, eg, the approach of McLachlin J in *Bazley* at 563, suggesting a focus on whether the employer's enterprise and the empowerment of the employee materially increased the risk. See also *Various Claimants v Catholic Child Welfare Society* [2013] 2 AC 1; [2012] UKSC 56 (***Various Claimants***).

28 Further, minds will differ as to whether it is sensible to speak of creating a risk which will only materialise if there is a violation of the employment arrangement by criminal conduct, cf. *Withyman v State of New South Wales* [2013] NSWCA 10 at [143] (Allsop P, Meagher and Ward JJA agreeing).

29 *Lepore* at [215] (Gummow and Hayne JJ). To recognise that abuse has occurred on a too-frequent basis within institutions does not necessarily entail that the creation and operation of institutions has enhanced the overall societal risk of offending, nor does it bring to bear the extent to which such institutions may avoid those societal risks. Cf. the submission of the Solicitor-General for Queensland in *Lepore* at 518.

30 See the observations of Gaudron J in *Lepore* at [126]-[127].

31 In *Lepore* at [66], Gleeson CJ remarked on the regrettable fact that the more intensive the care provided by an educational or recreational organisation, the more extensive will be its risk of no-fault liability for the conduct of its employees.

32 The appellant is incorporated pursuant to the *Prince Alfred College Incorporation Act* 1878 (SA) and is associated with the Uniting Church.

However, it is respectfully submitted that the proper limits of this informing consideration were stated by Gummow and Hayne JJ in *Lepore*, when they said (at [221]-[222]), in reference to the decision in *Bazley v Curry* [1999] 2 SCR 534 (***Bazley***):

> Conducting an enterprise carries with it a variety of risks. The paradigm kind of risk of which Pollock spoke was the risk that an employee, setting out on the employer's business, carried out a task carelessly and injured a third party. The risk, for the occurrence of which the employer was to be held liable, was, therefore, the risk of injury caused by an employee in pursuing the *employer's* venture.
>
> The analysis made in *Bazley* is founded in the general proposition that those who conduct a business or other venture, and employ staff for that purpose, receive the benefits of the enterprise and should therefore also bear its burdens. Where the analysis made in *Bazley* departs from the proposition identified by Pollock is that **the risks to be considered are not confined to those risks which attend the *furtherance* of the venture but include the risks of conduct that is directly antithetical to those aims**. (Emphasis added.)

50. The narrower approach accommodates vicarious liability for wrongdoing, even intentional wrongdoing, which may be contrary to an employer's instructions, but only in cases where the relevant risk is in furtherance of the employer's venture. Thus, as Gummow and Hayne JJ observed (at [225]), no one doubts that the employer who instructs an employee driver to drive within the road rules will be vicariously responsible if, contrary to that instruction, the employee speeds and causes injury to a third party. In the context of a school, cases of (even criminally) excessive punishment may fall within this category[33]. It also reflects the decision in *Deatons*, where Dixon J held the barmaid who threw a glass at a patron was not (at 381):

> a negligent or improper act, due to error or ill judgment, but done in the supposed furtherance of the master's interests. Nor [was] it one of those wrongful acts done for the servant's own benefit for which the master is liable when they are acts to which the ostensible performance of his master's work gives occasion or which are committed under cover of the authority the servant is held out as possessing or of the position in which he is placed as a representative of his master [referring, *inter alia*, to *Lloyd Grace, Smith & Co* [1912] AC 716 (***Lloyd***)].

51. The analysis of Gummow and Hayne JJ demonstrates that the two classes referred to by Dixon J (wrongful act done in *intended pursuit* of the employer's interests or in *intended performance* of the contract of employment, and wrongful act done in *ostensible pursuit* of the employer's business or in *apparent execution of authority* which the employer holds out the employee as having) are united by an identification of what the employee is actually employed to do or is held out by the employer as being employed to do. This, they said, was central to any inquiry about the course of employment (at [231]-[232]).

