IN THE HIGH COURT OF AUSTRALIA
ADELAIDE REGISTRY No A20 of 2016

BETWEEN **PRINCE ALFRED COLLEGE INCORPORATED**
Appellant

and **A, DC**

Respondent

RESPONDENT'S SUBMISSIONS

Part I: Certification

1 These submissions are in a form suitable for publication on the internet.

Part II: Issues

2 Was the Full Court correct in finding the appellant vicariously liable for the sexual abuse committed by its boarding house master, Bain, against the respondent?

3 Was the appellant in breach of its non-delegable duty of care to the respondent by reason of the sexual abuse committed by Bain against the respondent?

10 4 Did the Appellant breach its duty of care to the respondent by:

(a) employing Mr Bain, a paedophile, in 1961 and 1962;

(b) providing inadequate supervision of Mr Bain's activities in the boarding house;

(c) in failing adequately respond to the respondent's abuse.

5 Was the Full Court correct in granting an extension of time for the institution of proceedings by the respondent against the appellant?

Part III: Notice under s 78B of the *Judiciary Act 1903*

6 Consideration has been given to the question whether notice pursuant to s 78B of the *Judiciary Act 1903* (Cth) should be given with the conclusion that this is not necessary.

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Part IV: Facts

7 The respondent does not contest the narrative statement of facts found or admitted or the chronology provided by the appellant in its submissions (**AS**), save for the fact that the events listed in the second and third paragraphs as having occurred in February 2005 in fact occurred in late 2006.

Part V: Legislation

8 The appellant's statement of applicable legislative provisions is accepted.

Part VI: Argument

Introduction

10 9 The respondent, as a 12-year-old boy from country South Australia, was sent to Prince Alfred College (***appellant***) to board in 1962. He was sexually abused in the same year over a period of about eight months by Bain, a boarding house master.

10 This appeal is concerned with whether or not the appellant is liable for the harm caused by the sexual assault committed on the respondent by Bain whilst in the position of the appellant's boarding house master.

Application of *Lepore*

11 The decision in *Lepore v State of New South Wales* (2003) 212 CLR 511 is the most recent consideration by this Court of the principle of vicarious liability in the context of "intentional wrongful conduct" (in a sense which embraces deliberate criminal conduct).

20 12 The respondent in this case would be successful on the application of the tests propounded by the majority of judges of this Court in *Lepore*.

Gleeson CJ in Lepore

13 Gleeson CJ, in applying a "scope of employment" or "sufficient connection" test (*Lepore* at [40]), would find a school vicariously liability in circumstances in which the teacher-student relationship is invested with a high degree of power and intimacy and that power and intimacy is used to commit sexual abuse. The degree of power and intimacy is to be assessed by reference to factors such as the age of the student, their particular vulnerability, the tasks allocated to teachers, and the number of adults concurrently responsible for the care of students (*Lepore* at [74]).

30 14 The exploitation of the power and intimacy with which Gleeson CJ was concerned characterises the abuse committed by Bain. Bain was a full-time live-in master at the

appellant school {FC[261]}. The essence of his responsibilities was to care for the boarders, who were, in the relevant sense, vulnerable, including to supervise, protect, reassure and comfort them. Power and intimacy characterised his position. The members of the Full Court extracted the following facts:

(a) Peek J set out an extensive list of eleven factors which demonstrated that the teacher-student relationship between Bain and the respondent was invested with a high degree of power and intimacy, and was of a quasi-parental nature {FC[261}. Importantly, Bain was the only adult responsible for the care of the junior boarders when on duty and he had a close intimate relationship of a quasi-parental nature with the boarders as part of his role. 12-year-old boys in the position of the respondent, who was in his first year away from home, were particularly vulnerable to Bain's abuse of his power. Bain used this power and intimacy, together with the vulnerable position of the respondent, to perpetrate the sexual abuse. Bain was "in charge" and "in authority" {FC[254], [257]}. The evidence established, as Peek J observed, that "Bain, under cover of his (at least ostensible) authority, "groomed" the appellant in such a way as to make him vulnerable to sexual exploitation. This process took place within, and was made possible by, a disciplinary power structure that was an inseparable part of the functioning of the business of running the boarding school" {FC[259], see also TJ[147]}.

(b) Similarly, Gray J commented: "[Bain] had constant access to the boys and the opportunity to groom and molest them. The school put Bain in a position of authority, trust and intimacy in relation to young, vulnerable boys who were living away from home for the first time" {FC[128]}.

(c) Kourakis CJ (at {FC[13]}) observed, "the judge's finding that Bain's role involved responsibility for, and overall supervision of, the boarding house is plainly correct and indeed incontrovertible. PAC placed itself *in loco parentis* for its boarders and did so for reward. It was PAC's duty in law to provide its boarders with care, guidance and comfort which was age appropriate. PAC discharged that duty through the employment of its housemasters. The standard of care required of a boarding school for 12-year-old children, even in 1962, included having an adult supervisor available to ensure that the children went to bed at a reasonable time, and to provide them with comfort and reassurance as required." Kourakis CJ correctly noted that the trial judge "erroneously limited the enquiry to whether Bain had specifically been directed to settle the boarders after lights out" {FC[4]}.

15 The fact that Gleeson CJ's test would result in vicarious liability on the part of the school is confirmed by his Honour's apparent approval of then recent decisions of the Supreme Court of Canada and the House of Lords which, unlike the facts of the three cases before the Court in *Lepore*, were concerned with sexual abuse by boarding house staff (see *Lepore* at [55]-[72] referring to *Bazley v Curry* [1999] SCR 534, *Jacobi v Griffiths* [1999] 2 SCR 570 and *Lister v Hesley Hall Ltd* [2002] 1 AC 215 all discussed further below).

