Response to Royal Commission into Institutional Responses to Child Sexual Abuse: Consultation Paper – Redress & Civil Litigation

Submission

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VICTIM SUPPORT SERVICE INCORPORATED

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Introduction

The vision of Victim Support Service ("VSS") is that *all* victims of crime ("victims") in South Australia receive the support *they* need. We do this by providing a bespoke response to each victim, combining therapeutic expertise with knowledge of the criminal justice system to help victims both emotionally and practically. Our approach is augmented by a team of volunteers through the court process.

VSS is a statewide non-government community service organisation which provides free support, counselling and information services for adult crime victims, and advocates for victims' rights and community safety. We provide nearly 30,000 responses to victims each year, of which nearly 3,000 are new referrals.

The organisation has been working with and for victims in South Australia since 1979. We deliver programs that focus on victim engagement and evidence-based practice in areas such as trauma, crime prevention, homicide, domestic violence and child sexual abuse. To do so, we partner with government, non-government organisations, the wider community, and all agencies of the criminal justice system.

VSS provides a range of services including:

Practical Assistance	Information
• Assistance with claims for victim compensation • Supporting victims through the court process • Assistance with Victim Impact Statements • Advocating for victims' rights	• Statewide Victim Helpline (1800-VICTIM) • Statewide network of victim service centres • Victimology Resource Centre • Community education and training programs
Therapeutic Interventions	**Domestic and Family Violence**
• Free counselling for victims of crime • Specialist support for co-victims of homicide • Royal Commission Support Services	• Staying Home, Staying Safe (SHSS) • Statewide administration of Family Safety Framework meetings

VSS is governed by a voluntary Board of Management drawn from a diverse range of professional backgrounds including law, police, counselling, accounting, business, government and human services. The Board also retains a link with crime victims by retaining at least one crime victim/survivor as a Director.

VSS employs a team of staff drawn from the fields of psychology, social work and counselling deployed from one Adelaide office and seven country offices in South Australia. We provide a comprehensive range of practical and therapeutic services to all adult and older adolescents that have experienced crime, including information about a range of issues including victims of crime compensation, court support, training, counselling, brief intervention and assistance with preparation of Victim Impact Statements. This includes services for individual crime victims, their families, friends and the wider community. A victim does not need to have reported a crime to

access VSS services, and victims can contact VSS at any time after the crime – whether it was yesterday, last week or many years ago.

VSS also advocates on behalf of individual clients, and for systemic changes to improve how the criminal justice and the health/welfare systems treat victims of crime.

VSS staff provide consultancy, training and information to other professionals who work with crime victims. Additionally, we deploy a team of trained volunteers to provide:

- court preparation and companionship for victims or prosecution witnesses who attend court;
- community education talks;
- information resources for victims and other professionals.

VSS is primarily funded by the South Australian Attorney-General from the Victims of Crime Fund. In addition, VSS has been funded by:

- The Australian Government's Department of Social Services (DSS) to provide support and counselling services to individuals engaging with, or impacted by, the Royal Commission into Institutional Responses to Child Sexual Abuse;
- The South Australian Office for Women to provide administrative support for the statewide Family Safety Framework initiative;
- The South Australian Department for Communities and Social Inclusion (DCSI) to improve home security and safety for women who are at risk of homelessness as a result of family and domestic violence.

As the specialist victims of crime service in South Australia, and as a DSS funded service to support individuals wishing to engage in the Royal Commission, VSS has supported many individuals over many years to access various redress schemes for adult survivors of institutional child sexual abuse. As such, we have a well-developed and thorough understanding of how these processes and outcomes are experienced by individuals.

There currently are four redress options in SA:

- Civil litigation;
- Institutional redress schemes (such as *Towards Healing*, *Healing Steps*, etc);
- Statutory Victims of Crime Compensation Scheme; and
- *Ex-gratia* Payments payable through Victims of Crime Compensation Scheme for former residents of State care who experienced sexual abuse as children.

Limited statutory compensation was introduced in South Australia in 1969 with the enactment of *Criminal Injuries Compensation Act 1969 (SA)*. This act was repealed in 1978 when the *Criminal Injuries Compensation Act 1978 (SA)* came into force on 1 July. Then, on 1 January 2003, the current *Victims of Crime Act 2001 (SA)* came into effect.

