HIGH COURT OF AUSTRALIA

FRENCH CJ,
KIEFEL, BELL, GAGELER, KEANE, NETTLE AND GORDON JJ

PRINCE ALFRED COLLEGE INCORPORATED APPELLANT

AND

ADC RESPONDENT

Prince Alfred College Incorporated v ADC
[2016] HCA 37
5 October 2016
A20/2016

ORDER

1. *Appeal allowed with costs.*

2. *Set aside the order of the Full Court of the Supreme Court of South Australia made on 10 November 2015 and the order of that Court made on 24 March 2016, and in their place order that the appeal be dismissed with costs.*

On appeal from the Supreme Court of South Australia

Representation

M C Livesey QC with B J Doyle and K G Handshin for the appellant (instructed by Wallmans Lawyers)

B W Walker SC with E Holmes for the respondent (instructed by Astrid Macleod Solicitor)

CATCHWORDS

Prince Alfred College Incorporated v ADC

Limitation of actions – Extension or postponement of limitation periods – Extension of time in personal injury matters – Principles upon which discretion exercised – Where extraordinary delay – Where deficiencies in evidence due to passage of time – Where absence or death of witnesses – Where loss of documentary evidence – Where earlier decision by claimant not to institute proceedings – Whether just in all the circumstances to grant extension of time.

Tort – Vicarious liability – Course of employment – Where boarding school employed housemaster – Where housemaster sexually abused boarder – Consideration of correct approach to vicarious liability of employer for intentional criminal acts of employee – Whether employment gave "occasion" for wrongdoing – Whether employee placed in special position vis-à-vis victim – Whether features of special position warrant finding of liability.

Procedure – Courts and judges generally – Determination of issues – Whether appropriate for trial judge to determine all litigated issues.

Words and phrases – "authority", "close connection", "control", "course or scope of employment", "extension of time", "extraordinary delay", "fair and just", "intimacy", "occasion", "opportunity", "power", "special features", "special position", "trust", "vicarious liability".

Limitation of Actions Act 1936 (SA), s 48.

1 FRENCH CJ, KIEFEL, BELL, KEANE AND NETTLE JJ. In 1962 the respondent was sexually abused by one Dean Bain. The respondent was then 12 years old and a boarder at the Prince Alfred College ("the PAC"). Bain was employed by the PAC as a housemaster. In December 2008 the respondent brought proceedings against the PAC in the Supreme Court of South Australia.

2 In those proceedings the respondent alleged that the PAC was liable in damages to him on three alternative bases: that it breached its non-delegable duty of care that it owed him; that it was negligent and breached its duty of care; and that even if the PAC was not itself at fault, it was vicariously liable for the wrongful acts of its employee, Bain.

3 This Court considered issues of this kind in *New South Wales v Lepore*[1], a case involving the sexual abuse of a child by a teacher at a school. The Court held, by a majority, that a school's non-delegable duty of care with respect to a pupil did not extend to the intentional criminal conduct of a teacher, in the nature of sexual abuse[2]. The question of the school's vicarious liability for those acts was also considered, but no majority view emerged from the judgments.

4 The respondent required an extension of time within which to bring the proceedings. Section 48 of the *Limitation of Actions Act* 1936 (SA) ("the Limitations Act") permits a court to extend the time prescribed for instituting an action. The power is discretionary. The respondent was required to show that it was just in all the circumstances for the court to extend the limitation period[3] and that the PAC would not be significantly prejudiced if the discretion was exercised in his favour[4].

5 The primary judge, Vanstone J, dismissed the respondent's claims. Her Honour found that no case for the PAC's liability had been established on any of

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1 (2003) 212 CLR 511; [2003] HCA 4.

2 *New South Wales v Lepore* (2003) 212 CLR 511 at 534-535 [36]-[39], 598-601 [254]-[263], 609-610 [292]-[295], 624 [340].

3 *Limitation of Actions Act* 1936 (SA), s 48(3)(b).

4 *Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 541; [1996] HCA 25.

the bases claimed[5]. Her Honour then said that she would have refused an extension of time on the basis that the effluxion of time was so great that the PAC would be prejudiced in its attempts to defend the claims[6].

6 Each of the members of the Full Court (Kourakis CJ, Gray and Peek JJ) allowed the appeal from the primary judge's decision as to liability on the basis that the PAC was vicariously liable and held that an extension of time should have been granted[7]. Gray J would also have found the PAC in breach of its duty of care.

7 The PAC appeals from that decision. The respondent, by notice of contention, seeks to argue that the Full Court should have found that the PAC breached its duty of care to the respondent and that the issue of non-delegable duty of care was wrongly decided in *New South Wales v Lepore*.

8 The appeal must be allowed on the basis that the Full Court erred in holding that the respondent should have been granted an extension of time, under the Limitations Act, within which to bring his proceedings against the PAC. The extraordinary delay of over 11 years between the time of an apparent resolution of any claim against the PAC and the commencement of proceedings was not justified by the circumstances of this case and meant that a fair trial on the merits was no longer possible.

9 The Court generally encourages primary judges to deal with all issues, even if one is dispositive, so that any appeal may be final. However, in this case, it was inappropriate for the primary judge to determine the question of liability due to her Honour's finding that an extension of time should not be granted.

10 For the same reason, this Court, in upholding the primary judge's conclusion as to the extension of time, could not determine the question of liability for itself. Nevertheless, the principles governing the liability of an employer for the intentional criminal act of an employee are relevant to the question of extension of time. This is because it is within the framework of those principles that the possibility of a fair trial on the merits, relevant to the extension

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5 *A, DC v Prince Alfred College Incorporated* [2015] SASC 12 at [108], [138], [151], [166], [177]-[180].

6 *A, DC v Prince Alfred College Incorporated* [2015] SASC 12 at [229]-[231].

7 *A, DC v Prince Alfred College Inc* [2015] SASCFC 161.

question, must be considered. Moreover, as a result of the differing views expressed in the judgments in this Court in *New South Wales v Lepore*, there is a need for some guidance to be provided by this Court to intermediate appellate courts so as to reduce the risk of unnecessary appellate processes arising out of the existing uncertainties.

The respondent's evidence

11 It was not in dispute that the respondent had been subjected to abuse by Bain. Bain was convicted in 2007 of two counts of indecent assault against the respondent and of other offences involving two other boarders at the PAC. The primary judge found that the abuse of the respondent continued for some months.

12 The respondent gave evidence that there was a senior housemaster and three housemasters, of which Bain was one, in charge of the three dormitories in the boarding house of the PAC in which the respondent resided. He said that the housemasters were present during meal times. The prefects supervised the day-to-day activities of the junior boys including study, showering and "lights out" and disciplined them when rules were broken. The prefects could, if necessary, send boys to the senior housemaster for discipline. The respondent said that Bain was rostered on two to three times a week and was often around during shower time. He often told stories to the boys in the dormitory after lights out. The respondent said that the other housemasters did not supervise lights out and did not come into his dormitory.

13 The respondent gave evidence that the abuse commenced on an occasion when Bain was telling a story after lights out. Bain placed the respondent's hand on Bain's penis. The second incident occurred while Bain was telling a story after lights out when he fondled the respondent's genitals under the bedding. Thereafter the respondent attended at Bain's room at Bain's request on about 20 occasions and was there molested by Bain. On another occasion the respondent said that he was taken by Bain to a house where they spent the night together, during which Bain molested him again.

14 Bain was dismissed from his employment shortly after the PAC came to hear of the abuse of the respondent. The boarders were told of the dismissal and told not to talk about it outside of the school. The respondent was told by the school chaplain that he could talk to him if he needed help.

15 The respondent suffered symptoms of psychological injury and they continued, intensifying in their effects from time to time. After marrying and having children the respondent described feeling an abnormal depth of fear for

his children's welfare. By the early 1980s he was suffering anxiety and was drinking heavily. In the 1990s he started attending "Alcoholics Anonymous" meetings.

16 Up until 1996 the respondent was otherwise coping with his family life and his businesses, which were successful. In 1996 the respondent's son began attending the PAC. Attending sports days and functions at the PAC triggered flashbacks and dissociation. The respondent felt "panicky" and suffered nightmares. He consulted a psychologist. The expert evidence was that he had been suffering from post-traumatic stress disorder. The primary judge found that it had been undiagnosed from the early onset of the symptoms. The respondent's condition was made worse by hearing Bain's voice on the radio in early 1997. He resumed drinking.

17 In March and April 1997 the respondent sought legal advice. During meetings with his lawyers the need for an extension of time, in which to bring a claim for damages against the PAC, was discussed. The respondent was advised of the risk that time would not be extended, of the costs of litigation, and that his chances of success against the PAC were less than 50 per cent. The respondent decided not to sue the PAC at that time. An important factor in this decision was that he considered it had done the right thing by dismissing Bain.

18 At a meeting in May 1997 with representatives of the PAC the respondent advised them that it was not his intention to sue the PAC, but that he was seeking its acceptance of what had happened as well as financial assistance. In September 1997, there was a further meeting between the respondent, his lawyers and representatives of the school. The PAC offered to pay the respondent's 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 accepted this offer.