52. Their Honours analysed the decision in *Lloyd* as turning on the fact that the fraudulent clerk was authorised by his employer to act for the firm in a class of matters including conveyancing transactions which Emily Lloyd instructed him to effect (at [232]). The authority given to or bestowed upon the employee in such a case permits the wrongdoing. It is not sufficient that the wrongdoing is carried out in a way which the wrongdoer might portray as being sanctioned by his employer, unless the employer has cloaked the employee with authority to carry out the conduct of the class involved.

53. Properly understood, the second category requires a much closer analysis of the scope of authority than one which results in liability if an employee has a broad discretion as to how to carry out his tasks, and chooses to carry them out in a way which *then* provides the occasion to commit an act which, standing alone, no-one would assume was authorised.

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33 *Lepore* at [234] (Gummow and Hayne JJ).

54. As Gummow and Hayne JJ said of the facts in *Rich* and *Samin* (*Lepore* at [240]-[241]):

> To hold a school authority, be it government or private, vicariously liable for sexual assault on a pupil by a teacher would ordinarily give the victim of that assault a far better prospect of obtaining payment of the damages awarded for the assault than the victim would have against the teacher. But the party to pay those damages, the school authority, would itself have committed no wrong. And **in no sense could it be said that the commission of the assault was an act done in furtherance of the aims of the school authority or as a result of its pursuing those aims by establishing the school concerned and employing its staff.**
>
> The deliberate sexual assault on a pupil is not some unintended by-product of performance of the teacher's task, no matter whether that task requires some intimate contact with the child or not. It is a predatory abuse of the teacher's authority in deliberate breach of a core element of the contract of employment. Unlike the dishonest clerk in *Lloyd*, or the dishonest employee in *Morris*, the teacher has no actual or apparent authority to do any of the things that constitute the wrong. In *Lloyd*, the clerk had, and was held out as having, authority to act in conveying the property which Emily Lloyd had and which he took to his own use; in *Morris*, the employee had authority to receive the garment that he stole. **When a teacher sexually assaults a pupil, the teacher has not the slightest semblance of proper authority to touch the pupil in that way.** (Emphasis added)

55. It is respectfully submitted that the divergent approaches in *Lepore*[34] require these principles to be clarified or reconsidered. For the reasons given by Gummow and Hayne JJ, it is respectfully submitted that there is an insufficient basis in policy or principle to treat acts of intentional wrongdoing which are outside the two categories described by Dixon J in *Deatons* as occurring in the "course of employment".

56. A more open-textured test of sufficiency of connection does not assist in resolving difficult cases[35], and much may turn upon the precision with which the two matters being compared are described. For example, in the present case, it might be said that Bain's employment involved a degree of supervision over the boarders at night, and that settling children might be a form of pre-emptive supervision, and that the abuse could be described as inappropriate settling in so far as it coupled abuse with story telling and presence on a child's bed. This tends to overlook the insidious nature of sexual abuse, whereby an abuser will conjure an apparently legitimate reason to undertake a task which then provides the opportunity to offend. But in creating that opportunity the offender is not actually acting in the intended pursuit of his employer's interests. The whole exercise is a contrivance.

Error by the Full Court

57. It is submitted that, whether adopting the narrower approach of Gummow and Hayne JJ, or the approach of Gleeson CJ, the Full Court erred in setting aside the trial judge's decision, because it is not sufficient for the respondent to establish, at a very high level of generality, that an employee had authority or responsibility for the supervision of children, and that, as a matter of

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34 In *Sprod v Public Relations Oriented Security Pty Ltd* [2007] NSWCA 319, Ipp JA said it was not easy to trace a certain and secure path through the dicta, and that the safest course was to attempt to apply all of them to the facts of the particular case (at [54]). On the unsuccessful application for special leave ([2008] HCA Trans 237 at 387, Kirby J (sitting with Heydon and Kiefel JJ) acknowledged uncertainty in the governing law following *Lepore*. See also *Blake v JR Perry Nominees Pty Ltd* (2012) 38 VR 123 at [59]-[61] (Harper JA, Robson AJA agreeing) and *Various Claimants* (supra) at [82]. *Lepore* has been the subject of academic discussion: eg, White and Orr, "Precarious liability: The High Court in *Lepore, Samin* and *Rich* on school responsibility for assaults by teachers" (2003) 11 *Torts Law Journal* 1, Vines, "*NSW v Lepore* – Schools' Responsibility for Teachers' Sexual Assault: Non-Delegable Duty and Vicarious Liability" (2003) 27 *Melbourne University Law Review* 612. In Balkin & Davis, *Law of Torts* (2013, 5th ed) at [26.56], it is said that it is difficult to draw any clear principle from the judgments in *Lepore*. In Vines, *Fleming's The Law of Torts* (2011, 10th ed) it is said (at [19.130]) that no clear consensus emerged.