As an adjunct to the VOCC Scheme, and underpinned by s 27 of the *Victims of Crime Act 2001* (SA), former residents of State care who experienced sexual abuse as children may be able to access an *ex gratia* payment. This constitutes the State Government's response to Recommendation 40 of the *Children in State Care Commission of Inquiry: Allegations of Sexual Abuse and Death from Criminal Conduct* (often referred to as the Mulligan Inquiry) which reads:

> That a task force be established in South Australia to closely examine the redress schemes established in Tasmania, Queensland and Western Australia for victims of child sexual abuse; to receive submissions from individuals and relevant organisations on the

> issue of redress for adults who were sexually abused as children in State care; and to investigate the possibilities of a national approach to the provision of services.[1]

VSS understands that this recommendation has never been fully implemented.

VSS appreciates the opportunity to comment on the Redress and Civil Litigation Consultation Paper as part of the Royal Commission into Institutional Responses to Child Sexual Abuse. As VSS is victim based we have a strong interest in advocating for the rights of redress for victims abused historically, currently and into the future.

[1] E Mulligan, *Children In State Care Commission of Inquiry: Allegations of Sexual Abuse & Death from Criminal Conduct*, 2008, available at: <www.sa.gov.au/mulliganenquiry>.

Executive Summary

The Redress and Civil Litigation Consultation Paper ("Consultation Paper") acknowledges and highlights numerous areas of deficiency in the current system servicing survivors of childhood sexual abuse, particularly institutional sexual abuse. VSS commends the level of consultation, detail and thought that is clearly evident in the Consultation Paper. We would like to use this opportunity to highlight the areas of reform that we feel are particularly relevant to the experiences of survivors and their ongoing recovery.

VSS primary consideration is, at all times, the safety and welfare of the victims in these matters. With this in mind VSS would like to ensure a focus on survivor-led initiatives that take into account the complex nature of childhood sexual abuse.

We strongly endorse a National Redress Scheme that is administered consistently across all States and Territories of Australia. This submission is framed with this endorsement in mind, and most of our recommendations are in connection to the shape that such a Redress Scheme would take.

We emphasise the need to fund complex trauma informed service providers that are trained to deal consistently and appropriately with the challenges faced by survivors. We draw particular attention to the ongoing nature of complex trauma and sexual abuse recovery, and encourage the continuation of funding for services related to institutional child sexual abuse, such as legal services and counselling, past the expiry of the Royal Commission and into the future as part of a holistic approach to redress.

VSS emphasises the requirement for transparency in order to engender trust in both survivors and the community, and to ensure fairness. In matters such as sexual abuse, no compensation level will likely seem adequate to survivors, but transparency ensures that they see the process as fair and reasonable.

VSS wants to ensure that the primary responsibility for sexual abuse lies with the perpetrator, and with this in mind we recommend that the redress scheme is funded in a joint approach between appropriated assets of convicted offenders and institutional contributions. We note that the financial viability of such a scheme would also require government investment as a funder of last resort.

Access for survivors must be a paramount concern in any redress scheme, and therefore VSS recommends that barriers to eligibility are kept to a minimum. In acknowledgement of the significant challenges sexual abuse carries, every effort should be made to encompass as many potential claimants as possible to ensure justice. The standards of proof required in the redress scheme should necessarily be significantly lower than any civil standard. Any and all payments related to child sexual abuse claims should not negatively affect survivors, and therefore legislative assurance that compensation will not influence Centrelink and other welfare benefits is required.

The historical standards held by institutions have been shown to be manifestly inadequate, and based on antiquated systems and ideas. As such VSS recommends that substantial retrospective legislation be brought in to ensure proper justice is achieved for survivors who are additionally victimised by the era in which they were abused.

VSS will explore these issues in more detail in our submission.

Recommendations

VSS recommends that:

Recommendation 1

The implementation of a complex trauma informed and survivor driven National Redress Scheme for both past and future abuse in Australia, underpinned by a national legislative framework to ensure consistency, and administrated by state and territory governments.

Recommendation 2

That such a scheme includes the establishment of a liaison office in each state and territory to facilitate communication between survivors and institutional representatives. Any direct interaction between survivors and institutional representatives to take place only at the express wish of the survivor.