19 In August 1997, the respondent commenced civil proceedings against Bain. In September 1999, the respondent reached a settlement with Bain pursuant to which Bain agreed to pay $15,000 to the respondent.

20 By early 2002 the respondent felt very debilitated. He had attempted self-harm. He was admitted to a psychiatric clinic for a month between 11 June and 9 July 2002 and he commenced seeing a psychiatrist. He was readmitted in August 2003, suffering from suicidal thoughts.

21 In late 2004 the respondent stopped working. He was not coping and his marriage was deteriorating. He contacted the PAC again, seeking further

financial assistance, such as by way of a wage or pension, but he received no offer. He was readmitted to a psychiatric clinic. After discharge his symptoms became more severe.

22 In 2005 the psychologist whom he had been seeing expressed the opinion that the respondent would not work full-time again. His business failed and he was required to sell his family home. In April 2005 he asked the PAC for $1 million and a refund of his school fees on account of his desperate financial circumstances. The PAC did not accede to this request.

23 The respondent engaged in part-time work until September 2011. He was readmitted to the psychiatric clinic on a number of occasions between 2005 and 2014.

24 By the time the proceedings were commenced in December 2008 a number of persons who may have been witnesses in the proceedings had died. They included the persons who had been the headmaster, the senior master and the school chaplain of the PAC in 1962. The senior housemaster was ill and unable to give evidence. The psychologist whom the respondent first consulted had destroyed his notes.

Liability – the decisions below

25 The primary judge held[8], by reference to *New South Wales v Lepore*, that the non-delegable duty of care which the PAC owed to the respondent did not extend to a duty to protect him against the intentional criminal conduct of Bain, in the absence of fault of its own.

26 The respondent's case that the PAC breached its duty of care to him had three limbs: it failed to make proper enquiries before employing Bain; it failed to supervise Bain; and it did not respond appropriately when it learned of the abuse that the respondent had suffered. The primary judge held[9] that this case was not made out.

27 Her Honour was not satisfied that any enquiry which the PAC could have made of Bain's referees would have resulted in information about rumours

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8 *A, DC v Prince Alfred College Incorporated* [2015] SASC 12 at [108].

9 *A, DC v Prince Alfred College Incorporated* [2015] SASC 12 at [138], [151], [166].

concerning his conduct at a previous school being provided[10]. It had not been established that the PAC could have obtained information about his criminal record at that time. Moreover, there was no practice of schools undertaking criminal record checks at the time[11]. The primary judge was unable to find on the evidence before her that the systems in place, or the level of supervision of housemasters, were so deficient as to amount to a breach of duty. It was found that it would have been wholly impractical to prevent a housemaster being alone with a boarder[12]. The evidence did not permit the primary judge to make sufficient findings to determine whether the PAC breached its duty to the respondent in its response to learning of Bain's conduct[13].

28 The primary judge was unable to make findings relevant to the question of vicarious liability because of the state of the evidence. There was insufficient evidence of a reliable nature about Bain's designated role upon which to base a conclusion that what he did was done in the course of employment, her Honour explained[14]. Any conclusion about whether the activities generally undertaken by Bain in the dormitories after lights out were within the role assigned to him by the PAC was necessarily speculative[15].

29 Nevertheless, on the assumption that these activities were part of Bain's assigned role, her Honour concluded that 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"[16].

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10 *A, DC v Prince Alfred College Incorporated* [2015] SASC 12 at [133].

11 *A, DC v Prince Alfred College Incorporated* [2015] SASC 12 at [134].

12 *A, DC v Prince Alfred College Incorporated* [2015] SASC 12 at [151].

13 *A, DC v Prince Alfred College Incorporated* [2015] SASC 12 at [166].

14 *A, DC v Prince Alfred College Incorporated* [2015] SASC 12 at [174].

15 *A, DC v Prince Alfred College Incorporated* [2015] SASC 12 at [177].

16 *A, DC v Prince Alfred College Incorporated* [2015] SASC 12 at [179].

The PAC did not, by any requirement of Bain, "create or enhance the risk of Bain sexually abusing the [respondent]"[17].

30 In the Full Court, Gray J would have allowed the appeal on the ground that the PAC had breached its duty of care to the respondent in each of the respects alleged[18]. Although the primary judge had pointed to a dearth of evidence as to these matters, his Honour was unable to accept that the PAC could not have done more.

31 Each member of the Full Court found the PAC to have been vicariously liable, but the approaches taken by their Honours differed from that taken by the primary judge and differed as between themselves.

32 In the view of Kourakis CJ, the primary judge had taken an unduly narrow approach to vicarious liability, namely to enquire as to whether Bain had been specifically directed to settle the boarders after lights out. The legally relevant question was a wider one. It was whether those actions were within the scope of Bain's employment duties and whether the sexual abuse took place in the ostensible performance of those duties[19].

33 Gray J surveyed the judgments in *New South Wales v Lepore*, which, in turn, considered a number of Canadian and United Kingdom authorities. His Honour observed[20] that Bain had consistent access to the boys and was placed by the school in a position of authority, trust and intimacy in relation to them. It was foreseeable, his Honour considered[21], that boarding house staff, to whom the PAC had delegated its duty of care, were in a position of trust and able to take advantage of boarders. His Honour's conclusion of vicarious liability therefore seems to have been based upon a breach of duty of care rather than whether the PAC, regardless of the fact that it was not at fault, should be liable for Bain's acts.

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17 *A, DC v Prince Alfred College Incorporated* [2015] SASC 12 at [179].

18 *A, DC v Prince Alfred College Inc* [2015] SASCFC 161 at [92], [100], [106], [149].

19 *A, DC v Prince Alfred College Inc* [2015] SASCFC 161 at [4].

20 *A, DC v Prince Alfred College Inc* [2015] SASCFC 161 at [128].

21 *A, DC v Prince Alfred College Inc* [2015] SASCFC 161 at [129].

34 Peek J undertook an even more detailed analysis of "[t]he developing doctrine of vicarious liability in Australia", the differing judgments in *New South Wales v Lepore*, the importance of the relationship between the boarders and persons having a quasi-parental role to the question of vicarious liability, and developments in English case law. His Honour's resolution of the issue of vicarious liability focused upon the combination of power, intimacy and subservience present in the relationship. In his Honour's view the abuse was "so closely connected" to the employment "as to make it just to impose vicarious liability"[22]. The sexual abuse was "inextricably interwoven" with the master's carrying out of his duties so as to render it "fair and just to impose vicarious liability"[23].

The notice of contention

35 The respondent submits that the PAC should have been found liable in negligence for the reasons given by Gray J. However, his Honour identified no error in the primary judge's reasoning on the available evidence. His Honour's view, that the PAC could have done better in all three respects identified by the respondent, was not based on any evidence and was purely speculative.

36 So far as concerns the PAC's non-delegable duty of care owed to the respondent, the respondent contends that *New South Wales v Lepore* was wrongly decided. However, submissions for the respondent do not address the matters required to invoke the authority of this Court to reconsider a previous decision[24]. They are addressed to arguments which were rejected by the majority in *New South Wales v Lepore*.

37 The only issue necessary to be considered with respect to liability is therefore vicarious liability.

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22 *A, DC v Prince Alfred College Inc* [2015] SASCFC 161 at [261].

23 *A, DC v Prince Alfred College Inc* [2015] SASCFC 161 at [261].

24 *Queensland v The Commonwealth* (1977) 139 CLR 585; [1977] HCA 60; *John v Federal Commissioner of Taxation* (1989) 166 CLR 417; [1989] HCA 5; *Wurridjal v The Commonwealth* (2009) 237 CLR 309; [2009] HCA 2; *Beckett v New South Wales* (2013) 248 CLR 432; [2013] HCA 17.

Vicarious liability

38 The judgments of the courts below in this case reflect the divergent views about the approach to be taken to the question of vicarious liability both generally and in cases of the kind here in question. Differing views were also expressed in *New South Wales v Lepore*. *New South Wales v Lepore* itself was decided against the background of developments in Canada and the United Kingdom, the catalyst for which appears to have been cases of this kind – concerning the sexual abuse of children in educational, residential or care facilities by persons who were placed in special positions with respect to the children. Since *New South Wales v Lepore* there have been further developments in each of these jurisdictions. It is therefore understandable that trial courts and intermediate appellate courts in Australia are left in an uncertain position about the approach which should be taken.

A general basis for vicarious liability?

39 Vicarious liability is imposed despite the employer not itself being at fault. Common law courts have struggled to identify a coherent basis for identifying the circumstances in which an employer should be held vicariously liable for negligent acts of an employee, let alone for intentional, criminal acts. There have been concerns about imposing an undue burden on employers who are not themselves at fault, and on their business enterprises. On the other hand, the circumstances of some cases have caused judges to exclaim that it would be "shocking" if the defendant employer were not held liable for the act of the employee[25]. No doubt largely because of these tensions vicarious liability has been regarded as an unstable principle, one for which a "fully satisfactory rationale for the imposition of vicarious liability" has been "slow to appear in the case law"[26].