35 *Lepore* at [212]-[213] (Gummow and Hayne JJ), [345] (Callinan J), *Dubai Aluminium Co Ltd v Salaam* [2003] 2 AC 366 at 377-378 (Lord Nicholls), *Various Claimants* at [74] (Lord Phillips, with whom Lady Hale, Lord Kerr, Lord Wilson, Lord Carnwath agreed).

fact, the abuse was committed surreptitiously as part of the telling of stories which, had they been told for legitimate purposes, might have fallen within the scope of that supervisory role.

58. Although Gleeson CJ referred to the closeness of the connection between the abuse and the duties of the employee (at [67] and [74]), the ultimate test remained whether the tortious conduct occurred in the course of the employee's employment and, in order to make out a sufficiently close connection, it is critical to have regard to the **particular** functions carried out by the employee. Indeed, Gleeson CJ warned that it was not enough to say that teaching involves care. He went on to say that (at [74], emphasis added):

> 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 a 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 the teachers**, and the number of adults concurrently responsible for the care of students. Furthermore, the nature and circumstances of the sexual misconduct will usually be a material consideration.

59. That passage and others in his judgment (eg, [52]) illustrate the need to focus on the tasks *allocated* to the teacher. It is the allocation by the employer that renders it just to regard the abuse as occurring in the course of employment. A finding that Bain *did* engage in the telling of bedtime stories does not establish that this was a task allocated to him. The evidence justified no such finding. No other master engaged in the practice. Indeed, apart from (1) the possibility that it was implied in the general supervisory authority of a master that he *could* take steps to settle down the boarders after 'lights out', if necessary, and (2) the fact that Bain *did* tell the boys stories, there is simply no evidence on the matter.

60. The Full Court failed to maintain the important distinction between the conduct of Bain as revealed by the evidence of what boys observed him doing, and proof of the tasks actually allocated to Bain as part of his employment contract.

61. To reason that molestation occurred under cover of the telling of stories, and then to treat telling stories as falling into a class of tasks as broad as 'settling' the boarders, is to pose the inquiry at too high a level of generality. By hypothesis, in cases of this kind, the teacher *has* engaged in inappropriate sexually intimate behaviour. Typically, the offender will have created an opportunity for that abuse including by constructing or encouraging an environment of physical intimacy, such as sitting on the victim's bed. Usually, it will be possible to posit legitimate circumstances for creating the opportunity, and to find some source of authority within a teacher or boarding master's general powers or duties for so doing. But to approach the matter in this way, by effectively inquiring whether there might have been legitimate reasons for Bain to be sitting on the respondent's bed does not, on the approach of Gleeson CJ, establish a sufficient connection.

62. There was no evidence at all that it was part of any tasks allocated to Bain to tell stories to the boarders, or that it was necessary for him to do so[36]. No other house master did so. There was no evidence that he was actually settling boarders down for the night on any of the occasions he entered the dormitory after lights out. In accord with long established practice half a century ago, the prefects had primary responsibility for supervision and disciplinary matters, including after lights out.

63. Adopting the approach of Gummow and Hayne JJ, it could not be said that the molestation occurred in intended pursuit of the school's interests nor in the intended performance by Bain of his contract of employment. Nor can it be said in the present case that the wrongful act is

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[36] There was evidence that Dr Webber read stories to preparatory school students (FC [10]) but this was physically separate from the dormitories in which year 8 and older students resided.

done in ostensible pursuit of the employer's business or in the apparent execution of authority which the employer holds out the employee as having.