Kirby J in Lepore

16 Kirby J, after clearly setting out the basis on which it is clear that intentional wrongdoing is not a bar to vicarious liability (*Lepore* at [309]-[314] and [332]), propounded a very similar test to that of Gleeson CJ, and emphasised that "activities of the employment" should be considered "in general terms rather than concentrating only on the particular actions or omissions of the employee in question" (*Lepore* at [315]). On both views, the test was concerned with the connection between the intentional wrongful act and the employment. The relevant connection is to be determined by a broad connection analysis which was consistent with the risk analysis developed by Canada and English courts (including *Bazley* and *Lister*) (*Lepore* at [318]-[320]) which, as his Honour observed, was cited with apparent approval in the joint judgment of Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ in *Hollis* at [42].

17 In this case, relationships of affinity and trust of a quasi-parental nature were necessary to the undertaking of the commercial venture of running the appellant boarding school since it was deemed uneconomic to have sufficient staff to be able to supervise the master's activities {FC[250]}. The appellant put in place "a disciplinary power structure that was an inseparable part of the functioning of the business of running the boarding school" and that the employer's enterprise model of trust rather than supervision materially increased the risk of sexual assault {FC[259], also [250]}. The school created and enhanced the risk that Bain could abuse students {FC[128]}.

18 Further, in formulating his test, Kirby J expressly referred to and applied decisions of the Canadian Supreme Court and the House of Lords, which had variously found schools vicariously liable for sexual abuse committed by boarding house masters (or equivalent) upon the application of a risk analysis test (e.g. *Lepore* at [273]-[277]). His Honour concluded that "there is no reason why the common law of Australia should protect those who claim against employers for fraud, theft of property and other property crimes by employees [apparently referring to the decisions in *Lloyd and Morris v CW Martin & Sons Ltd* [1996] 1 QB 716 and *Lloyd v Grace, Smith & Co* [1911] 2 KB 489] but not protect them for the crime of sexual assault by employees" (*Lepore* at [332]).

Gaudron J in Lepore

19 Gaudron J would find a school vicariously liable in respect of the deliberate criminal acts of another where the person against whom liability is asserted is estopped from asserting that the person whose acts are in question was not acting as his or her servant, agent or representative when the acts occurred (*Lepore* at [130]). This is because, according to her Honour, "where the issues concern the doing of an authorised act in an unauthorised way, it will ordinarily be the case that vicarious liability results from the ostensible authority of the person whose acts caused injury to the plaintiff" (*Lepore* at [128]). This involved the application of a "close connection" test which required such a connection between what was done and what that person was engaged to do (*Lepore* at [131]).

20 Applying the test of estoppel (and stating her Honour's test in a manner which is relevant to the facts of this case), the question for her Honour would be whether the appellant had acted in such a way that the respondent would reasonably assume that Bain was acting as the servant, agent or representative of the appellant. There can be no doubt that the respondent would reasonably have assumed Bain to be acting as the servant of the appellant school. He used his position and authority as boarding house master in the way described above to exploit the respondent's vulnerability by sexually abusing him {TJ[147], FC[254], [257]}. It was under the cover of the activity of caring for the respondent and the other boarders that Bain exploited the inherent relationship of trust and authority {FC[128]}.

McHugh J in Lepore

21 McHugh J considered the matter only as an application of the principles of non-delegable duty (finding it "unnecessary to decide whether the [employer] is also vicariously liable for the tort of the teacher who assaults of sexually assaults a pupil" at [136]), but unequivocally considered that in these circumstances the employer is liable "even if the teacher intentionally harms the pupil" (*Lepore* at [136]). (His Honour's remarks in *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21 at [100] and *Scott v Davis* (2000) 204 CLR 333 at [104] show that he would form the same conclusion upon the application of principles of vicarious liability.) McHugh J's judgment, or its application to the facts of this case, requires no further discussion at this stage because it is beyond doubt that he would have had no hesitation in finding in favour of the respondent in this case on the basis of non-delegable duty, discussed further below.

Gummow and Hayne JJ in Lepore

22 The respondent would be successful on the application of the test propounded by Dixon J in *Deatons Pty Ltd v Flew* (1949) 79 CLR 370, cited with approval by Gummow and

Hayne JJ. In applying that test, their Honours accept that an employer could be liable for an "intentional tort" of an employee (*Lepore* at [239]), including acts contrary to law and contrary to the directions of an employer (*Lepore* at [225]). According to their Honours in *Lepore*, liability in the case of intentional wrongs "should not be extended beyond the two kinds of case identified by Dixon J in *Deatons*" (*Lepore* at [239]).[1]

23 The passage in *Deatons*, relied upon by Gummow and Hayne JJ, arose in Dixon J's consideration of the conduct of a barmaid who threw a beer and glass at the face of a customer. At 381, Dixon J concluded that such conduct was:

> ...not a case of a negligent or improper act, due to error or ill judgment, but done in the supposed furtherance of the master's interests. Nor is 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 representative of his master (see *Lloyd v Grace, Smith & Co*; *Uxbridge Permanent Benefit Building Society v Pickard*" [references omitted]

24 The application of this test to the facts of this case would result in the appellant's vicarious liability, because, as explained above in applying the reasoning of the other judges of this Court in *Lepore*, Bain's abusive acts were committed in circumstances in which the ostensible performance of the appellant's work gave occasion for their occurrence. They were committed under cover of his authority as boarding house master.

25 Gummow and Hayne JJ then restate the two categories identified by Dixon J in *Deatons* (*Lepore* at [231] (and also at [239])) so that "acts to which the ostensible performance of [a] master's work gives occasion" is reduced to "ostensible pursuit of the employer's business" (note in particular the absence of "gives occasion") and "committed under cover of the authority the servant is held out as possessing or of the position in which he is placed as representative of his master" is reduced to "apparent execution of the authority which the employer held out the employee as having" (note in particular the absence of "under cover of" the authority). The same approach appears to be propounded by the appellant, which does not distinguish between *Deatons* test and the Gummow and Hayne JJ restatement.