40 Vicarious liability has not to date been regarded as a form of absolute liability, although policy choices, and the questions posed for the determination of vicarious liability, can lead in that direction. The traditional method of the common law of confining liability, in order to reflect some balance between competing interests, is the requirement that the employee's wrongful act be

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25 *Lloyd v Grace, Smith & Co* [1912] AC 716 at 738 per Lord Macnaghten.

26 *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21 at 37 [35]; [2001] HCA 44. See also *Sweeney v Boylan Nominees Pty Ltd* (2006) 226 CLR 161 at 166 [11]; [2006] HCA 19.

committed in the course or scope of employment[27]. At the least this provides an objective, rational basis for liability and for its parameters.

41 Difficulties, however, often attend an enquiry as to whether an act can be said to be in the course or scope of employment. It is to some extent conclusionary and offers little guidance as to how to approach novel cases. It has the added disadvantage that it may be confused with its use in statutes, where it has a different operation. In statutes providing compensation for injury suffered by employees it operates as a limit upon a right to compensation[28]; in the common law it is an essential requirement for vicarious liability. But it has not yet been suggested that it should be rejected. It remains a touchstone for liability.

42 Long ago, Sir John Salmond proposed tests for determining whether an act was in the course of employment[29]. They were whether the act (a) is authorised by the employer; or (b) is an unauthorised mode of doing some other act authorised by the employer. He went on further to explain that an employer would also be liable for unauthorised acts provided that they are "so connected" with authorised acts that they may be regarded as modes, although improper modes, of doing them[30].

43 In recent decisions of the courts of Canada and the United Kingdom this explanation appears to have provided a springboard for the development of tests which have regard, more generally, to the connection between the wrongful act and the employment and, in the United Kingdom, to what a judge determines to be fair and just. As appears from those decisions, the new tests of connection were devised not only to provide an explanation for cases of the kind to which they were initially addressed – involving the sexual abuse of children in educational, residential or care facilities by employees having special positions with respect to the children – but also to serve as a basis for vicarious liability which might apply more generally.

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27 This is not confined to the common law: see Markesinis and Unberath, *The German Law of Torts: A Comparative Treatise*, 4th ed (2002) at 696 as to the equivalent "in the exercise of the function assigned to him".

28 See eg *Safety, Rehabilitation and Compensation Act* 1988 (Cth), ss 5A, 6, 6A.

29 Salmond, *The Law of Torts*, (1907) at 83.

30 Salmond, *The Law of Torts*, (1907) at 83-84.

44 The identification of a general principle for vicarious liability has, however, eluded the common law for a long time. In *EB v Order of the Oblates of Mary Immaculate in the Province of British Columbia*, Binnie J counselled[31] that:

> "Overly frequent resort to general principles opens the door to subjective judicial evaluations that may promote uncertainty and litigation at the expense of predictability and settlement."

45 Of course, if a general principle favours the imposition of liability it may be said to provide some level of certainty. And, if a general principle provides that liability is to depend upon a primary judge's assessment of what is fair and just, the determination of liability may be rendered easier, even predictable. But principles of that kind depend upon policy choices and the allocation of risk, which are matters upon which minds may differ. They do not reflect the current state of the law in Australia and the balance sought to be achieved by it in the imposition of vicarious liability.

46 Since the search for a more acceptable general basis for liability has thus far eluded the common law of Australia, it is as well for the present to continue with the orthodox route of considering whether the approach taken in decided cases furnishes a solution to further cases as they arise. This has the advantage of consistency in what might, at some time in the future, develop into principle. And it has the advantage of being likely to identify factors which point toward liability and by that means provide explanation and guidance for future litigation.

47 Such a process commences with the identification of features of the employment role in decided cases which, although they may be dissimilar in many factual respects, explain why vicarious liability should or should not be imposed.

Earlier English and Australian authorities

48 The decision of the House of Lords in *Lloyd v Grace, Smith & Co*[32] has been referred to with approval on many occasions. It holds an important place in the development of the law relating to vicarious liability because it corrected the

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31 *EB v Order of the Oblates of Mary Immaculate in the Province of British Columbia* [2005] 3 SCR 45 at 70 [41].

32 [1912] AC 716.

view, then current, that there should be no recovery for an employee's wrongful act unless it is undertaken in furtherance of the employer's interests. The case is no less important for the features it identifies in relation to the employee's role, and thus whether certain intentional acts of an employee warrant the imposition of liability on the employer. The question then is, what are these features?

49 The employee in *Lloyd v Grace, Smith & Co* was a managing clerk who conducted the conveyancing business of the defendant, a firm of solicitors, unsupervised. The plaintiff sought advice regarding two properties she owned. She was introduced to the managing clerk for that purpose and left to his attentions. The clerk induced the plaintiff to give him the deeds to the properties for the purpose of their sale and to sign two documents. The documents conveyed the properties to him. The firm was held liable for his conduct because it took place in the course of his employment.

50 Earl Loreburn spoke of the clerk having been entrusted with the client's business as a representative of the firm[33] and Lord Shaw of Dunfermline of the apparent authority by which he was able to commit the fraud[34]. Lord Macnaghten, with whom Lord Atkinson agreed, pointed out[35] that the plaintiff thought the clerk was a member of the firm and implied that she was not to know the limits of his authority. His Lordship observed[36] that the partner of the firm who had appointed the employee "put this rogue in his own place and clothed him with his own authority".

51 *Morris v C W Martin & Sons Ltd*[37] has been described as a classic example of vicarious liability for intentional wrongdoing[38] even though most of the judgments did not deal with that topic and decided the matter on the basis of bailment. The owner of a mink fur sent it to a furrier. With her permission the furrier delivered it to the defendants for cleaning. The employee who was given

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33 *Lloyd v Grace, Smith & Co* [1912] AC 716 at 724.

34 *Lloyd v Grace, Smith & Co* [1912] AC 716 at 740.

35 *Lloyd v Grace, Smith & Co* [1912] AC 716 at 728, 738-739.

36 *Lloyd v Grace, Smith & Co* [1912] AC 716 at 738.

37 [1966] 1 QB 716.

38 *Lister v Hesley Hall Ltd* [2002] 1 AC 215 at 225 [19] per Lord Steyn.

charge of it for that purpose stole it. The Court of Appeal held the employer liable. Diplock LJ applied[39] "the principle laid down in *Lloyd v Grace, Smith & Co*" to the facts of that case and said:

> "They [the employer] put Morrissey as their agent in their place to clean the fur and to take charge of it while doing so. The manner in which he conducted himself in doing that work was to convert it. What he was doing, albeit dishonestly, he was doing in the scope or course of his employment".

52 Diplock LJ made it plain that, for an act to be said to be in the course of employment, something more was necessary than that the employment merely create an opportunity for the wrongful act to take place[40]. This is a view which has been consistently applied[41]. It could have been said of the facts of *Deatons Pty Ltd v Flew*[42], referred to below, that more was required than that the barmaid had access to glasses which could be thrown at customers. And, as will be seen, some Canadian cases concerning sexual abuse show that more is necessary for liability than that the employment puts an employee in a place where children are present. These are cases where the employment provides an opportunity for the act to occur, but the act cannot be said to be in the course or scope of the employment.

53 *Lloyd v Grace, Smith & Co* was referred to with approval by Dixon J in *Deatons Pty Ltd v Flew*[43], a case in which it was sought to render the employer liable for an assault by an employee. On the plaintiff's version of events, which had been accepted by a jury, he was the victim of an inexplicable and unprovoked attack by a barmaid when he asked to speak to the licensee. She

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39 *Morris v C W Martin & Sons Ltd* [1966] 1 QB 716 at 736-737.

40 *Morris v C W Martin & Sons Ltd* [1966] 1 QB 716 at 737.

41 *Jacobi v Griffiths* [1999] 2 SCR 570 at 598 [45], 600 [51], 619 [81] per Binnie J; *Lister v Hesley Hall Ltd* [2002] 1 AC 215 at 229 [25], 235 [45], 237 [50], 241 [59], 244 [65], 247 [75], 249-250 [81]-[82]; *New South Wales v Lepore* (2003) 212 CLR 511 at 546 [74] per Gleeson CJ.

42 (1949) 79 CLR 370; [1949] HCA 60.

43 (1949) 79 CLR 370.

responded by throwing a glass at him and he suffered the loss of the sight of an eye.

54 Dixon J held[44] that the barmaid could not be said to have acted in the course of her employment in taking that action. Her actions were entirely unconnected with her employment. His Honour described[45] the barmaid's act as one of personal "passion and resentment" not done in furtherance of the employer's interests, under his express or implied authority or as an incident to, or in consequence of, anything she was employed to do. She did not throw the beer or glass in the course of maintaining discipline or order, for which she was not in any event authorised.

55 More relevantly, for present purposes, his Honour said[46], by reference to *Lloyd v Grace, Smith & Co*, that it was not one of those acts for which an employer may be liable because they were 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".