64. Kourakis CJ concluded that the abuse was engaged in during the ostensible performance of Bain's responsibility (FC [18]), but that is different from concluding that the abuse was in the ostensible pursuit of his employer's business. The abuse may have been conducted *while* another task, the telling of stories, was being performed, but that is a different inquiry. That will almost always be the case in a temporal sense, and if that were the correct analysis, the outcome in *Deatons* may have been different.

65. Finally, if it were thought appropriate to apply the further inquiry posited by Salmond[37], the abuse committed by Bain could not be regarded as an improper mode of carrying out an authorised task. It would be wholly artificial to regard interfering with the respondent while telling a story as an unauthorised form of settling the boarders. There is no evidence that on these occasions he was 'settling' anyone. The more natural conclusion on the facts was that the telling of a story was a situation contrived by Bain to facilitate abuse.

Extension of time

66. On the respondent's application for an extension of time, two questions arose: (1) Did the respondent satisfy either of the criteria in s 48(3)(b)(i) or (ii) of the *Limitations Act*? (2) If so, did the respondent establish that an extension of time was "just in all the circumstances"?

67. Having observed and considered the significant volume of evidence led at trial relevant to this issue, the trial judge made a discretionary decision not to grant the extension of time. She did not err in her examination of the evidence or the applicable principles. The Full Court was wrong to interfere with the trial judge's decision for three reasons.

67.1 The trial judge's decision was soundly reasoned and based on the evidence. In finding that the exercise of the discretion miscarried, the Full Court misapprehended the trial judge's approach to the absence of evidence about the scope or allocation of Bain's duties.

67.2 The Full Court gave insufficient consideration to important features of the extension machinery in s 48 and, in particular, the controlling function served by the limitation regime.

67.3 The Full Court's treatment of the prejudice to the school as a result of the extraordinary delay between the accrual of the respondent's cause of action and the institution of his proceedings was flawed. Indeed, in the school's submission, the reasons of Kourakis CJ suggest a comparison of the position the school would have been in had the proceedings been commenced within time against the position at trial, contrary to *Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 541 (***Taylor***).

Misapprehension of the trial judge's approach

68. The premise upon which Kourakis CJ found it necessary to reconsider the exercise of the discretion to grant an extension of time was that the trial judge's misconstruction of the principle of vicarious liability led her to approach the assessment of prejudice to the appellant on an erroneous basis (FC [21]). It follows that, if the trial judge did not err about the need for a close examination of Bain's duties and the tasks allocated to him, the basis on which Kourakis CJ considered the discretion had to be re-exercised falls away.

69. Alternatively, contrary to Kourakis CJ's reasons (FC [21]), if the applicable test is in fact broader than that applied by the trial judge, the prejudice suffered by the school was arguably

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37 See footnote 10 above.

elevated. Kourakis CJ's analysis proceeded on the assumption that a broader principle underpinning vicarious liability diminished the prejudice confronting the school. That assumption was not supported by deductive logic. If nothing more had to be shown by the respondent to make out a case of vicarious liability than that Bain was employed by the school and had overall responsibility for the Boarding House, including settling boarders at lights out (FC [4]-[5]), the significance of the unavailability or loss of evidence that could otherwise have been deployed by the school to demonstrate the truly restricted nature of his authorised duties was more profound.

70. Moreover, the approach of Kourakis CJ to the trial judge's reasons concerning the refusal to grant an extension of time misapprehends the importance of the matters relied upon by the trial judge (TJ [228]). The criticised passages of the trial judge's reasons (TJ [223]-[228]) demonstrate that, even if the trial judge had applied a narrower test on vicarious liability, there was no error in her analysis of the prejudice occasioned to the school (TJ [228]). In the passage primarily relied upon by Kourakis CJ (FC [21]), the trial judge was doing no more than identifying evidentiary issues that arose by virtue of the effluxion of time.

The failure to account for the important controlling functions of the limitation regime

71. Respectfully, the reasons of Kourakis CJ pay no regard to the well established policy justifications for imposing limitation periods. Limitation periods serve an important, controlling function in civil litigation. They represent a value judgment by the legislature that the right of a party to pursue a cause of action is neither indefinite or unlimited[38]. Limitation periods endeavour to achieve a balance of the competing and generally irreconcilable interests of those who seek to enforce a legal right and those called to defend the enforcement of a legal right[39].