Recommendation 3

Ongoing provision of funding for support services established in response to the Royal Commission after its close in recognition of the long term needs of survivors. Support offered by these services to include that which is already being offered as well as to support survivors to access the national redress fund and/or civil litigation.

Recommendation 4

Ongoing provision of funding of legal services to enable survivors access to free and independent legal advice. Practitioners of such a service to be trained in trauma informed care and practice. This could be achieved through the continuation of funding of knowmore legal service once the Royal Commission has completed its inquiry.

Recommendation 5

VSS endorses the principles for counselling and psychological care as outlined in the Consultation Paper. VSS recommends that there should be no requirement for a DSMV diagnosis to access the Redress Scheme, associated services (i.e. counselling), or Medicare funded services, such as a mental health care plan.

Recommendation 6

That a complex trauma informed national accreditation scheme be implemented for lawyers taking instruction from child sexual abuse survivors.

Recommendation 7

In assessing monetary payments, VSS endorses the adoption of a table or matrix that takes into account both the severity and impact of the abuse, as outlined in the Consultation Paper. Other aggravating factors to consider include length of abuse, number of perpetrators and institutional responses to disclosures. This matrix should be publically accessible to ensure transparency.

Recommendation 8

That there is a legislative exemption of any payment from the National Redress Scheme affecting the survivor's Centrelink or Medicare status and benefits.

Recommendation 9

That survivors who have previously received a payout or successful civil claim still have access to the National Redress Scheme, but any payment that they have received be deducted from their National Redress Scheme payment. If a survivor has had a failed civil claim this should not exclude them from the National Redress Scheme.

Recommendation 10

That the standard of proof in the National Redress Scheme consists of a plausibility test, or a reasonable likelihood test, as opposed to the civil balance of probabilities.

Recommendation 11

That there is no confidentiality requirement on any survivor, with the exception of the personal details of other survivors.

Recommendation 12

That there is to be no deed of release associated with any redress scheme payment.

Recommendation 13

The mandatory contribution to a redress fund by non-government institutions where child sexual abuse has taken place.

Recommendation 14

Where the perpetrator has been convicted, mandatory seizure of assets to contribute to the National Redress Scheme Fund, and/or direct payments to the victim.

Recommendation 15

Where an institution that no longer exists has a traceable and tangible connection to a current institution, the current institution should be partially liable for contribution to the National Redress Scheme.

Recommendation 16

The South Australian Victims of Crime fund model to be extended to all States and Territories to provide a funding stream for the redress scheme.

Recommendation 17

That all statutes of limitation in relation to sexual abuse are abolished, and abolished retrospectively.

Recommendation 18

That all legislation recommended be implemented nationally and consistently.

Recommendation 19

That there is a retrospective legislative liability imposed on institutions, unless the institution proves that it took reasonable precautions to prevent abuse.

Recommendation 20

That there is a prospective legislative liability imposed on institutions, unless the institution proves that it took significant precautions to prevent abuse.

Recommendation 21

That there is retrospective legislative reform to enable the identification of a proper defendant. VSS endorses the options for reform as outlined in the Consultation Paper (p. 34) whereby a statutory property trust is a proper defendant where no more appropriate defendant can be found.

Recommendation 22

That improved digital records management and standards be implemented for government and non-government records that are likely to be relevant in claims of sexual abuse including cessation of State Archive record destruction and compliance audits by the relevant Commissioner or Ombudsman.

Recommendation 23

That legislation is enacted to exempt claims related to child sexual abuse from pre-action procedures, such as the requirement to mediate or enter into negotiations with the perpetrator(s) and/or Institution(s). These are too prohibitive and onerous for survivors and have the potential to re-traumatise.

Detailed Response

Structural Issues

1. Redress schemes for survivors of sexual abuse currently vary widely in accessibility, payments provided, and barriers to receiving payments. It is the position of the VSS that this creates a culture of injustice and re-victimisation of survivors based on circumstances they cannot control.

2. The principles on which redress schemes should be based are:
    - Redress should be fair and equal, not discriminating based on location, continued existence of the institution, whether the institution was private or government, whether the matter went to court, and other such factors;
    - A survivor driven approach focused on what survivors want and the methods they wish to pursue;
    - A 'no wrong door' approach, where regardless of the access point to redress all options should be available;
    - All redress schemes and options should be provided in a complex-trauma informed manner; and
    - Regard should be given to the particular vulnerabilities of survivors and all possible assistance should be given.