56 Although the term "authority" is used in *Lloyd v Grace, Smith & Co* and *Morris v C W Martin & Sons Ltd*, it was not just ostensible authority which was decisive of those cases. Fundamentally, those cases were decided by reference to the position in which the employer had placed the employee vis-à-vis the victim of the wrongful act, as the passage from Diplock LJ set out above makes plain. In the words of Dixon J, the position is one to which the apparent performance of the employment "gives occasion" for the wrongful act[47]. In *Lloyd v Grace, Smith & Co* the position of the clerk, from the client's perspective, was indistinguishable from that of a partner of the firm. Because of what the clerk's position conveyed to the client, the clerk was able to secure the client's trust and confidence so that she unhesitatingly complied with his requests with respect to the deeds and the documents. In *Morris v C W Martin & Sons* the position of the employee was again one of trust, but is perhaps more simply explained by reference to the level of control he was given over the property.

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44 *Deatons Pty Ltd v Flew* (1949) 79 CLR 370 at 380.

45 *Deatons Pty Ltd v Flew* (1949) 79 CLR 370 at 381-382.

46 *Deatons Pty Ltd v Flew* (1949) 79 CLR 370 at 381.

47 *Deatons Pty Ltd v Flew* (1949) 79 CLR 370 at 381.

57 As will be seen, in cases involving the sexual abuse of children at educational, residential or care facilities, Canadian courts have taken an approach to vicarious liability which, although expressed in terms of an "enterprise risk theory", emphasises features analogous to the considerations which proved determinative in *Lloyd v Grace, Smith & Co*.

Canada

58 *Bazley v Curry*[48] involved sexual abuse by an employee who, unknown to a children's foundation which conducted residential care facilities for the treatment of emotionally troubled children, was a paedophile. His role with respect to the children was effectively that of substitute parent. There could therefore be little doubt about the power and control which he was able to exert over the children in his charge. However, in finding the employer liable, the Supreme Court of Canada did not focus on these features as determinative of liability, but attempted to state a wider, more general, theory.

59 The theory of liability stated in *Bazley v Curry* is that it is appropriate to impose liability where there is "a significant connection between the creation or enhancement of a risk and the wrong that accrues therefrom"[49]. The requirement of connection might be based on what had been said by Salmond[50], as referred to above. However, the risk-allocation aspect of the theory is based largely on considerations of policy, in particular that an employer should be liable for a risk that its business enterprise has created or enhanced. Such policy considerations have found no real support in Australia or the United Kingdom.

60 The "enterprise risk theory" was not disapproved in later cases in Canada. It was explained. In *Jacobi v Griffiths*, which was handed down the same day as *Bazley v Curry*, Binnie J said[51] that the theory was "an effort to explain the existing case law, not to provide a basis for its rejection". And in later cases involving vicarious liability for sexual abuse the question of the connection between the abuse and the employment, or the enterprise, has been approached

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48 [1999] 2 SCR 534.

49 *Bazley v Curry* [1999] 2 SCR 534 at 559 [41] (emphasis omitted).

50 As suggested by Lord Steyn in *Lister v Hesley Hall Ltd* [2002] 1 AC 215 at 224 [15].

51 *Jacobi v Griffiths* [1999] 2 SCR 570 at 610 [65] (emphasis omitted).

by reference to factors such as the authority and the power that the employee was able to exercise.

61 The employer in *Jacobi v Griffiths* was a club which offered group activities for children at its premises and employed a program director for that purpose. He sexually abused children on occasions at his home, outside working hours. Binnie J, writing for the majority (L'Heureux-Dubé, McLachlin and Bastarache JJ dissenting), distinguished the two cases on their facts. *Bazley v Curry*, his Honour explained, involved persons having authority and power. By contrast, the program director had "no job-created authority to insinuate himself into the intimate lives of these children"[52]. The club did not confer any meaningful "power" over the children[53]. The activities for which he was engaged took place as group activities in a public place, not at his home[54].

62 In two further cases, *John Doe v Bennett*[55] and *EB v Order of the Oblates of Mary Immaculate in the Province of British Columbia*[56], a similar approach was taken. In the former, which involved the actions of a priest, the Court proceeded on the footing that the enquiry is one of authority and that central to that enquiry lies the question of the power and control given to the employee[57]. In the latter case, which involved the acts of a man employed as a baker, boat-driver and odd-job man at a school, Binnie J identified[58] the "critical inquiry" as concerning the powers, duties and responsibilities conferred on the employee. His Honour concluded[59] that whilst the employment relationship

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52 *Jacobi v Griffiths* [1999] 2 SCR 570 at 597 [43].

53 *Jacobi v Griffiths* [1999] 2 SCR 570 at 621 [83].

54 *Jacobi v Griffiths* [1999] 2 SCR 570 at 596-597 [43].

55 [2004] 1 SCR 436.

56 [2005] 3 SCR 45.

57 *John Doe v Bennett* [2004] 1 SCR 436 at 446 [21].

58 *EB v Order of the Oblates of Mary Immaculate in the Province of British Columbia* [2005] 3 SCR 45 at 51-52 [2].

59 *EB v Order of the Oblates of Mary Immaculate in the Province of British Columbia* [2005] 3 SCR 45 at 75-77 [48].

provided the employee with an opportunity to commit the wrongful acts, his assigned role fell short of what is required to attract vicarious liability. His employment did not put him in a position of "power, trust or intimacy with respect to the children"[60].

The United Kingdom

63 In *Lister v Hesley Hall Ltd*, the abuser was a warden of a boarding house where pupils of the school, conducted by his employer, resided. The boarding house was intended to be the boys' home and the warden's role was one of complete supervision. As might be expected, it was found that his conduct in that role enabled him to establish control over the boys that he abused.

64 Lord Steyn referred to *Lloyd v Grace, Smith & Co* and *Morris v C W Martin & Sons Ltd* as cases of high authority but not, it would appear, as offering guidance. His Lordship considered the decisive factor in the former to be that the client had been invited by the firm to deal with its managing clerk[61] and in the latter that the employee had been given custody of the fur[62]. His Lordship did not identify the factors as furnishing a solution to whether the abuse could be said to have occurred in the course of employment, as might have been done. Rather, Lord Steyn appears to have considered that cases after *Lloyd v Grace, Smith & Co* necessarily focused "on the connection between the nature of the employment and the tort of the employee"[63]. The focus shifted from the features of decided cases to a search for a more general principle.

65 The cases referred to by Lord Steyn in this regard (aside from *Morris v C W Martin & Sons Ltd*) did not involve an employee having any special authority or control. They may be seen as being far removed from the circumstance where an employee is placed in such a position as to enable the commission of a wrongful act. One case involved a driver deviating from his authorised route when conveying passengers to a specified destination[64]; the

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60 *EB v Order of the Oblates of Mary Immaculate in the Province of British Columbia* [2005] 3 SCR 45 at 78 [51].

61 *Lister v Hesley Hall Ltd* [2002] 1 AC 215 at 224 [17].

62 *Lister v Hesley Hall Ltd* [2002] 1 AC 215 at 226 [19].

63 *Lister v Hesley Hall Ltd* [2002] 1 AC 215 at 224 [17].

64 *Williams v A & W Hemphill Ltd* [1966] SC (HL) 31.

other a milkman who disobeyed his employer's order not to allow children to help him on his rounds[65]. It may be accepted that these cases could be explained, in part, by reference to some internal connection of the tortious act and the employment. It is not necessary for present purposes to further explain them.

66 Lord Steyn determined vicarious liability in *Lister v Hesley Hall Ltd* on the basis that the employer undertook to care for the boys through the service of a warden. This spoke of "a very close connection between the torts of the warden and his employment"[66]. The other members of the House of Lords agreed with this approach[67] .

67 The question ultimately posed in *Lister v Hesley Hall Ltd* contained the means by which the requisite "closeness" of the connection was to be assessed. It was "whether the warden's torts were so closely connected with his employment that *it would be fair and just* to hold the employers vicariously liable" (emphasis added)[68]. In answering "yes", Lord Steyn described[69] the sexual abuse as "inextricably interwoven" with the carrying out by the warden of his duties.

68 Pausing at that point, it may immediately be accepted that the finding of vicarious liability in each of *Lloyd v Grace, Smith & Co*, *Morris v C W Martin & Sons Ltd* and other cases to which Lord Steyn referred may be explained by reference to there being a connection between the wrongful act and the employment. In most cases in which an act is found to have occurred or to have not occurred in the course of employment, the act can be said to be connected, or unconnected, to the employment. In *Deatons Pty Ltd v Flew*, Dixon J described the barmaid's acts, which did not give rise to liability, as "quite unconnected with her occupation or employment"[70]. But it is also to be observed that a test of

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65 *Rose v Plenty* [1976] 1 WLR 141; [1976] 1 All ER 97.

66 *Lister v Hesley Hall Ltd* [2002] 1 AC 215 at 227 [20].