72. Delay in the prosecution of legal rights has a variety of implications. Delay erodes the quality of justice because, amongst other things, delay is productive of unfairness and prejudice. Evidence is invariably lost or diluted; witnesses die; cannot be found by the parties; and memories naturally fade or are reconstructed[40].

73. Limitation periods also recognise more practical matters and that, for example, there is an element of oppression associated with requiring members of the community to be in a perpetual state of readiness to defend litigation predicated on historical allegations of wrongdoing that have not been pursued in a timely fashion[41]. Equally, limitation regimes acknowledge that private and commercial enterprises need some assurance about their outstanding liabilities[42]. Heydon J's observations in *AON Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175 (***AON***) at [137] illustrate the point:

> Those who claim to be entitled to money should know, as soon as possible whether they will be paid. Those against whom the entitlement is asserted should know, as soon as possible, whether they will have to pay. In each case that is because it is important that both the claimants and those resisting claims are able to order their affairs. How they order their affairs affects how their creditors, their debtors, their suppliers, their customers, their employees, and, in the case of companies, their actual and potential shareholders order their affairs. The courts are thus an important aspect of the institutional framework of commerce.

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38 *Taylor* at 553 (McHugh J).

39 *Taylor* at 552-553 (McHugh J): "what has been forgotten can rarely be shown" (at 551).

40 In the criminal context, see *R v Lawrence* [1982] AC 510, 517 (Lord Hailsham).

41 *Taylor* at 552-553 (McHugh J).

42 Again, in a different context, see *AON* at [101] (Gummow, Hayne, Crennan, Kiefel, Bell JJ).

74. The importance of the expression of these policy considerations in limitation regimes is summed up by Lord Simon in *Central Asbestos Co Ltd v Dodd* [1973] AC 518 at 547 who said that limitations are intended to ensure:

> ... that legal rights are vindicated with reasonable promptitude - for reasons both of social stability and of fairness to defendants.

75. The policy justifications behind the *Limitations Act* are reflected in the construction of s 48. Section 48 is expressed in a way that illustrates the primacy of the presumptive position created by the *Limitations Act* – when a limitation period has expired, the institution of otherwise statute barred proceedings is exceptional[43]. Second, the conferral of a discretion to *grant* an extension of time reflects the allocation of the persuasive onus on the applicant for an extension of time[44]. An extension of time is not a presumptive entitlement upon satisfaction of the pre-conditions that enliven the discretion[45]. Furthermore, the conferral of a discretion to grant an extension by reference to what is "just" indicates a fact specific analysis must be undertaken[46].

76. Two important considerations flow from this analysis: first, the exercise of the discretion to grant an extension must take account of the reasons for the limitation regime; second, the discretionary nature of the decision to be made under s 48(3)(b) must be respected when it comes to appellate review of a trial judge's decision[47].

77. Kourakis CJ's treatment of s 48 ignored the statutory and evidentiary context in which the respondent's application had to be determined. He reconsidered the exercise of the discretion through the wrong prism, focusing largely on explanations for the respondent's conduct (FC [23]-[25]). These were relevant considerations but they needed to be viewed collectively, with what Kourakis CJ accepted was a "sound description of the general prejudice suffered by" the school at TJ [223], and mindful of the matters of principle discussed above.

78. Any review of the trial judge's decision must acknowledge that it was not for the school to persuade the trial judge – nor the Full Court – that the respondent's application should have been refused; the respondent bore the onus. The fact that the respondent qualified for an extension of time did not mean his application ought to succeed[48]. The reasons of Kourakis CJ do not address these principles and suggest error.

The Full Court's treatment of prejudice

79. Limitation regimes are a recognition by the legislature that, after a prescribed period of time, a plaintiff is not entitled to prosecute the asserted infringement of a legal right. There is an implicit assumption in limitation regimes that a party who is called upon to meet a case brought outside the prescribed time periods will incur some prejudice as a result of the failure to bring proceedings in a timely manner[49].