26 Gummow and Hayne JJ's approach is implicitly narrowed even further when their Honours come to applying it to the facts of the cases there before the Court (that is, sexual assaults committed by teachers, albeit not in a boarding house context), where they appear to apply a test which requires the act to be in furtherance of the school's aims or to be an

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[1] c.f. *Hollis* at [42] (Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ), referred to above in para 16.

unintended by-product of performance of a teacher's task (*Lepore* [240] and [241]). An application of this test might well result in vicarious liability not being imposed in the case of sexual assaults committee by teachers because "when a teacher sexually assaults a pupil, the teacher has not the slightest semblance of proper authority to touch the pupil in that way" (*Lepore* at [241]). But that is not the *Deatons* test. The appellant cannot, therefore, consistently with its reliance on the *Deatons* test, rely on the outcome of the application of that test to support a refusal to accept vicarious liability for Bain's acts in this case.

27 Significantly, in reaching the conclusion that "the teacher has not the slightest semblance of proper authority" to sexually assault a student, Gummow and Hayne JJ assume a description of the wrongful act with such specificity that it was obviously beyond authority. This illustrates the importance of Lord Diplock's warning that one must not dissect the servant's task into its component activities since otherwise liability would never be imposed (see *Ilkiw v Samuels* [1963] 1 WLR 991 at 1004, similarly Kirby J in *Lepore* at [321]-[330]). In their analysis, their Honours try to distinguish *Lloyd* on the basis that in that case, the solicitors' clerk had and was held out as having authority to act in conveying the property which he took to his own use, and in *Morris* the employee had authority to receive the garment that he stole. But equally it is undoubtedly the case that Bain had authority to be "intimate" with the boarders, including to comfort, supervise and reassure the respondent which authority and power he exploited in order to commit the abuse. The statement that "the teacher has no actual or apparent authority to do any of the things that constitute the wrong" is of course equally applicable to the fraud committed by the solicitor's clerk and the theft of the fur coat {see further FC[205] (Peek J)}.[2] But in each case, including this, the acts were "acts to which the ostensible performance of [the] master's work [gave] occasion" and which were "committed under cover of the authority the servant [was] held out as possessing".

28 In other words, an application of the *Deatons* test as articulated by Dixon J in that case, cited with apparent approval by Gummow and Hayne JJ in *Lepore*, would result in the appellant being vicariously liable for the harm inflicted on the respondent by Bain's abuse.

Conclusion: application of Lepore

29 Accordingly, the respondent in this case would be successful on the application of the respective tests for vicarious liability propounded by a majority of judges of this Court in *Lepore*, including the application of Dixon J's test in *Deatons*.

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[2] Indeed, no employee is ever likely to have actual or apparent authority to undertake tasks carelessly.

Vicarious liability - other common law jurisdictions

30 The application of the majority judgments in *Lepore* leads conclusively to the imposition of vicarious liability on the appellant for the harm caused to the respondent by Bain's abuse. There is, therefore, no need to look to other common law jurisdictions to determine the appropriate test for vicarious liability in the circumstances of this case, or to fashion a test which would give rise to the appellant's liability. A straightforward application of *Lepore* requires that conclusion. Nevertheless, consideration of the relevant case law in the Canada and the UK shows that the law of vicarious liability in Australia shares common elements with that in Canada and the UK which, when applied to the facts of this case, would also lead to the appeal readily being dismissed.

Canada

31 The decisions of the Canadian Supreme Court in *Bazley* and *Jacobi* have received widespread support amongst Australian[3] and other common law[4] courts. McLachlin J in *Bazley*, in considering the appropriate test for vicarious liability (there to be applied in the case of sexual abuse committed by a counsellor upon a child in residential care) expressly applied a "sufficient relationship to conduct authorized by the employer" test, as part of which the connection between "the employer's creation of enhancement of the risk", and the "wrong complained of" (referred to sometimes as "enterprise risk") should be considered (at [41]). The same factors were applied by Binnie J (with whom Cory, Iacobucci, and Major JJ agreed) in *Jacobi* (at [43]ff), albeit in reaching a different conclusion on the facts of that case.

32 Further, the five more specific factors applied by the Canadian Supreme Court (see *Bazley* at [41] and *Jacobi* at [79]) as a means of assessing whether an employer created or materially enhanced the risk of an employee committing an intentional tort applied in each case reflect the approach taken by Australian courts. The application of those factors would put the appellant's liability in this case beyond doubt. Those factors are:

(a) The opportunity that the enterprise afforded the employee to abuse his or her power (*Lepore* at [74] (Gleeson CJ, confirmed that it is not a sufficient criterion in itself); {FC[128], [261]});

(b) The extent to which the wrongful act may have furthered the employer's aims (*Lepore* at [46] (Gleeson CJ), [231]-[239] (Gummow and Hayne JJ));

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[3] *Hollis* (2001) 207 CLR 21 at [41]-[42], *Lepore* (2003) 212 CLR 511 at [55]-[58] (Gleeson CJ); [108], [119] (Gaudron J); [272], [318]-[320], [326] (Kirby J); *Sweeney v Boylan Nominees Pty Limited* (2006) 226 CLR 161 at [71] (Kirby J); *Blake v J R Perry Nominees Pty Ltd* [2012] 38 VR 123 at [5], [16].

[4] See for example *Lister v Hesley Hall* [2002] 1 AC 215; *Various Claimants v Catholic Child Welfare Society* [2013] 2 AC 1; *Cox v Ministry of Justice* [2016] UKSC 10; *Mohamud v WM Morrison Supermarkets plc* [2016] UKSC 11.

(c) The extent to which the wrongful act was related to friction, confrontation or intimacy inherent in the employer's enterprise (*Lepore* at [67], [74] (Gleeson CJ), [321] (Kirby J); {FC[250], [259]});

(d) The extent of power conferred on the employee in relation to the victim (*Lepore* at [67], [74] (Gleeson CJ), [216] (Gummow and Hayne JJ); {FC[254], [257]});

(e) The vulnerability of potential victims to wrongful exercise of the employer's power (*Lepore* at [74] (Gleeson CJ); {FC[56], [128], [261]}).