67 *Lister v Hesley Hall Ltd* [2002] 1 AC 215 at 231 [34], 232 [37] per Lord Clyde, 238 [52] per Lord Hutton, 243 [63] per Lord Hobhouse of Woodborough, 245 [70] per Lord Millett.

68 *Lister v Hesley Hall Ltd* [2002] 1 AC 215 at 230 [28].

69 *Lister v Hesley Hall Ltd* [2002] 1 AC 215 at 230 [28].

70 *Deatons Pty Ltd v Flew* (1949) 79 CLR 370 at 380.

connection does not seem to add much to an understanding of the basis for an employer's liability. As has been seen from *Lister v Hesley Hall Ltd*, a further requirement – that the connection be sufficient to make it "fair and just" to impose liability – is necessary. However, as was earlier observed, that requirement imports a value judgment on the part of the primary judge which, even if explained by reasons, will not proceed on any principled basis or by reference to previous decisions. As was said in *Sullivan v Moody*[71], albeit in a different context, "[t]he question as to what is fair, and just and reasonable is capable of being misunderstood as an invitation to formulate policy rather than to search for principle".

69 *Lister v Hesley Hall Ltd* was applied more recently in *Mohamud v Wm Morrison Supermarkets plc*[72]. There an employee serving at the sales counter of a petrol station responded offensively and aggressively to a request by the claimant, a customer, and then demanded that he leave. When the customer did so the employee followed him to his car and subjected him to two serious physical attacks. The employee's supervisor was unsuccessful in his attempts to stop the employee from acting as he did.

70 In the judgment of Lord Toulson JSC, with whom the other members of the Supreme Court agreed, it was said that two matters should be considered: first[73], what functions or "field of activities" have been entrusted by the employer to the employee or, in everyday language, what was the nature of his job? This question is to be approached broadly. The second[74] is whether there is a sufficient connection between the position for which he was employed and his wrongful conduct "to make it right for the employer to be held liable under the principle of social justice which goes back to Holt CJ". The statements made by Holt CJ, to which reference is made in *Mohamud*[75], suggest that a broad approach be taken to the liability of an employer.

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71 (2001) 207 CLR 562 at 579 [49]; [2001] HCA 59.

72 [2016] AC 677.

73 *Mohamud v Wm Morrison Supermarkets plc* [2016] AC 677 at 693 [44].

74 *Mohamud v Wm Morrison Supermarkets plc* [2016] AC 677 at 693 [45].

75 *Mohamud v Wm Morrison Supermarkets plc* [2016] AC 677 at 684-685 [12]-[16].

71 In *Mohamud* it was considered that the employee's conduct, in the manner of answering the customer's request, was inexcusable, but within the field of activities assigned to him[76]. This would appear to be uncontroversial. The employee was clearly authorised to respond to enquiries. But this would not explain why the employer should be liable for the conduct of the employee which followed.

72 The explanation given for the employer being held liable in *Mohamud* was that, because the employer had entrusted the employee with the position of serving customers, it was just that the employer should be held responsible for the employee's abuse of it[77]. The requirement was made out because there was an "unbroken sequence of events" and a "seamless episode", which involved the employee "following up on what he had said to the [customer]". This might show, in a temporal and causal sense, that there was a connection, but it would not give the answer to why it was fair and just to impose liability for the assaults. It does not explain how the actions could or should be said to be in the course or scope of the employment.

73 In one sense *Mohamud* had regard to the position in which the employee was placed by the employer, but, unlike cases like *Lloyd v Grace, Smith & Co*, it was not explained how that meant liability should be attracted. There were no special features of his employment which would be associated with the offending. His want of authority, power or control over customers was confirmed by the fact that he was clearly subject to supervision. It is apparent that the carrying out of his employment duties did not provide the "occasion" for the offending.

New South Wales v Lepore and Deatons Pty Ltd v Flew

74 At the time that *New South Wales v Lepore* was decided neither *Mohamud* nor the Canadian cases following *Jacobi v Griffiths* had been decided. It could not then be discerned how the test for vicarious liability propounded in *Lister v Hesley Hall Ltd* might be applied more widely or how the Canadian cases of the kind here in question would come to focus attention on features of the employment in order to determine liability. It can, however, be observed that the Canadian approach to the "enterprise risk theory" did not attract any significant support in *New South Wales v Lepore*, and the recent test favoured by the United

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76 *Mohamud v Wm Morrison Supermarkets plc* [2016] AC 677 at 693-694 [47].

77 *Mohamud v Wm Morrison Supermarkets plc* [2016] AC 677 at 693-694 [47].

Kingdom courts also did not attract unqualified support from members of the Court.

75 It is well known that different approaches were taken to the question of vicarious liability in *New South Wales v Lepore*. Gleeson CJ appears to have been disposed to a consideration of whether the sexual abuse could be regarded as sufficiently connected with the responsibilities given to persons associated with school children so as to give rise to vicarious liability[78]. However, his Honour did not suggest that the question of liability should be answered by reference to whether the connection made it fair or just, but rather that the nature of the teacher's responsibilities might justify a conclusion that there is a sufficient connection for the abuse "fairly to be regarded as in the course of the teacher's employment"[79]. The responsibilities to which his Honour referred were those "that involve an undertaking of personal protection, and a relationship of ... power and intimacy"[80].

76 Gleeson CJ's approach appears to have anticipated that later taken in the Canadian cases. And, as earlier explained, the Canadian approach is consistent with that taken to vicarious liability in *Lloyd v Grace, Smith & Co* and *Deatons Pty Ltd v Flew*. In the former, features were identified as arising from the special position in which the employment placed the managing clerk, and in the latter, it was explained that liability might arise where the employment provided the "occasion" for the wrongful act.

77 Gaudron J considered that liability could be founded on a person being estopped from asserting that the person whose acts are in question was not acting as his or her employee, agent or representative when the acts occurred. Her Honour said that the test is whether the person seeking the benefit of the estoppel (the person injured) would reasonably assume the existence of a particular state of affairs[81]. Given her Honour's earlier references to *Lloyd v Grace, Smith & Co* and *Morris v C W Martin & Sons Ltd*, it may be open to infer that her Honour drew something from these cases about the position in which the employer had placed the employee.

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78 *New South Wales v Lepore* (2003) 212 CLR 511 at 544 [67].

79 *New South Wales v Lepore* (2003) 212 CLR 511 at 546 [74].

80 *New South Wales v Lepore* (2003) 212 CLR 511 at 544 [67].

81 *New South Wales v Lepore* (2003) 212 CLR 511 at 561 [130]-[131].

78 McHugh J rested his judgment on the issue of the existence of a non-delegable duty of care.

79 Gummow and Hayne JJ considered[82] that recovery against an employer should not be extended beyond what was to be taken as the two kinds of cases identified by Dixon J in *Deatons Pty Ltd v Flew*, namely where the employee acted in intended pursuit or performance of the contract of employment or where the conduct occurred in the ostensible pursuit or apparent execution of authority which the employer held out the employee as having. With respect, that may be too narrow a view of what was held in that case. As has been explained, there is another aspect to Dixon J's approach, which draws from *Lloyd v Grace, Smith & Co*. The other basis for liability to which his Honour referred was the "occasion" which the apparent performance of the employment provided for the wrongful, intentional act to be committed. It is that aspect of *Deatons Pty Ltd v Flew* which is of particular relevance here.

The relevant approach

80 In cases of the kind here in question, the fact that a wrongful act is a criminal offence does not preclude the possibility of vicarious liability. As *Lloyd v Grace, Smith & Co* shows, it is possible for a criminal offence to be an act for which the apparent performance of employment provides the occasion. Conversely, the fact that employment affords an opportunity for the commission of a wrongful act is not of itself a sufficient reason to attract vicarious liability. As *Deatons Pty Ltd v Flew* demonstrates, depending on the circumstances, a wrongful act for which employment provides an opportunity may yet be entirely unconnected with the employment. Even so, as Gleeson CJ identified in *New South Wales v Lepore*[83] and the Canadian cases show, the role given to the employee and the nature of the employee's responsibilities may justify the conclusion that the employment not only provided an opportunity but also was the occasion for the commission of the wrongful act. By way of example, it may be sufficient to hold an employer vicariously liable for a criminal act committed by an employee where, in the commission of that act, the employee used or took advantage of the position in which the employment placed the employee vis-à-vis the victim.

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82 *New South Wales v Lepore* (2003) 212 CLR 511 at 594 [239].

83 (2003) 212 CLR 511 at 544 [67].

81 Consequently, in cases of this kind, the relevant approach is to consider 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. In determining whether the apparent performance of such a role may be said to give the "occasion" for the wrongful act, particular features may be taken into account. They include authority, power, trust, control and the ability to achieve intimacy with the victim. The latter feature may be especially important. Where, in such circumstances, the employee takes advantage of his or her position with respect to the victim, that may suffice to determine that the wrongful act should be regarded as committed in the course or scope of employment and as such render the employer vicariously liable.