3. For the above reasons, institutional redress schemes are unsuitable. They are discriminatory based on whether the institution continues to exist and retain resources. Further, they are inherently institution-led, rather than survivor-led and require survivors to engage with institutions when it may not be their desire to do so, or advisable for their wellbeing.

4. As such, a statutory scheme is the most appropriate model to adopt.

5. As VSS has expanded upon in more detail in our Submission on Issues Paper 7, there currently are two statutory redress options in SA:
    - Statutory Victims of Crime Compensation Scheme; and
    - *Ex-gratia* Payments payable through Victims of Crime Compensation (VOCC) Scheme for former residents of State care who experienced sexual abuse as children.

6. While many victims face barriers to accessing compensation through the current South Australian VOCC Scheme, there are some advantages to the current system, such as an opportunity for redress without having to go through civil litigation, meaning there is less opportunity for re-victimisation.

7. However, the VOCC scheme is insufficient to deal with matters occurring prior to 2001, as the legislation is not retrospective, and the payouts are very limited. Further, the offence must be admitted to or proven beyond reasonable doubt, which in the case of historical sexual abuse is unlikely.

8. The VOCC Scheme does not include any of the other forms of redress sought by adult survivors, such as an apology from the offender, public recognition and affirmation of a wrong done, and commitment from institutions to better protect children now and in the future.

9. In the context of institutional child sexual abuse, many survivors making a claim would do so under the *Criminal Injuries Compensation Act 1978 (SA)* rather than the *Victims of Crime Act 2001 (SA)* due to the time the offence(s) took place. Under this legislation, the claimant has to apply to court for

compensation and serve the application on both the Crown Solicitor and the offender. In making the offender a party to proceedings, they then have the legal right to force the matter to trial even when the Crown and victim are in agreement. In addition, any party can require the claimant to undergo a medical examination by a doctor of their own choice, thus enabling "the potential that an offender could use this provision to effectively re-victimise his or her victim".[2]

10. In regard to *ex gratia* payments to former state wards, there is a considerable lack of transparency surrounding the decision-making process of the Attorney General; the Attorney General decides who will be offered payment, the amount of such payment and any conditions to be applied in receipt of the payment. The Attorney General is not obliged to provide reasons for these decisions, and there is no appeal process. In fact, the application process, unlike the VOCC Scheme, does not require legal representation and this may result in claimants not being aware of their legal rights. Further, the only aspect of the process where there is provision to cover legal fees is for funding of $750 for legal advice to sign a Deed of Discharge and Release. As the amount paid is determined by the severity of the abuse experienced, it seems inadequate that there is no provision for claimants to engage the assistance of a lawyer as they can with the VOCC Scheme. In addition, there is no mechanism regarding *ex gratia* payments to former state wards to hold the perpetrator and/or institution accountable.

11. Neither of these schemes is adequate for responding to survivors of institutional child sexual abuse because they fail to provide fair and equal access to survivors regardless of when they were abused and whether their case went to court.

12. It is VSS' position that any redress scheme should be available to all survivors, regardless of when the abuse took place. The principle that there should be 'no wrong door' for survivors should ensure that future victims are not excluded from any redress scheme that is implemented as it limits their avenues of recourse.

13. For these reasons VSS supports a National Redress Scheme that operates within a complex trauma informed, survivor driven framework.

14. The Scheme ought to be administered by each state and territory via a state liaison office who would facilitate information sharing between the states, give equal access to victims regardless of current location and the location of the abuse, and provide a protective barrier between survivors and institutions.

Recommendation 1

The implementation of a complex trauma informed and survivor driven National Redress Scheme for both past and future abuse in Australia, underpinned by a national legislative framework to ensure consistency, and administrated by state and territory governments.

Direct Personal Response

15. For many survivors, the occurrence of a genuine, personalised apology from the institution is integral to their ongoing recovery and sense of justice. As such, for any scheme to provide justice a measure to achieve this would need to be in place.

[2] J Ellisdon, 'Criminal Injuries Compensation: Criminal Injuries Compensation Act', 1969 to 1978 & Victims of Crime Act 2001", Law Society of SA CPD Program, 16 March 2011, pp. 1-2.