80. Accordingly, it is uncontroversial that the discretion to grant an extension of time must take account of the prejudice to a defendant brought about by a plaintiff's delay in instituting proceedings. Although in *Taylor* slightly different approaches to the question of prejudice

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43 *Taylor* at 553 (McHugh J). Indeed, the approach of this Court in *Batistatos v Roads and Traffic Authority of New South Wales* (2006) 226 CLR 256 emphasises that even the "right" to bring an action which is not time barred is not absolute. Prejudice or unfairness resulting from the circumstances in which the action is commenced, including delay and its incidental consequences, might engage a court's inherent power to stay such proceedings as an abuse of process where there can be no fair trial.

44 *Taylor* at 544 (Dawson J); 547 (Toohey and Gummow JJ); 551, 553-554 (McHugh J), 567 (Kirby J).

45 *Taylor* (1993) 186 CLR 541 at 554 (McHugh J).

46 See, eg, *Klein v Domus Pty Ltd* (1963) 109 CLR 467, 473 (Dixon CJ).

47 *House v The King* (1936) 55 CLR 499, 504-505.

48 *Lovett v Le Gall* (1975) 10 SASR 479, 486 (Wells J), "to qualify is not to succeed".

49 *Taylor* at 553-555 (McHugh J).

emerged, all agreed that prejudice to a defendant is one of, if not the most, important considerations in answering the dispositive question posed by provisions such as s 48.

81. Dawson J, who agreed generally with McHugh J, held that for an application for an extension of time to succeed, it was for the applicant to establish that the commencement of action would not result in significant prejudice to the potential defendant (at 544).

82. Toohey and Gummow JJ posed the relevant question by reference to 'a fair trial' (at 548-549 and 550):

> whether, by reasons of the time that has elapsed, a fair trial is possible. Whether prejudice to the prospective defendant is likely to thwart a fair trial is to be answered by reference to the situation at the time of the application. It is no sufficient answer to a claim of prejudice to say that, in any event, the defendant might have suffered some prejudice if the applicant had not begun proceedings until just before the limitation period had expired.
>
> The real question is whether the delay has made the chances of a fair trial unlikely.

83. McHugh J approached the issue as one about the fact or possibility of significant prejudice (at 555):

> The general rule that actions must be commenced within the limitation period should therefore prevail once the defendant has proved the fact or the real possibility of significant prejudice. In such a situation, actual injustice to one party must occur. It seems more in accordance with the legislative policy underlying limitation periods that the plaintiff's lost right should not be revived than that the defendant should have a spent liability reimposed upon it.

84. If there is any material difference between the three judgments in *Taylor*, the appellant submits that the approach of McHugh J (and Dawson J) is to be preferred because of its reconciliation of the policy objectives of limitation regimes with the statutory formulation. McHugh J's approach acknowledges that there are at least two relevant types of prejudice to be considered: presumptive prejudice that flows from the failure to institute proceedings in what the legislature has determined to be a suitable limitation period; and actual prejudice (such as the loss or unavailability of evidence) and which may impair the capacity of a court to ensure that any ensuing trial is fair.

85. These two types of prejudice were considered by the trial judge by reference to the appellant's position at the time of trial, and not by a comparison of the differential in prejudice suffered if the proceedings had been commenced in time[50]. The undisputed evidence before the trial judge and the Full Court was that a significant number of witnesses who would have been able to speak to central issues in the case had died or could not give evidence or be cross-examined (TJ [15], [223]).

86. The dearth of evidence on critical topics such as Bain's authorised role and allocated tasks – including on whether he was prohibited from sitting on beds after lights out - was a product of delay (TJ [15], [223]). The reasons of the Chief Justice effectively assumed that the school's position at trial – 52 years after the accrual of the cause of action – was not affected by delay. The analysis was flawed, including for the reasons set out by McHugh J in *Taylor* (at 554-555):

> But this analysis, with respect, treats the limitation period as little more than a point of reference. It suggests that all that is ordinarily relevant is the marginal prejudice created by the delay. ... The analysis gives no weight to the fact that the defendant's potential liability expired at the end of that period and that to extend the period may result in the imposition of a new legal liability on the defendant. Indeed, it seems to indicate that a limitation period is provisional rather than a rigid limit.