82 That approach may be tested against the Canadian cases earlier referred to and against *Lister v Hesley Hall Ltd* and *Mohamud*. It is consistent with the process of reasoning in the more recent Canadian cases in emphasising that, although it is not enough to found vicarious liability that employment provides an opportunity for the commission of a wrongful act, in cases of this kind, factors such as authority, power, trust, control and intimacy may prove critical. It is consistent in result with *Lister v Hesley Hall Ltd*, although different in process of reasoning, for it is apparent that the role assigned to the warden in that case placed him in such a position of power, authority and control vis-à-vis the victims as to provide not just the opportunity but also the occasion for the wrongful acts which were committed.

83 *Mohamud* is not a case of this kind. However, it is apparent that the role assigned to the employee in that case did not provide the occasion for the wrongful acts which the employee committed outside the kiosk on the forecourt of the petrol station. What occurred after the victim left the kiosk was relevantly unconnected with the employee's employment. The approach of focusing on 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, is also designedly different from the approach in *Mohamud*. This is because such a test of vicarious liability, requiring no more than sufficiency of connection – unconstrained by the outer limits of the course or scope of employment – is likely to result in the imposition of vicarious liability for wrongful acts for which employment provides no more than an opportunity[84].

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84 See Morgan, "Certainty in vicarious liability: a quest for a chimaera?", (2016) 75 *Cambridge Law Journal* 202 at 205.

84 In the present case, the appropriate enquiry is whether Bain's role as housemaster placed him in a position of power and intimacy vis-à-vis the respondent, such that Bain's apparent performance of his role as housemaster gave the occasion for the wrongful acts, and that because he misused or took advantage of his position, the wrongful acts could be regarded as having been committed in the course or scope of his employment. The relevant approach requires a careful examination of the role that the PAC actually assigned to housemasters and the position in which Bain was thereby placed vis-à-vis the respondent and the other children.

85 It is evident from the primary judge's reasons with respect to liability that her Honour was alert to the importance of the evidence concerning the actual role assigned to Bain by the PAC to any determination of liability. The evidence did not permit her Honour to determine that question. Much of the evidence necessary to a determination had been lost. That raised a question as to whether the PAC could have a fair trial on the issue of liability. Further, as will be seen from what follows, the PAC would be prejudiced in other ways if it were required to defend an action at this late juncture. These matters were considered in more detail by her Honour when the question of the application for the extension of time to bring proceedings and the position of the PAC were considered. It is necessary to turn to those matters before determining whether a decision on vicarious liability is possible.

An extension of time?

86 The Limitations Act required the respondent to bring his action against the PAC by 17 July 1973, three years after his 21st birthday[85]. In 1996 the respondent was diagnosed with post-traumatic stress disorder. He had suffered symptoms of psychological damage for some years. In 1997 he accepted the PAC's offer of some financial assistance. He brought proceedings against Bain which subsequently settled. It was not until December 2008 that he brought the present proceedings.

87 As mentioned at the outset of these reasons, s 48 of the Limitations Act permits a court to extend the time for instituting proceedings. The court may extend time if it is satisfied that facts material to the plaintiff's action were not ascertained until after that time and the action is instituted within 12 months after those facts were ascertained. That requirement was found in the respondent's

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85 *Limitation of Actions Act* 1936 (SA), ss 36, 45.

favour. The proceedings below turned upon the exercise of the court's discretion to grant an extension.

The decisions below

88 At the hearing before the primary judge the respondent claimed that his failure to institute the action within the limitation period resulted from the conduct of the PAC. The respondent argued that the conduct of the headmaster and the chaplain at the assembly held soon after Bain was dismissed caused the respondent to suppress the trauma of Bain's abuse, and that the failure of the PAC to provide counselling and report Bain to the police resulted in the respondent's failure to disclose the abuse and take legal action earlier.

89 The primary judge found that the PAC's conduct did not cause the delay. Her Honour found that the "considerable lapse of time between the [respondent's] disclosure of the abuse and diagnosis in 1996 and his institution of these proceedings in 2008 undermine[d]" the argument that the failure to bring the claims earlier resulted from events occurring in 1962[86]. Further, her Honour found that in 1997 the respondent made an informed decision, which was "rational and sensible", not to sue the PAC[87].

90 A further issue was as to whether the respondent discovered facts material to his case within 12 months before instituting the action. Her Honour found[88] a psychiatric opinion given in December 2007, that the respondent would never fully recover or be able to manage a business again, to be a fact material to the respondent's case. That requirement of s 48 of the Limitations Act was therefore satisfied.

91 The primary judge then turned to the question whether it was just, in all the circumstances, to grant the extension of time. Her Honour took into account the length of the delay, which she described as "extraordinary"[89], the deliberate decision of the respondent not to sue in the decade before he instituted his claims, and that he reversed this decision "because he simply ran out of money and …

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86 *A, DC v Prince Alfred College Incorporated* [2015] SASC 12 at [198].

87 *A, DC v Prince Alfred College Incorporated* [2015] SASC 12 at [198].

88 *A, DC v Prince Alfred College Incorporated* [2015] SASC 12 at [204].

89 *A, DC v Prince Alfred College Incorporated* [2015] SASC 12 at [216].

options for improving his financial position"[90]. The delay since 1996 told "especially" against the exercise of any discretion in favour of the respondent because he "could have, had he so chosen, sued the school much earlier"[91].

92 The primary judge also took into account the relative insignificance of the psychiatrist's 2007 prognosis as a reason for the respondent's decision to institute proceedings. Her Honour said that by 2007 he had been treated by mental health professionals for almost 10 years and "well knew of the pervasive impact of his various disorders"[92].

93 Her Honour said that, "[m]ost importantly", there was actual prejudice suffered by the PAC by reason of the delay[93]. Her Honour referred to the "marked disadvantage" to which the PAC was put by reason of the "absence, either by death or ill health, of a number of critical witnesses"[94]. There was also the loss of documentary evidence, mainly since 1996. In particular, the loss of the psychologist's notes dating back to 1996 was described as "of great significance"[95].

94 The primary judge rejected the respondent's argument that the PAC had suffered less prejudice, by reason of the effluxion of time, in relation to the vicarious liability claim. The delay had two principal effects, in her Honour's opinion. It left the PAC in the position of "warding off inferences and being unable to call evidence on that issue"[96] and it prevented the court from undertaking a close examination of Bain's role and being able to draw any conclusion about it[97]. It is also to be borne in mind that, although most of Bain's

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90 *A, DC v Prince Alfred College Incorporated* [2015] SASC 12 at [219]-[220].

91 *A, DC v Prince Alfred College Incorporated* [2015] SASC 12 at [221].

92 *A, DC v Prince Alfred College Incorporated* [2015] SASC 12 at [222].

93 *A, DC v Prince Alfred College Incorporated* [2015] SASC 12 at [223].

94 *A, DC v Prince Alfred College Incorporated* [2015] SASC 12 at [223].

95 *A, DC v Prince Alfred College Incorporated* [2015] SASC 12 at [227].

96 *A, DC v Prince Alfred College Incorporated* [2015] SASC 12 at [228].

97 *A, DC v Prince Alfred College Incorporated* [2015] SASC 12 at [174], [228].

wrongful acts against the respondent were committed in the boarding house, one was committed outside the school, where, depending upon the evidence, the extent of Bain's authority vis-à-vis the respondent might be judged differently from his authority and influence over the respondent in the boarding house. Depending on all the facts and circumstance of a given case, it is at least conceivable that unlawful acts committed by a housemaster in a boarding house would be seen to attract vicarious liability, whereas some or all of other such unlawful acts committed by the housemaster elsewhere in or beyond the school would not. In the course of argument for the respondent it was conceded that acts outside the school might well fall into a different category from those which took place in the boarding house. The dearth of evidence that now exists would make any conclusion about Bain's role, authority and influence during the occasion of offending outside the school at least as difficult and possibly even more incapable of probable ascertainment.

95 Each of the members of the Full Court held that the respondent should be granted an extension of time in which to bring proceedings.

96 Kourakis CJ considered that the difficulty of assessing the extent and depth of the respondent's post-traumatic stress disorder resulting from the lapse of time "could sufficiently be addressed by taking a conservative approach to the assessment of damages rather than by denying [the respondent] any redress at all"[98]. His Honour did "not give much weight" to the respondent's acceptance of compensation from the PAC and his failure to bring proceedings in 1997[99]. In particular, his Honour said that the "reluctance to bring proceedings is symptomatic of the very injury caused by the wrong alleged against [the PAC]"[100].

97 Gray J found that the delay resulted from the PAC's conduct, in particular the statements made at the assembly when Bain was dismissed, and that the respondent's conduct was reasonable in the circumstances[101]. His Honour held that it was just to grant the extension of time because of the nature and extent of the harm suffered by the respondent, as well as the fact that the PAC had the

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98 *A, DC v Prince Alfred College Inc* [2015] SASCFC 161 at [23].

99 *A, DC v Prince Alfred College Inc* [2015] SASCFC 161 at [24].

100 *A, DC v Prince Alfred College Inc* [2015] SASCFC 161 at [24].