16. VSS supports the right of the survivor to define how redress is accessed, and therefore the scheme would need to allow for contact between the survivor and the institution if the survivor wished it, but for this to be an entirely optional path of redress.

17. VSS acknowledges that personal responses from survivors will lead to variable content, so to ensure that no survivor who engages with a redress scheme is re-traumatised there must be minimum standards associated with these interactions, consisting of an opportunity to meet with a senior representative of the institution with a support person of their choice, an open and frank acknowledgement of failure to protect the survivor, an apology for that, and assurance that steps have been taken to prevent future abuses.

18. In order to ensure that there is no inadvertent re-traumatising of victims, representatives from institutions supporting survivors to deliver personal responses to institutions should undertake training in complex-trauma and the effects of child sex abuse.

19. In order to ensure that the interaction is survivor led, all preliminary contact should be facilitated through the National Redress Scheme, and not through the survivor having to approach the institution.

Recommendation 2

That such a scheme includes the establishment of a liaison office in each state and territory to facilitate communication between survivors and institutional representatives. Any direct interaction between survivors and intuitional representatives to take place only at the express wish of the survivor.

Counselling and Psychological Care

20. As detailed in the Consultation Paper, child sex abuse has a strong link to a variety of psychological and mental health issues later in life (p. 107). It is important to acknowledge that these issues may or may not meet DMSV diagnostic criteria, and the absence of a diagnosis does not mean that care is not required.

21. Counselling and psychological care for survivors cannot be a one-off venture. Most survivors will require some form of psychological care from time to time throughout their lives.

22. Through funding associated with the existence of the Royal Commission specialist counselling services for adult survivors of child sexual abuse have been established and are offering assistance to those associated with the Commission. VSS is an organisation that has been funded to provide a complex trauma informed service offering counselling and support to survivors.

23. Survivors should be able to choose from a range of support service providers. If funding from the Royal Commission was withdrawn, this would create a service gap that is currently filled by organisations that have developed specific expertise in relation to institutional abuse.

24. VSS is aware that funding will end six months after the conclusion of the Commission. In line with the Consultation Paper (p. 111), VSS believes that this care should be available throughout a survivor's life, and therefore the funding for these services should be extended past the conclusion of the Commission. Eventually this funding could be administered by the National Redress Scheme, and in the interim, be through DSS.

25. As part of safeguarding survivors' mental health, legal services catering specifically for adult survivors are invaluable to the recovery and redress process. In particular, in-depth knowledge of redress pathways in conjunction with complex trauma informed training is ciritical.

26. The process of redress, regardless of the avenue chosen, is complex and technical. Therefore, services like knowmore, which have provided legal assistance for survivors associated with the Commission, are an integral part of administering a fair and equal redress scheme in the future. VSS submits that funding for these services should continue alongside counselling services.

Recommendation 3

Ongoing provision of funding for support services established in response to the Royal Commission after its close in recognition of the long term needs of survivors. Support offered by these services to include that which is already being offered as well as to support survivors to access the national redress fund and/or civil litigation.

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Ongoing provision of funding of legal services to enable survivors access to free and independent legal advice. Practitioners of such a service to be trained in trauma informed care and practice. This could be achieved through the continuation of funding of knowmore legal service once the Royal Commission has completed its inquiry.

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VSS endorses the principles for counselling and psychological care as outlined in the Consultation Paper. VSS recommends that there should be no requirement for a DSMV diagnosis to access the Redress Scheme, associated services (i.e. counselling), or Medicare funded services, such as a mental health care plan.

Recommendation 6

That a complex trauma informed national accreditation scheme be implemented for lawyers taking instruction from child sexual abuse survivors.

Monetary Payments

27. VSS acknowledges the difficulty of attributing a compensation value that is adequate recompense for the injuries sustained by sex abuse survivors in a manner that is fair and equal for all survivors.

28. As discussed in submissions 5 to 7, the current statutory schemes available to South Australian victims are difficult, time consuming, opaque in their processes, and do not provide adequate payments for survivors. Data at p. 135 of the consultation paper shows that redress from the current state schemes varies significantly, unfairly discriminating against survivors on the basis of their location.