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50 *Taylor* at 548-549 (Toohey and Gummow JJ); 555 (McHugh J).

87. The question for the Full Court was whether the trial judge correctly approached the issue whether, at the time the application for an extension was made, the respondent established that it would be just to grant the application.

88. The Chief Justice's error in approach is exemplified by his statement (FC [5], [12]) that, absent an express direction to the contrary, Bain was authorised to engage in a bedtime routine of the kind described. That highlighted the degree to which the school was actually prejudiced. As the trial judge observed, the school was left to ward off inferences without the ability to call evidence going to the scope of Bain's authorised conduct and allocated duties (TJ [228]).

89. Importantly, Kourakis CJ accepted the findings of the trial judge (TJ [223]) as a "sound description" of the "general prejudice" suffered by the appellant (FC [21]). It is not clear what was meant by the label "*general* prejudice". The trial judge found there was "actual prejudice" to the appellant. That included the loss of the psychologist's notes (TJ [81], [227], [229]). The Full Court did not disturb that finding. The comments of McHugh J in *Taylor* (at 555) were apposite:

> When actual prejudice of a significant kind is shown, it is hard to conclude that the legislature intended that the extension provision should trump the limitation period. The general rule that actions must be commenced within the limitation period should therefore prevail once the defendant has proved the fact or the real possibility of significant prejudice.

90. The approach of the Full Court disregards the need for finality and the well known effects of delay on the quality of justice. Respectfully, it is unprincipled to suggest that these difficulties can be dealt with by taking a "conservative" approach to the assessment of damages (cf. FC [23]). Nor is it realistic to say that the school could have protected its position. It was reasonable for the school to consider that, after it provided assistance to the respondent in the late 1990's, the respondent's decision (on the legal advice of solicitors and counsel paid for by the school) to pursue Bain, but not the school, would be adhered to. Kourakis CJ failed to have regard to the broad rationales underlying the limitation regime which influence the circumstances in which the extension machinery may be used.

PART VII: LEGISLATIVE PROVISIONS

91. See annexure.

PART VIII: ORDERS SOUGHT

92. That the appeal be allowed with costs.

93. That the orders and judgment of the Full Court of the Supreme Court of South Australia given on 10 November 2015 be set aside, and in lieu thereof, it be ordered that the appeal to that Court be dismissed with costs.

94. Such further or other order as this Honourable Court deems fit.

PART IX: ESTIMATE OF TIME

95. The appellant estimates that 2 hours will be required to present its oral submissions.

20 May 2016

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ANNEXURE

Relevant legislative provisions

1. The form of s 48 of the *Limitations Act* 1936 (SA) relevant to the proceedings was as follows.

48—General power to extend periods of limitation

(1) Subject to this section, where an Act, regulation, rule or by-law prescribes or limits the time for—

(a) instituting an action; or

(b) doing any act, or taking any step in an action; or

(c) doing any act or taking any step with a view to instituting an action,

a court may extend the time so prescribed or limited to such an extent, and upon such terms (if any) as the justice of the case may require.

(2) A court may exercise the powers conferred by this section in respect of any action that—

(a) the court has jurisdiction to entertain; or

(b) the court would, if the action were not out of time, have jurisdiction to entertain.

(3) This section does not—

(a) apply to criminal proceedings; or

(b) empower a court to extend a limitation of time prescribed by this Act unless it is satisfied—

(i) that facts material to the plaintiff's case were not ascertained by him until some point of time occurring within twelve months before the expiration of the period of limitation or occurring after the expiration of that period and that the action was instituted within twelve months after the ascertainment of those facts by the plaintiff; or

(ii) the plaintiff's failure to institute the action within the period of the limitation resulted from representations or conduct of the defendant, or a person whom the plaintiff reasonably believed to be acting on behalf of the defendant, and was reasonable in view of those representations or that conduct and any other relevant circumstances,

and that in all the circumstances of the case it is just to grant the extension of time.

2. Respectfully, Gray J extracted a later version of s 48 which was amended in 2004 to include new subsections (3a) and (3b) (FC [139]). That version did not apply to this case.