101 *A, DC v Prince Alfred College Inc* [2015] SASCFC 161 at [146]-[147].

opportunity to undertake an investigation and maintain proper records, both in the aftermath of learning of the abuse, and when the respondent approached the PAC for assistance in the 1990s[102].

98 Peek J gave no reasons for his conclusion that time should be extended[103].

The exercise of the discretion

99 In considering the exercise of the discretion under s 48(3) of the Limitations Act, two fundamental propositions established by this Court's decision in *Brisbane South Regional Health Authority v Taylor*[104] must be borne in mind. First, an applicant for an extension of time must prove the facts which enliven the discretion to grant the extension and also show good reason for exercising the discretion in his or her favour[105]. An extension of time is not a presumptive entitlement which arises upon satisfaction of the pre-conditions that enliven the discretion[106]. The onus of persuasion is upon the applicant for an extension of time[107]. The exercise of the discretion to grant an extension of time must take account of the reasons for the limitation regime, and the discretionary nature of the decision to be made must be respected when conducting appellate

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102 *A, DC v Prince Alfred College Inc* [2015] SASCFC 161 at [148].

103 *A, DC v Prince Alfred College Inc* [2015] SASCFC 161 at [264].

104 (1996) 186 CLR 541.

105 *Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 541 at 544 per Dawson J, 547 per Toohey and Gummow JJ, 551, 553-554 per McHugh J, 573 per Kirby J.

106 *Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 541 at 544 per Dawson J, 554 per McHugh J.

107 *Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 541 at 544 per Dawson J, 547 per Toohey and Gummow JJ, 551, 553-554 per McHugh J, 567 per Kirby J.

review of a primary judge's decision[108]. In *Brisbane South Regional Health Authority v Taylor*, McHugh J said[109]:

> "The enactment of time limitations has been driven by the general perception that '[w]here there is delay the whole quality of justice deteriorates'[110]."

100 Secondly, the purpose of the legislative conferral of the discretion is to ensure a fair trial on the merits of the case. The loss of evidence which will tend against the prospects of a fair trial will usually be a fatal deficit in an argument that good reason has been shown to exercise the discretion to grant an extension[111]. As McHugh J pointed out in *Brisbane South Regional Health Authority v Taylor*[112], the justice of a plaintiff's claim is seldom likely to be strong enough to warrant a court reinstating a right of action against a defendant who, by reason of the delay, is unable fairly to defend itself or is otherwise prejudiced. His Honour had earlier observed[113] that, in cases of long delay, prejudice may exist without the parties or anyone else realising that it exists.

101 Kourakis CJ considered that the primary judge was in error in her Honour's approach to vicarious liability and that this provided a basis for the re-exercise of the discretion[114]. But even if it be accepted that her Honour took too narrow an approach to vicarious liability, it could not be said that her Honour was wrong to regard the absence of witnesses of the events of 1962 and the circumstances surrounding them as a forensic disadvantage which weighed against the grant of the extension of time. It has rightly been said that the absence of witnesses which affects the ability of a party to mount a defence

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108 *House v The King* (1936) 55 CLR 499 at 504-505; [1936] HCA 40.

109 *Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 541 at 551.

110 *R v Lawrence* [1982] AC 510 at 517.

111 *Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 541 at 544, 549-550, 556.

112 (1996) 186 CLR 541 at 555.

113 *Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 541 at 551.

114 *A, DC v Prince Alfred College Inc* [2015] SASCFC 161 at [21].

cannot readily be dismissed as a real forensic disadvantage because "what has been forgotten can rarely be shown"[115].

102 It was said on the respondent's behalf that the absent witnesses were not critical and could not have given evidence on the vicarious liability issue which would have assisted the PAC's case; but it is difficult for a party to assert that the absence of witnesses who might have been expected to be able to give evidence on an issue is immaterial to the prospects of a fair trial of an issue where the absence of the witnesses is due to that party's delay. As the primary judge herself observed[116], because of the dearth of evidence no conclusion could be drawn about Bain's role, a matter critical to the question of vicarious liability. It could not be assumed that the position in which Bain was placed by his assigned role provided the "occasion" for the offending. The evidence on the respondent's case was that no other housemaster was present in dormitories after lights out and that the prefects were given the role of supervising the boys after that time. This raised a real question about what the role of housemaster entailed, a question which could not fairly be answered given the loss of relevant evidence.

103 In addition, Kourakis CJ did not take into account that the loss of the psychologist's notes significantly prejudiced a fair trial of the respondent's claims against the PAC. The PAC sought to advance a case that the respondent's disorders were not "linked to his abuse by Bain" but were associated with issues as to anxiety and alcohol abuse which the respondent was said to share with other members of his family[117]. In this regard, the PAC was able to point to the circumstance that the referral to the psychologist from the respondent's general practitioner attributed the respondent's symptoms of "destructive anxiety, inadequacy and inability to concentrate, make decisions and handle pressure plus the physical symptoms of tremor" to financial pressures and abuse of alcohol[118]. The PAC sought to develop an argument that it was only after the period of treatment by the psychologist that the respondent reported to the expert witnesses called on his behalf in terms which suggested post-traumatic stress disorder[119].

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115 *Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 541 at 551 citing *Barker v Wingo* 407 US 514 at 532 (1972).

116 *A, DC v Prince Alfred College Incorporated* [2015] SASC 12 at [228].

117 *A, DC v Prince Alfred College Incorporated* [2015] SASC 12 at [94].

118 *A, DC v Prince Alfred College Incorporated* [2015] SASC 12 at [97].

119 *A, DC v Prince Alfred College Incorporated* [2015] SASC 12 at [81].

As the primary judge observed[120], the argument was, in effect, that the psychologist had inadvertently coached the respondent. In these circumstances it may have been preferable for her Honour not to make a finding with respect to the cause of the respondent's disorder. Indeed it would have been preferable not to decide the issue of liability at all.

104 These problems with respect to the PAC's evidence were necessary to be taken into account in the exercise of the discretion conferred by s 48 of the Limitations Act. They could not be ignored by saying that the damages to be awarded to the respondent, should his claims ultimately succeed, may be reduced to reflect the delay during which evidence has been lost. To say that is simply to acknowledge that a fair trial on the merits of the case in order to do justice according to law is no longer possible.

105 The lengthy delay, rightly described as "extraordinary" by the primary judge, weighed little with Kourakis CJ and Gray J and not at all with Peek J. Where a trial is conducted long after the events which gave rise to the dispute, the risk that the trial will be a mere simulacrum of the process of doing justice becomes greater with the passage of time. The onus is upon the party claiming an extension of time to show that a fair trial may be had now, notwithstanding that passage of time. That onus is not discharged by saying that the putative defendant should have been more astute to conserve its own interests by anticipating litigation that did not eventuate until many years after the expiration of the limitation period. Kourakis CJ's view, that the PAC could and should have protected its position, fails to recognise that it was reasonable for the school to consider that, after its assistance to the respondent in the late 1990s, the respondent's decision to pursue Bain and not the school would be adhered to.

106 It is an error of principle not to regard the arrangements made by the respondent with the school as significant. Where an injured party makes a deliberate decision not to commence proceedings, there must be strong reasons to permit proceedings to be brought against a defendant who reasonably considered that the dispute had been laid to rest. It has been recognised that there is an element of oppression involved in bringing an action so long after the circumstances which gave rise to it have passed[121]. That oppression is

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120 *A, DC v Prince Alfred College Incorporated* [2015] SASC 12 at [227].

121 *R B Policies at Lloyd's v Butler* [1950] 1 KB 76 at 81-82; *Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 541 at 552.

aggravated where a party conveys the impression that he or she will not bring proceedings on certain terms and then, when the terms are met, changes his or her mind.

107 The courts are unlikely to countenance changes of mind where the other party has acted to its detriment. While the PAC did not bargain with the respondent for a release from any claim against it, there can be little doubt that both sides understood that the arrangements made in September 1997 were to bring any issue between them to an end.

108 In addition, the view that the respondent's failure to commence proceedings earlier than he did was explicable by a reluctance to litigate on the part of the respondent which was "symptomatic of the very injury caused by the wrong alleged against [the PAC]"[122] cannot be reconciled with the indisputable fact that the respondent did bring proceedings against Bain in 1997.

109 The respondent urged the view taken by Gray J, that the primary judge failed to have regard to the fact that the PAC could have investigated the abuse committed by Bain when the respondent first complained to it in 1997 and kept its records of that investigation. However, it is difficult to see that any failure to investigate at this point in time is a factor which weighs in favour of a grant. It has been said that in weighing prejudice a court should not undertake a comparison of the prejudice suffered by a defendant before the expiration of a limitation period and that suffered thereafter[123].

110 For these reasons the Full Court was wrong to extend time under s 48(3) of the Limitations Act.

A determination as to liability?

111 The primary judge heard the issue of liability together with questions about whether an extension of time was necessary and should be granted. Section 48(5) of the Limitations Act, which allows for a question as to an extension of time to be determined after the close of pleadings, in practical terms permits this course. It is, however, a question for the court, having regard to the circumstances of the case, whether it is an appropriate course. In the present

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122 *A, DC v Prince Alfred College Inc* [2015] SASCFC 161 at [24].