33 Subsequent Canadian authorities illustrate that the application of the test in *Bazley* imposes limits not concerned with whether or not the employee's act constitutes intentional wrongful conduct, but rather with the nature of the functions which the employer was engaged to perform. The Canadian Supreme Court did not, for example, impose vicarious liability in the case of a sexual assault by a baker perpetrated on a student because his job did not require him to interact with the students at the school (*EB v Order of the Oblates of Mary Immaculate in the Province of British Columbia* [2005] SCR 45) or in the case of a janitor who assaulted a student, for a similar reason (*EDG v Hammer* [2003] 2 SCR 459). The intentional wrongful nature of an act is not in itself relevant to a determination of vicarious liability, and it has not been so in any common law jurisdiction for some time (*Lepore* at [47], [73] (Gleeson CJ), [309]-[314] (Kirby J), and the cases cited therein).

United Kingdom

34 English superior courts have for a long time not been shy about imposing vicarious liability on employees for intentional wrongful acts of employees, At least since *Lister*, another boarding house sex abuse case in which the employer was found to be vicariously liable, Lord Millett said at [250]:

> in the case of boarding schools ... and other residential homes for the young or vulnerable, there is an inherent risk that indecent assaults on the residents will be committed by those place in authority over them, particularly if they are in close proximity to them and occupying a position of trust.

35 English courts have, however, recently been inclined to expand the description of the test for vicarious liability in at least two ways: First, by applying the principle beyond the relationship of employer and employee (see *Cox v Ministry of Justice* [2016] UKSC 10), and secondly, and most significantly to this case, by propounding a relatively broad description of the conduct for which employers or principals are vicariously liable (*Mohamud v WM Morrison Supermarkets* [2016] UKSC 11).

36 The nature and general description of the test is, however, not substantively different to that propounded by the Canadian courts and by Australian courts. In *Mohamud* Lord Toulson described the question as "whether there was sufficient connection between the wrongdoer's employment and his conduct toward the claimant to make the defendant legally responsible" (at [1]). In that case, Lord Toulson, at [44]-[45], described a two-fold test: the first question being an inquiry into the functions or field of activities which have been entrusted by the employer to the employee, and, secondly, whether or not there was sufficient connection between the position in which he was employed and the wrongful conduct to make it right for the employer to be held liable. Lord Reed in *Cox* (at [24]) set out a similar statement of the test, although perhaps providing further guidance in respect of the second stage. According to his Lordship, vicarious liability arises where "harm is wrongfully done by an individual who carries on activities as an integral part of the business activities carried on by a defendant and for its benefit ... and where the commission of the wrongful act is a risk created by the defendant by assigning those activities to the individual in question". Taken together, this is a clear statement of a sufficient connection test, determined by analysing the integral business activities carried on by the defendant for its benefit, together with the risk created by assigning those activities to the individuals in question.[5]

Conclusion

37 The concerns expressed by the courts in determining and applying the "sufficient connection" test are similar in all three jurisdictions, despite the varying use of terminology. Further, it is interesting to note that although the dominant test for vicarious liability in Australia, the UK and Canada may seem superficially different to the categories identified by Dixon J in *Deatons*, in practice the risk analysis, enterprise risk, and close connection tests all seems likely to capture similar conduct to that described in *Deatons* as "acts to which the ostensible performance of [a servant's] 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 representative of his master".

Non-delegable duty

38 The appellant also owes the respondent a non-delegable duty of care.[6]

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[5] The same test recently in each of *Maga v Archbishop of Birmingham* [2010] 1 WLR 1441, *E v English Province of Our Lady of Charity* [2013] QB 722 and *Various Claimants v Catholic Child Welfare Society* [2013] 2 AC 1, led the Court of Appeal (in the case of the first two cases) and the Supreme Court (in the case of the third, which was also a boarding school case) to find various Roman Catholic orders vicariously liable for sexual abuse committed by priests and brothers.

[6] In a school situation, the basis for the imposition of a non-delegable duty is the "immaturity and inexperience of the pupils and their propensity for mischief" which suggests that "there should be a special responsibility on a school authority to care for their safety, one that goes beyond a mere vicarious liability for the acts and

39 Accordingly, the appellant owed its students, including the respondent, a duty to procure that reasonable care was taken in the performance of its functions, by whomever it might get to perform them. To put it another way, as Gleeson CJ stated in *Lepore* at [20], "the person subject to the duty has a responsibility either to perform the duty, or to see it performed, and cannot discharge that responsibility by entrusting its performance to another".[7] This is not controversial. The essence of a non-delegable duty is that "the person accused of a breach of the obligation cannot escape liability because he has employed another person, whether servant or agent, to discharge it on his behalf" (see *Gold v Essex County Council* [1942] 2 KB 293).

10 **40** The appellant's functions, insofar as the boarding house was concerned, have been set out in detail above. By way of summary, they were to supervise, protect, reassure and comfort boarders {TJ[108], FC[196], [261]}.

