

PRINCE ALFRED COLLEGE INCORPORATED v ADC (A20/2016)

Court appealed from: Full Court of the Supreme Court of South Australia
[2015] SASCFC 161

Date of judgment: 10 November 2015

Date special leave granted: 15 April 2016

The respondent was enrolled as a boarder in the boarding house of the appellant school in 1962, when aged 12 years. He was sexually assaulted on at least twenty occasions in 1962 by a boarding house master (Bain), who was later convicted for indecent assault in relation to his abuse of the respondent and other former boarders. Prior to being employed by the respondent, Bain had been convicted for gross indecency and he was suspected to have engaged in indecent behaviour towards students at another school that had employed him. There was little evidence as to what, if any, enquiries about Bain's suitability were undertaken by the appellant prior to employing him, or what could have been discovered had proper enquiries been undertaken.

Bain lived in the boarding house and the evidence established that he was the only housemaster regularly rostered to supervise the junior boarders during their bed time routine. He told stories to the juniors in their dormitory after "lights out", and did so while sitting on the respondent's bed. It was in this context that Bain began to sexually abuse the respondent.

Upon learning of the abuse, the appellant dismissed Bain, but did not at that time report the matter to police. The abuse caused the respondent to develop a post-traumatic stress disorder in the early 1980s, which in turn resulted in alcoholism, a breakdown in relationships, an inability to work and self-harming. The initial prognosis for the respondent was positive and he was expected to recover. In the 1990s the respondent received financial assistance from the appellant and reached a settlement with Bain. The appellant did not at that time undertake an investigation of what took place in the 1960s or preserve relevant records. A significant body of evidence has been lost since that time and some potential witnesses have died. In 2007, the respondent received medical advice that he would likely never recover from his post-traumatic stress disorder.

In 2008, the respondent commenced proceedings against the appellant in the Supreme Court of South Australia. The trial Judge (Vanstone J) found the appellant was neither vicariously liable for Bain's abuse of the respondent, nor directly negligent, and, in any event, her Honour would have declined to extend the time for the respondent to bring proceedings.

The respondent's appeal to the Full Court (Kourakis CJ, Gray and Peek JJ) was successful on the ground that the appellant was vicariously liable for Bain's abuse. The Court found that the trial Judge had erred in failing to find that Bain had at least ostensible authority to supervise and discipline the boarders and that this included supervision of showering and other preparations for bed and telling stories to the boarders to settle them into sleep. The power or authority which Bain used to accomplish his criminal purpose could be said to have been

conferred by the enterprise of running a school and to be characteristic of that type of enterprise in the community. Accordingly, it could be seen that the appellant's enterprise model of trust rather than supervision materially increased the risk of sexual assault and hence the harm that eventuated.

Bain's practice of inviting groups of boys to his room to watch television established that Bain, under cover of his (at least ostensible) authority, "groomed" the respondent 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. Having regard to the cumulative effect of these matters, the Court considered that vicarious liability was established.

The Full Court also allowed the appeal against the trial Judge's exercise of discretion to refuse an extension of time within which to bring the proceedings. The Court considered that the trial Judge's erroneously narrow circumscription of the scope of Bain's duties affected the weight given to the prejudice suffered by the respondent and therefore vitiated the exercise of the Judge's discretion. The receipt of a medical report in 2007 which gave a bleak prognosis was a material fact ascertained by the respondent in the 12 months before bringing his claim. That enlivened a discretion to extend the time in which to bring the action pursuant to s 48 of the *Limitation of Actions Act 1936 (SA)*.

The grounds of appeal are:

- The Full Court erred in finding that the school was vicariously liable for the unauthorised sexual molestation of the respondent by an assistant boarding housemaster during 1962;
- 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 school pursuant to s 48 of the *Limitation of Actions Act (SA) 1936*.

The respondent has filed a Notice of Contention which submits that the appellant should be liable on the basis that the sexual abuse by its employee breached its non-delegable duty of care to the respondent.