

Extension of time

Daniel Habashy reports on *Prince Alfred College Incorporated v ADC* [2016] HCA 37.

The respondent was sexually abused in 1962 by a housemaster employed at the time by a boarding school, Prince Alfred College (PAC). He commenced proceedings in the Supreme Court of South Australia on 4 December 2008 against PAC, claiming that it was liable in damages to him for breach of its duty of care, breach of a non-delegable duty of care, and that it was vicariously liable for the wrongful acts of the housemaster.

The two issues before the High Court were:

- whether the respondent should have an extension of time under the relevant South Australian limitation of actions legislation; and
- identification of the basis of the boarding school's liability, if any.

The primary judge found against the respondent on both questions. The Full Court found for the respondent on both questions. The High Court held an extension of time should not be granted, and that it was unnecessary, inappropriate and indeed not possible to decide liability.

Extension of time issue

At the time of the abuse in 1962, the respondent was 12 years old. Sections 36 and 45 of the *Limitation of Actions Act 1936* (SA), in effect, required the respondent to commence proceedings by 17 July 1973, three years after his 21st birthday.

However, s 48 confers on a court a discretion to extend the time prescribed, provided that (a) facts material to the action were not ascertained until after that time, and (b) the action is instituted within 12 months after those facts were ascertained.

The primary judge found that a fact material to the action, namely low prospects of future recovery from psychiatric injury as a result of the abuse, was only ascertained on 6 December 2007, after receipt of a report from the respondent's treating psychiatrist. However, the primary judge refused to exercise the discretion to extend the limitation period because the absence or death of critical witnesses, and the loss of documentary evidence, placed PAC at a marked disadvantage in defending the action.

On appeal, the Full Court held the primary judge's discretion miscarried, and granted an extension of time. Kourakis CJ and Gray J supported their conclusion by reference to the seriousness of the abuse, its effect on the respondent, the opinion in the psychiatrist's report of 6 December 2007, PAC's ability to have taken steps to preserve records within its control once it became aware of the abuse in the 1960s, PAC's failure to obtain a release

in return for compensation paid to the respondent in 1997, and the court's ability to address difficulties of proof of extent of injury by taking a conservative approach to the assessment of damages.

The High Court held that the Full Court should not have extended time under s 48(3).

French CJ, Kiefel, Bell, Keane and Nettle JJ emphasised the importance of two principles in considering the exercise of the discretion under s 48(3). First, the party seeking extension bears the onus of persuasion and must show good reason for exercising the discretion, taking into account the reasons for the limitation regime. Extension is not a presumptive entitlement arising upon satisfaction of the pre-conditions that enliven the discretion. Secondly, the purpose of the discretion is to ensure a fair trial. Loss of evidence which will tend against the prospects of a fair trial, will usually be fatal to an argument for extension, and is seldom outweighed by the justice of the plaintiff's claim.

The delay of over 11 years between the time of an apparent resolution of any claim against PAC and the commencement of proceedings meant that a fair trial on the merits was no longer possible, due to the loss of evidence. It was no answer to say that PAC should have retained records for so long after the expiration of the limitation period, particularly when the respondent made arrangements for compensation that suggested no proceedings would be brought against PAC.

Gageler and Gordon JJ arrived at the same conclusion. They reasoned that the deliberate decision of the respondent to bring an action against the housemaster personally, but enter an arrangement with PAC that was to resolve the issues between them, and then, after a delay of 11 years, to change his mind and institute proceedings against PAC, demonstrated that it was wrong to extend the time. They did not base their conclusion on loss of evidence.

Liability issue

The High Court did not decide the question of liability, holding that it was inappropriate and not possible to do so, but provided some guidance about the proper approach for determining questions of vicarious liability for intentional wrongdoing. The key paragraphs are [80]–[85] of the judgment of the plurality.

The fact that a wrongful act is a criminal offence does not preclude the possibility of vicarious liability. It is possible for a criminal offence to be an act for which the apparent performance of employment provides the occasion.

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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. A wrongful act for which employment provides an opportunity may yet be entirely unconnected with the employment.

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.

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. 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.

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