41 Four things, at least, about non-delegable duty are clear from the authorities. First, liability for a breach of non-delegable duty is personal, not vicarious. Secondly, the essential question is the nature of the duty owed by the defendant to the plaintiff (and not, as in vicarious liability, on the relationship between the employee or agent and the defendant). Thirdly, the duty is not one to keep all those to whom the duty is owed free from all harm (*Lepore* at [22], [31] (Gleeson CJ)). That would be true strict liability. It is a duty the consequence of which is that a failure to take care by those to whom the defendant delegated
20 its functions amounts to a breach by the defendant of its non-delegable duty of care. Fourthly,

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omissions of its servants" (see Mason J, with whom, Gibbs CJ agreed in *Commonwealth v Introvigne* (1982) 150 CLR 258 at [30]). The school assumes "a particular responsibility for [a student's] safety, in circumstances where [the student] might reasonably expect that due care will be exercised" (Mason J in *Kondis v State Transport Authority* (1984) 154 CLR 672. In *Burnie Port Authority v General Jones Pty* (1994) 179 CLR 520 at [37] this Court stated the basis for the imposition of a non-delegable duty as "such a central element of control and by such special dependence and vulnerability". Gaudron J in *Lepore* at [123] attributed the existence of a personal or non-delegable duty on the increased "foreseeable risk". Her Honour went on to cite with approval a passage from Lord Millett in *Lister* [2002] 1 AC 215 at [250]: "in the case of boarding schools, prisons, nursing homes, old people's homes, geriatric wards, and other residential homes for the young or vulnerable, there is an inherent risk that indecent assaults on the residents will be committed by those placed in authority over them, particularly if they are in close proximity to them and occupying a position of trust". In *Woodland v Essex County Council* [2014] AC 537, Lord Sumption suggested that "[b]oth principle and authority suggest that the relevant factors are the vulnerability of the claimant, the existence of a relationship between the claimant and the defendant by virtue of which the latter has a degree of protective custody over him, and the delegation of that custody to another person" (at [12]).

[7] This Court has stated that "the law will identify a duty as non-delegable whenever a person has undertaken the supervision or control of, or has assume a particular responsibility for, the person or property of another in circumstances where the person affected might reasonably expect that due care would be exercised". See McHugh J in *Lepore* at [152] citing *Kondis v State Transport Authority* (1984) 154 CLR 672 at 687 and *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520 at 550-552. See also *Commonwealth v Introvigne* (1982) 150 CLR 258.

it is a duty which can be breached by a wrongful act by the holder of the duty or by a person to whom its functions are delegated.[8]

42 Although the existence of a non-delegable duty of care owed by the appellant to the respondent is indisputable, Gleeson CJ in *Lepore* thought that a problem with the application of the accepted non-delegable duty of care 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" (at [36]). His Honour concluded that cases of institutional sexual abuse are not properly considered as cases of non-delegable duty. In doing so his Honour observed:

> If a pupil is injured by the criminal act of another pupil, or of a stranger, then the possible liability of the school authority is determined by asking whether some act or omission of the school authority, or of some person for whose conduct it is vicariously responsible, was a cause of the harm suffered by the pupil. Why is a different question asked when the injury results from the criminal act of a teacher?

43 The same concern was expressed by Gummow and Hayne JJ in *Lepore* at [262]-[263]. Their Honours appeared to regard non-delegable duty as "a species of vicarious responsibility" (at [257]) or "a new and wider form of strict liability to prevent harm" (at [260]) and hence imposed similar limits to those imposed by their Honours on vicarious liability: "The duty concerns the conduct of that activity" (at [261]). That is, with respect to their Honour, contrary to established principle.

44 There is a principled basis for distinguishing a criminal act of another pupil or of a stranger from the criminal act of an employee or delegate. The school's duty applies only to the extent that the act was in performance of "a function for which the defendant has assumed responsibility" (*Woodland* at [13], [24] (Lord Sumption)). A school does not delegate its functions to other school children, or to passers-by. A non-delegable duty is not a duty to prevent any harm occurring. It is a duty to take reasonable care. If neither the school nor its delegate fails to take care in the case of a criminal act of another pupil or of a stranger, then there is no basis for liability to be imposed on the school. The distinction is one of principle. It is fair and reasonable, in the circumstances in which non-delegable duties are imposed,[9] to hold the principal responsible for the care of the class of persons in respect of whom a non-delegable duty is imposed even on the basis of wrongful conduct committed by that delegate. Further, the same concern in respect of liability for acts performed by strangers or other

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[8] Lord Sumption in *Woodland v Essex County Council* [2014] AC 537 stated that "a duty to take reasonable care in the performance of the functions entrusted to it, so far as it performed those functions itself, through its own employee", as well as "a duty to procure that reasonable care was taken in their performance by whomever it might get to perform them" was each a case of personal (or non-delegable) duty of care. His Lordship regarded actions of an employer as actions of the (there) authority rather than a third party, apparently not requiring the "non-delegable" description in order to find a breach of duty in respect of their actions. In this case, however, the distinction is not material.

[9] See footnote 6 above.

children could be expressed in respect of careless conduct: there is no suggestion that the school is liable for the careless conduct of another pupil or of a stranger (if there is no breach of duty on the part of the school or its delegate) any more than for their intentional criminal conduct, and yet no concern is generally expressed for visiting liability on a school for the careless conduct of its teachers.

45 If an intentional criminal act can itself amount to a breach of duty (as undoubtedly it can),[10] then in circumstances in which an employer's duty of care cannot be delegated to an employee or agent (that is, an agent's breach of duty is taken to be that of the employer), there is no reason in principle to exclude liability imposed on the institution. To do so would be in effect to require some degree of fault on the part of the principal, which non-delegable duties are expressly designed not to require. Certainly in McHugh J's view (expressed *Lepore* at [165]):

> whether or not there are any reasonably practicable methods by which education authorities can eliminate or reduce the incidence of abuse, long established legal principle and this Court's decisions require that they carry the legal responsibility for any abuse that occurs. Given the potential – often permanent – consequences of the sexual abuse of children, this result does not seem unjust.

