



HIGH COURT OF AUSTRALIA

5 October 2016

PRINCE ALFRED COLLEGE INCORPORATED v ADC [2016] HCA 37

Today the High Court unanimously allowed an appeal from the Full Court of the Supreme Court of South Australia. It held that the respondent should not have been granted an extension of time under s 48(3) of the *Limitation of Actions Act 1936* (SA) ("the Limitations Act") to bring his proceeding.

In 1962, the respondent was a 12 year old boarder at the Prince Alfred College ("the PAC"). He was sexually abused by Bain, a housemaster employed by the PAC. The first two instances of abuse occurred on occasions when Bain was telling a story in the respondent's dormitory after lights out. Thereafter, the respondent was molested by Bain on about 20 occasions in Bain's room and again when they spent a night together at a house. The respondent's evidence was that prefects supervised the daily activities of the junior boys, such as study, showering and lights out, but that Bain was often present during shower time and often told stories in the dormitory after lights out. The respondent said that other housemasters did not supervise lights out or enter his dormitory. The respondent suffered symptoms of psychological injury from the early 1980s onwards. In 1997, he decided not to sue the PAC and accepted its offer to pay his medical and legal fees to date and his son's school fees. The respondent commenced civil proceedings against Bain, and reached a settlement in 1999. The respondent's symptoms persisted and he sought further financial assistance from the PAC in 2004 and 2005, without success. In 2005, his psychologist said that he would not work full-time again.

The respondent brought proceedings against the PAC in the Supreme Court of South Australia in December 2008. He alleged that the PAC was liable in damages to him for breach of a non-delegable duty of care and breach of its duty of care, and that the PAC was vicariously liable for the wrongful acts of Bain. Due to the passage of time, the respondent required an extension of time to bring proceedings. Section 48(3) of the Limitations Act permits, if certain preconditions are met, a court to extend time at its discretion if the respondent shows that it was just in all the circumstances for it to do so. This involves showing that the PAC would not be significantly prejudiced as a result of the exercise of the court's discretion. The primary judge dismissed the respondent's case regarding liability, and refused to grant an extension of time due to the prejudice suffered by the PAC by reason of the "extraordinary" delay in commencing proceedings. Her Honour considered that the PAC was disadvantaged due to the absence or death of critical witnesses, and the loss of documentary evidence. On appeal, each member of the Full Court held that the PAC was vicariously liable and an extension of time should have been granted.

By grant of special leave, the PAC appealed to the High Court. Unanimously, the Court held that the primary judge was correct not to have granted an extension of time. The respondent's decision in 1997 not to commence proceedings was significant in this regard. A majority of the High Court considered the correct approach to be taken to the question of the PAC's vicarious liability for the acts of Bain. In cases of this kind, attention must be given to any special role that the employer has assigned to the employee and the position in which the employee is thereby placed vis-à-vis the victim. Relevant features in this regard include authority, power, trust, control and the ability to achieve intimacy with the victim. However, the identification of the correct approach also showed that a determination could not be made as to the PAC's liability in this case, because the length of the delay and consequent deficiencies in the evidence placed the PAC in such a position that it could not properly defend the claims brought against it. That was another reason why the extension of time could not be granted and it was also the reason why the primary judge should not have proceeded to determine liability. The High Court allowed the appeal.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*