123 *Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 541 at 544, 548-549, 556.

case, even if there were considered to be good reasons to hear the evidence relating to liability and the extension at the same time, that does not mean that the issue of liability should have been decided once it was obvious that there were problems arising from the state of the evidence and the position in which the PAC was placed.

112 It is not apparent why the primary judge determined the issue of liability prior to the issue of extension of time. The question whether an extension of time is to be granted is one necessarily antecedent to the determination of any issue in the proceedings relating to liability to which the extension is relevant. Moreover, in a case of this kind – where there had been a very long delay in commencing proceedings and the defendant had raised questions of prejudice arising from its inability to obtain evidence – it was essential that those matters, as relevant to the question of extension, be first considered. It is the consideration of those matters which will point to the appropriateness or otherwise of determining any remaining issue in the action where an extension is not to be granted.

113 In some cases it may be possible to deal with an issue such as vicarious liability when the court has refused an extension of time. It is a matter of long-standing practice in most trial courts that, where possible, all issues be the subject of adjudication. The practice is based upon the desirability of avoiding the need for a new trial in the event that an appeal on one issue is successful. However, as has been observed[124], it is no more than a rule of convenience. It is not something which should invariably be done without consideration of the appropriateness of that course of action in the circumstances of the case.

114 Here, there were difficulties in the way of findings of fact necessary to a determination of the issue of liability and they affected all three of the respondent's claims. Even the question of whether a non-delegable duty of care was owed by the PAC to the respondent, which was approached by the Full Court largely as a question of law[125], requires a finding that there be a breach of the PAC's duty to take reasonable care in all the circumstances. That requires in the first place that the nature and content of the particular duty and responsibility owed to the respondent be identified.

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124 *Nevin v B & R Enclosures Pty Ltd* [2004] NSWCA 339 at [74].

125 *A, DC v Prince Alfred College Inc* [2015] SASCFC 161 at [6], [114].

115 The primary judge identified real deficiencies in the available evidence. In particular, questions about the role conferred on Bain, critical to the issue of vicarious liability, could only be answered by resort to speculation. That was reason enough not to attempt to determine the issue of liability.

116 There are other, fundamental, reasons why the issue of liability should not have been decided. The first concerns the position of the court and coherence in its reasoning. A court cannot conclude that it would not be just in all the circumstances to grant an extension of time because a proposed defendant cannot properly defend the claims to be brought against it and then proceed to decide whether it could be held liable with respect to those claims.

117 The second reason has regard to the position of the PAC in the event that liability was determined. It is not to the point, of course, that the primary judge was of the view that the PAC did not breach its own duty of care and could not be held liable for the acts of Bain. Whatever view her Honour reached exposed the PAC to an appeal on the basis of findings on evidence which was, on the primary judge's own assessment, incomplete so far as concerned the position of the PAC.

118 It is true that trial courts are sometimes obliged to determine issues on evidence which is deficient. In such cases the courts do the best that they can on the available material. But that circumstance arises where a court is obliged to make findings in order to determine issues joined in a duly constituted proceeding. Here the refusal to grant the extension of time denied the proceeding that status.

119 For these reasons the primary judge should not have decided the issue of liability and the Full Court should not have revisited it. Consistently, this Court is not in a position to determine it either.

Conclusion and orders

120 An extension of time under the Limitations Act should not have been granted by the Full Court. The appeal should be allowed with costs and the orders of the Full Court of the Supreme Court of South Australia given on 10 November 2015 set aside. In lieu thereof it should be ordered that the appeal to that Court be dismissed with costs.

121 On 24 March 2016, the Full Court of the Supreme Court of South Australia also ordered that costs for the appellant in that Court (the respondent in

this Court) be reduced to 90 per cent of the costs of the appeal, and 80 per cent of the costs of the trial. That order should now also be set aside.

122 GAGELER AND GORDON JJ. The respondent, whilst boarding at Prince Alfred College in the 1960s, was sexually abused by Dean Bain, a housemaster employed by the College. Some, but not all, of the acts of abuse occurred on the College's premises. There were two issues on appeal to this Court. Should the respondent have an extension of time under s 48 of the *Limitation of Actions Act* 1936 (SA) ("the Limitation Act") to bring these proceedings against the College in respect of that sexual abuse and, if so, what is the basis of liability, if any, of the College to the respondent for Bain's conduct?

123 This appeal should be allowed on the basis that no extension of time under s 48(3) of the Limitation Act should be granted to the respondent.

No extension of time

124 It was not in dispute that the respondent was abused by Bain and that Bain was convicted in 2007 of two counts of indecent assault against the respondent and of other offences against two other boarders at the College. As the other reasons for judgment explain, in September 1997, the respondent made a deliberate decision to bring proceedings against Bain, but not against the College, and instead to enter an arrangement with the College that was to resolve the issues between them. But after a delay of some 11 years, the respondent changed his mind and instituted this action against the College.

125 The respondent's deliberate decisions not to bring proceedings earlier against the College, and then, after a lengthy delay, to institute this proceeding against the College, demonstrate that the Full Court of the Supreme Court of South Australia was wrong to extend the time under s 48(3) of the Limitation Act[126].

126 That is sufficient to dispose of the appeal. It is unnecessary and inappropriate to address the primary judge's conclusion that an extension of time should be refused because the effluxion of time had resulted in there being a "dearth of evidence" on Bain's role at the College[127]. That finding assumes the primary judge identified and applied the proper test for vicarious liability.

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126 *R B Policies at Lloyd's v Butler* [1950] 1 KB 76 at 81-82; *Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 541 at 552; [1996] HCA 25.

127 See *A, DC v Prince Alfred College Incorporated* [2015] SASC 12 at [228].

Vicarious liability for intentional wrongdoing

127 Judges make and develop the common law, as distinct from discovering and declaring it[128]. Identification, modification or even clarification of some general principle or test requires that judgments be made. Those judgments are best made in the context of, and by reference to, contestable and contested questions.

128 In this case, because of the refusal to grant the respondent an extension of time, there cannot be any resolution of contestable and contested questions. That consideration is important. The course of decisions in this Court[129] and the courts of final appeal in the United Kingdom and in Canada reveals that decisions concerning vicarious responsibility for intentional wrongdoing are particularly fact specific. Decisions in the United Kingdom[130] and Canada[131] recognise that resolution of each case will turn on its own particular facts and that existing cases provide guidance in the resolution of contestable and contested questions. The overseas decisions also expose a difficulty in undertaking any analysis by reference to generalised "kinds" of case. Why? Because the "[s]exual abuse of children may be facilitated in a number of different circumstances"[132].

129 The decisions of *Bazley v Curry*[133] and *Jacobi v Griffiths*[134] in the Supreme Court of Canada are instructive. Both involved the sexual abuse of children by employees. Judgment in each was delivered on the same day by an identically constituted court. In *Bazley*, the employer was held vicariously liable

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128 See Dixon, "Concerning Judicial Method", in *Jesting Pilate and Other Papers and Addresses*, 2nd ed (1997) 152 at 155, 157-158.

129 See *Deatons Pty Ltd v Flew* (1949) 79 CLR 370 at 381-382; [1949] HCA 60.

130 *Dubai Aluminium Co Ltd v Salaam* [2003] 2 AC 366 at 378 [26] cited in *Mohamud v Wm Morrison Supermarkets plc* [2016] AC 677 at 692 [41], 694 [50].

131 *Bazley v Curry* [1999] 2 SCR 534 at 545 [15] cited in *Jacobi v Griffiths* [1999] 2 SCR 570 at 590 [31], *John Doe v Bennett* [2004] 1 SCR 436 at 445 [20] and *EB v Order of the Oblates of Mary Immaculate in the Province of British Columbia* [2005] 3 SCR 45 at 69 [38].

132 *Various Claimants v Catholic Child Welfare Society* [2013] 2 AC 1 at 26 [85].

133 [1999] 2 SCR 534.

134 [1999] 2 SCR 570.

in a unanimous judgment. In *Jacobi*, the Court, by a majority of four judges to three, held that the employer was not vicariously liable. The particular facts of each case were critical, both for drawing comparisons with decided cases and to avoid drawing generalised conclusions based on perceived similarities.

130 We accept that the approach described in the other reasons as the "relevant approach" will now be applied in Australia. That general approach does not adopt or endorse the generally applicable "tests" for vicarious liability for intentional wrongdoing developed in the United Kingdom or Canada (or the policy underlying those tests), although it does draw heavily on various factors identified in cases involving child sexual abuse in those jurisdictions.

131 The "relevant approach" described in the other reasons is necessarily general. It does not and cannot prescribe an absolute rule. Applications of the approach must and will develop case by case. Some plaintiffs will win. Some plaintiffs will lose. The criteria that will mark those cases in which an employer is liable or where there is no liability must and will develop in accordance with ordinary common law methods. The Court cannot and does not mark out the exact boundaries of any principle of vicarious liability in this case.

132 For those reasons, we agree with the orders proposed in the other reasons.