McHugh J, in *Lepore*, who decided in favour of the original plaintiffs in that case on the basis that the relevant schools had breached their non-delegable duties of care,[11] stated the nature of non-delegable duties clearly, embracing intentional harmful (and criminal) acts:

> The duty cannot be delegated. If, as is invariably the case, the State delegates the performance of the duty to a teacher, the State is liable if the teacher fails to take reasonable care to prevent harm to the pupil. The State is liable even if the teacher intentionally harms the pupil. The State cannot avoid liability by establishing that the teacher intentionally caused the harm even if the conduct of the teacher constitutes a

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[10] Although Gummow and Hayne JJ state that "intentional infliction of harm cannot be pleaded as negligence", citing *Williams v Milotin* (1957) 97 CLR 465 at 470 and *Cousins v Wilson* [1994] 1 NZLR 463 at 468, it is respectfully submitted that this fails to draw a critical distinction between an intentional act which constitutes a breach of duty to take care of a person (such as a child, or a patient) owed by the relevant person (or a person to whom relevant functions have been delegated) and intentional acts which cause harm which are not committed by a person who owes (or who is a delegate of a person who owes) such a duty. In any event, it is now clear more generally that if a person has a duty to take care of another, the commission of an intentional wrongful act, even one known to be wrongful, counts as a failure to take care. Intentionally speeding, for example, can amount to a criminal charge of dangerous driving, yet can also be characterised as a failure to take care. Another example is *Stingel v Clark* (2006) 226 CLR 442, 452 [13] in which a majority of the Court (Gleeson CJ, Callinan, Heydon and Crennan JJ) adopted a statement generally consistent with the views of McHugh J, saying "an intentional trespass might be committed by someone (such as a teacher or a nurse) who owes a conventional duty of care to the injured person". In that cast the Court accepted that a rape committed by constitute a breach of duty for the purposes of limitation. See further *Gray v Motor Accident Commission* (1998) 196 CLR 1 at [21]-[24]; *Wilson v Horne* (1999) 8 Tas R 363; *Casaclang v WealthSure Pty Ltd* [2015] FCA 761 [332]-[340].

[11] His Honour, therefore, found it unnecessary to consider vicarious liability.

criminal offence. It is the State's duty to protect the pupil, and the conduct of the teacher constitutes a breach of the State's own duty."[12]

46 A further point made by McHugh J is that "the relationship of school authority and pupil gave rise to a duty of care 'prior to and independently of the particular conduct alleged to constitute a breach of the duty ... the relationship of school authority and pupil belongs to the class of cases in which a duty of care springs from the relationship itself" (*Lepore* at [141]). As with all duties of care, the essential issue is the nature and scope of the duty. The school does not have a personal duty "to take care of children except that it can perform intentional acts of abuse". That is of course absurd. The scope of the duty does not exclude intentional harmful acts. That is so whether it is performing the function of caring for students itself (in which description at least Lord Sumption would include through its employees: *Woodland* at [4]) or by a delegate whom it engaged to perform them.

47 Whatever connection is required between the acts of an employee and the tasks he was employed to carry out for the purposes of vicarious liability, that connection is satisfied in this case. Nevertheless, one important consequence of the imposition of a non-delegable duty of care is that "it is irrelevant that in failing to perform the duty with reasonable care the employee was acting outside the scope of his or her employment" (*Lepore* at [145]).[13] Given that there is no dispute that the appellant owed the respondent a (non-delegable) duty of care, there is no reason in principle to carve out from that duty intentionally wrongful acts. On this basis, by reason of Bain's conduct, the appellant breached its non-delegable duty of care to the respondent.[14]

"Direct" breaches of duty

48 Gaudron J was, with respect, correct in observing that "in most, if not all, of the situations of which Lord Millett spoke in *Lister*, it ought now be recognised that there is a personal ... duty on the authority concerned to take reasonable steps to minimise, if not eliminate, the opportunity for abuse by those to whom the employer has delegated its duties and functions" (*Lepore* at [124]).

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[12] There is no issue that the same applies to any school authority, whether it be the government, a corporation or an individual (see *Lepore* at [105] (Gaudron J), [139] (McHugh J); *Ramsay v Larsen* (1964) 111 CLR 16 at 28).

[13] McHugh J in *Lepore* at [145]. Indeed, as Gleeson CJ (Gaudron and Hayne JJ agreeing) confirmed in *Modbury Triangle Shopping Centre v Anzil* (2000) 205 CLR 254, a school has a duty to take reasonable care to protect its students from criminal behaviour of third parties (see eg Gleeson CJ at [26]).

[14] Kourakis CJ found, on the application of *Lepore*, that "the non-delegable duty of schools did not extend to the intentional criminal wrongdoing of its teachers" {at FC[6]}. Gray J, having comprehensively set out relevant authorities, concluded that he did "not propose to further address the submission that Prince Alfred College may be held to have breached its non-delegable duty to take care of the plaintiff" and that "the question is better addressed as one of vicarious liability". Peek J was silent on the issue of non-delegable duty.

49 One of the steps which a boarding school must take is to take "reasonable care in employing persons who were suitable to teach and to care for him" {TJ[129]}. Another is to provide "adequate supervision of the work of boarding house masters" {TJ[129]}. These were two of the three claims of "primary" breach of the appellant's duty of care before the Full Court. Only two of the three judges considered these claims at all. Gray J was the only judge in the Full Court to consider the claims in more than a cursory fashion (and indeed his Honour did so in some detail) and reached the conclusion that the appellant breached its duty in each respect. His Honour was correct in so doing.

Lack of reasonable care in employing Bain

50 Underlying his Honour's findings in overturning the trial judge was a consideration of the circumstances as a whole. Bain had, when he was employed by the appellant, a conviction for an offence of gross indecency {TJ[111]; FC[86]}. He sexually abused at least two students at his former school {TJ[112]-[113]}. The headmaster and other masters at Bain's former school were aware of the possibility that Bain had engaged in such conduct and at least one such master would have "expressed serious concern as to the appropriateness of Bain being taken on as a teacher" had he been asked {TJ[114]-[117]}. Further, although there was no formal process for obtaining criminal records, criminal records were kept, and there was at least in practice a means of finding out whether a potential employer should be concerned {TJ[126]}. Although Bain was employed initially as a regular teacher, in 1962 he was placed in a position of having authority over, and intimacy with, vulnerable young children in a residential situation {FC[40]}. The requirement of suitability is particularly acute in the context of a boarding house master who has domestic and pastoral responsibilities beyond those of an ordinary teacher, and whose opportunities for misconduct, including sexual misconduct, are particularly pronounced {TJ[110]}.

51 Gray J was right to have regard to the fact that the paucity of evidence as to the appellant's usual or specific practice when it came to employing teachers arose from the fact that "the majority of the evidence which had been lost had been lost since 1996" {FC[91]}. The appellant "became aware of a potential claim arising out of the abuse perpetrated by Bain ... in 1996" and the appellant "at that time had the opportunity to make enquiries about [its] practices in regard to employment in the 1960s". There was no evidence as to what attempts the School made to preserve any evidence or properly to investigate the matters. Gray J was right, particularly in these circumstances, to draw inferences from the facts which were available, and, in particular, to conclude that "whatever enquiries the school made prior to appointing Bain to a position in the boarding house were entirely inadequate and evidence of a want of care" {FC[91]}.

52 Gray J was, therefore, correct in concluding that the School "breached its duty of care by failing to conduct appropriate enquiries as to Bain's suitability to be employed in the boarding house as a boarding house master with sole responsibility for the care of young boys for two to three days each week" {FC[91]}.[15]

Lack of reasonable care in supervising Bain

53 The appellant then failed properly to supervise the respondent's care, and to supervise Bain once it had appointed him as a boarding house master.

54 As Gray J found, "in circumstances where a housemaster was the only staff member on duty throughout the night, there was a need to guard against such a person engaging in abuse" {FC[98]}. Further, as his Honour quite rightly observed, "if it be the case that only superficial checks were made when first employing Bain as a teacher, the need for appropriate checks was all the greater when he was to take on the duties of a boarding house master" {FC[98]}. As the trial judge found, no other boarding house master would be present in dormitories after lights out, told stories to the boarders, or supervised shower time {TJ[21], [143], [173]}. The fact that Bain did, means, therefore, that either it was within the general role of a boarding house master to do these things (despite the fact that prefects also undertook some of these tasks) or else, if it was a "frolic", then it follows that the appellant employed inadequate supervision on the activities of boarding house masters. The fact that it was the primary responsibility of boarding house prefects to supervise year 8 boarders {see TJ[21], [149]} rather tends to illustrate the manifest lack of adequate supervision. As Gray J observed, "rudimentary checks and supervision would have revealed Bain's practices of spending an unusually lengthy amount of time in the showering areas, being with the boys and on their beds in the dormitories after lights out. Any enquiry of the young boarders would have revealed the extent to which Bain was engaging in conduct that could be described as grooming" {FC[99]}.

55 The appellant breached its duty of care to the respondent by failing to ensure adequate supervision of its boarding house masters.

Lack of reasonable care to supervise respondent's welfare

56 As Gray J concluded, "it was as evident in 1960 as at today that a 12 year old child subjected to ongoing sexual abuse would require special care. It was wrong to cast the onus on the plaintiff to take the initiative to seek counselling. He was in no fit state to do so"

[15] Kourakis CJ, in upholding the trial judge's conclusions, failed to acknowledge that it was appropriate, particularly in these circumstances, to draw inferences from the facts which were known. This, together with an exaggerated willingness to accept institutional ignorance in the 1960s, permeated his Honour's findings in respect of the appellant's direct breaches of duty.

{FC[104]}. The appellant's public exhortation to the respondent and other students not to speak of the abuse, its failure to take active steps to care for the respondent when it became aware of the abuse and instead to cover it up and even fail to report it to the police, constituted an obvious breach of the appellant's duty to the respondent. The appellant failed in these respects to take reasonable steps to care for the respondent's welfare once it discovered the abuse {FC[106]}.

Conclusion

57 The respondent came to the appellant school as a 12 year old boarder. He was self-evidently vulnerable. He was placed in the care of the appellant who was entrusted with his care, and who took on the role of providing him with the care and supervision which would normally be provided by parents. The appellant's resident boarding house masters had immense authority over him, and their relationship with the respondent was necessarily intimate (in the relevant sense). The appellant had the strongest duty to make sure those entrusted with the care of the respondent in these circumstances were of appropriate character, and to carefully supervise the respondent's care by those employees. Once it became aware of the fact that one of those employees had inflicted prolonged sexual abuse on the 12 year old respondent, the school had an acute duty provide active support. The appellant failed in each of these respects and was, therefore, in breach of its duty to take care of the respondent and to protect him from harm.

Time limitation

58 It is agreed between the parties that the version of s 48 of the *Limitation Act 1936* (SA) set out in the annexure to the appellant's submissions applies to this case. The respondent's second point of contention raises the application of s 48(1) which provides a broad discretion for the court to extend time for instituting an action "to such an extent, and upon such terms (if any) as the justice of the case may require". There are, however, some limitations upon that broad discretion with which this contention is concerned. Section 48(3)(b) provides that the court must only exercise its broad discretion if one of two criteria are satisfied. The first, which is relevant to this contention, is s 48(3)(b)(i). It applies where:

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

If one of the two criteria is satisfied, the court may extend time if "in all the circumstances of the case it is just" to do so.

59 There is no dispute that the criterion in s48(3)(b)(i) is satisfied.[16] The trial judge {TJ[204]} as well as each member of the Full Court (Kourakis CJ {FC[20]} and Gray J {FC[138], [143]} expressly, and Peek J implicitly) found that the report received by the respondent on 6 December 2007 from Dr Kelly which expressed the opinion that it was unlikely the respondent would at any stage in the future would be able to return to the level of functioning that he had had during much of his adult life[17] was a material fact ascertained by the respondent in the 12 months before bringing his claim.[18]

60 The only issue, therefore, is whether or not the judges of the Full Court erred in the exercise of their discretion in determining that in all the circumstances it was just to extend time. Their Honours were correct in re-exercising the discretion because the trial judge made a number of errors in the exercise of her discretion. The relevant facts are addressed in Gray J's detailed consideration of the facts relevant to the determination of whether it would be just to extend time for the respondent to bring proceedings {FC[131]}.

61 Kourakis CJ quite rightly found {FC[21]} that the trial judge's consideration of the question of prejudice in respect of the vicarious liability claim proceeded on the basis that vicarious liability could only be made out if Bain was expressly contracted, or directed, to perform the particular duties settling the boarders after lights out {TJ[[223], [228]}. As discussed above, that is not the test for the imposition of vicarious liability. Further, *a fortiori*, as discussed above, it is not the test for the application of a non-delegable duty of care. The trial judge was, therefore, also wrong in finding that that "the defendant was put at a marked disadvantage in defending the action by reason of the absence, either by death or ill health, of a number of critical witnesses" {TJ[223]}. Those witnesses were not critical to the issues of vicarious liability and non-delegable duty, in respect of which the material facts (of the abuse and the circumstances of its commission) were all non-contentious. To the extent any further findings were required, they were readily available as a matter of obvious inference from those non-contentious facts.

62 When one considers the proper application of the test, there is little, if any, either applicable presumed or actual prejudice suffered by the appellant by allowing an extension of

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[16] Ground 3 of the Notice of Appeal is: "The Full Court erred in overturning the exercise of discretion by the Honourable Justice Vanstone who had refused to extend the time in which the respondent might commence proceedings against the appellant pursuant to s 48 of the *Limitations of Actions Act 1936*." The factual finding is also not disputed in the appellant's submissions: see {AS[66]-[67]: point (1) in [66] is not subsequently discussed.}

[17] The trial judge found at [204] that only in December 2007 did the respondent fully appreciate the permanency of his illness and its deleterious effect on his capacity to work in the future in the same way as before.

[18] The test of materiality has been described as "extremely modest": *Wright v Donatelli* (1995) 65 SASR 307. See also *Rundle v Salvation Army (South Australia Property Trust)* [2007] NSWSC 443 (appeal dismissed: [2008] NSWCA 347).

time. Any real prejudice, presumed or actual, is the respondent's in establishing the harm he has suffered, for which the appellant is liable. The appellant criticises Kourakis CJ's observation in this respect, and says "it is unprincipled to suggest that these difficulties can be dealt with by taking a 'conservative' approach to the assessment of damages" {AS[90]}. With respect to the Chief Justice, the point could perhaps have been more clearly expressed by observing that the evidence which the appellant says was not available to it impacts, if anything, on damages, not liability, or at least certainly not on the issues of liability by way of vicarious liability or breach of non-delegable duty of care.

63 Such prejudice as there is for the appellant is relevant only to the respondent's "direct" negligence case. It is to this case that the majority of the reasons given by the trial judge for not extending time were relevant. For example, her Honour found that the appellant was incapable of proving what processes it followed in employing Bain, and, in relation to Bain's conduct in the boarding house, what instructions and supervision were provided {TJ[223]}. Further, the trial judge noted the absence of evidence concerning Bain's misconduct at his previous school {TJ[226]}.

64 Even that relatively minimal prejudice, though, should not be given any or significant weight in the balance against extending time. The trial judge found that "the preponderance of the lost evidence and materials occurred since 1996" {TJ[225]}. Her Honour, however, failed to have regard to the fact that it was entirely within the appellant's control to have investigated the abuse committed by Bain as far back as 1996, when the respondent first complained to the appellant, and to have kept its records of that investigation along with all contemporaneous records it then had. As Gray J observed {FC[91]}:

> Prince Alfred College became aware of a potential claim arising out of the abuse perpetrated by Bain against students at the school in 1996. The school at that time had the opportunity to make enquiries about the school's practices in regard to employment in the 1960s. There is no evidence as to what attempts, if any, were made at that time by the school to seek evidence of these matters. It is relevant to note that the Judge found that the majority of the evidence which had been lost had been lost since 1996. The claims being advanced by the plaintiff were serious and, to my mind, it is self-evident that the school must have been aware of the potential for a legal claim being advanced by the plaintiff, and possibly others.

65 Kourakis CJ made similar observations {FC[24]}. The facts that it was within the appellant's power to investigate such a serious matter and retain records in respect of it, but that the appellant failed to do so, are significant factors weighing in favour of the extension of time (see *Ellis v Pell* [2006] NSWSC 109; *Rundle v Salvation Army* [2007] NSWSC 443 (appeal dismissed: [2008] NSWCA 347)).

66 The trial judge held that the delay since 1996 especially weighed against any exercise of discretion in favour of the respondent {TJ[221], see also [216]}. But such criticism ignores the serious deterioration in the respondent's condition since that time. The trial judge accepted that "the abuse has had myriad profound impacts on the plaintiff's development and personality and that it has, in effect, overshadowed and tainted his life" {TJ[101]} and that the plaintiff's mental state significantly deteriorated since 1996, the year in which his son first attended the appellant's school {TJ[32]ff, [90]-[91], [232]}. Indeed Kourakis CJ correctly observed that "a reluctance to bring proceedings is symptomatic of the very injury caused by the wrong alleged against PAC. Professional advice does not immunize victims of sexual abuse against the stress of making a claim" {FC[24]: see further the opinion of Professor McFarlane recorded at FC[145]}.

67 Finally, this is a case in which there has never been any dispute that the appellant's employee committed sexual abuse on a number of children, including the respondent. That there has been a serious wrong is not in dispute. The only question is whether or not the appellant should be liable for it, and that is a matter which, in the exercise of a court's discretion, and particularly given the nature and seriousness of the harm inflicted on the respondent, the respondent should not be precluded from pursuing.

68 The members of the Full Court did not, therefore, err in re-considering the exercise of the discretion to extend time, or in their own application of that discretion.

Part VII: Time estimate

69 The respondent seeks no more than two hours for the presentation of its oral argument.

8th June 2016

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