29. Civil litigation is available; however, it is a costly and time consuming process which carries its own challenges (to be discussed later in the submission).

30. As such, it is the view of VSS that any redress scheme must include an element of monetary

compensation to victims.

31. VSS supports a table model as a method of assessing the payment each survivor ought to receive.

32. However, VSS stresses that the model should account not only for the objective severity of abuse, but the personal impact of the abuse and that this impact should not be decided based on diagnosed psychological or physical damage alone. There are elements of complex trauma that do not amount to the diagnostic criteria under the DSMV, but still have a negative impact on survivors' lives.

33. As such, VSS submits that when assessing the impact of the abuse, submissions from the survivor, family, friends, and Allied Health Professionals should receive significant weight, and that medical diagnosis is not the sole criteria for measuring impact.

34. VSS supports additional payments for special criteria, such as victims from an Aboriginal or Torres Strait Islander background, in order to acknowledge the particular cultural damage done by institutional abuse.

35. VSS emphasises the need for transparency in compensation system, and that the table used for determining damages, and the thresholds for each level within those criteria is publicly available.

36. VSS notes that no payment should negatively impact a survivor's life, therefore we submit that legislative amendments should be made to exempt any redress scheme payment from calculations of Centrelink or Medicare benefits.

37. VSS notes that the redress scheme should not be an exclusionary scheme, and that survivors who have received previous compensation should still be able to access the scheme.

38. VSS recommends that any previous payment be deducted from the amount that the survivor would receive under the scheme. If the previous payment is larger than the amount the survivor would receive under the scheme, the survivor would not receive any additional payment.

39. This arrangement allows for survivors whose matters have been inadequately compensated to receive redress, but prevents claimants from receiving adequate payments on multiple occasions.

Recommendation 7

In assessing monetary payments, VSS endorses the adoption of a table or matrix that takes into account both the severity and impact of the abuse, as outlined in the Consultation Paper. Other aggravating factors to consider would include length of abuse, number of perpetrators and institutional responses to disclosures. This matrix should be publically accessible to ensure transparency.

Recommendation 8

That there is a legislative exemption of any payment from the National Redress Scheme affecting the survivor's Centrelink or Medicare status and benefits.

Recommendation 9

That survivors who have previously received a payout or successful civil claim still have access to the National Redress Scheme, but any payment that they have received be deducted from their National

Redress Scheme payment. If a survivor has had a failed civil claim this should not exclude them from the National Redress Scheme.

Redress Scheme Processes

40. A redress scheme, once established, should remain in place indefinitely. VSS believes that victims should have a right to redress regardless of when they were abused, including potential abuse in the future.

41. The redress scheme should be open to as many survivors as possible. As such, there should be no statutory restrictions on making a claim linked to the date when the abuse took place, and survivors of all institutions – private and government, existing and non-existent – should be eligible for the scheme.

42. The threshold to make an application should only be an association with the institution where the alleged abuse took place. If an applicant has reached this threshold, then their application should be admitted for assessment by the redress scheme.

43. The standard of evidence should be relatively low in a redress scheme. A redress scheme is not a court, and the time lapse between the abuse occurring and the survivor accessing the redress scheme will be lengthy in many cases.

44. One of the most challenging aspects faced by survivors is the lack of belief about what happened to them. In line with being a survivor focused, complex trauma informed scheme, the redress scheme should start from the assumption that survivors are truthful. As such, the standard of proof for the redress scheme should be lower than in a court. The civil balance of probabilities is a threshold that will prejudice the redress scheme against victims, as they do not have an investigative body to gather evidence for them. As such a plausibility test or reasonable likelihood test should be applied.

45. No deed of release should be required for the redress scheme, in line with the principle of there being 'no wrong door' for survivors when accessing redress. A deed of release would obstruct the survivor from pursuing their matter in a civil court after receiving compensation. The only requirement should be that any subsequent civil payment would take in to account compensation received through the redress scheme.

Recommendation 10

That the standard of proof in the National Redress Scheme consists of a plausibility test, or a reasonable likelihood test, as opposed to the civil balance of probabilities.

Recommendation 11

That there is no confidentiality requirement on any survivor, with the exception of the personal details of other survivors.

Recommendation 12

That there is to be no deed of release associated with any redress scheme payment.

Funding Redress

46. VSS proposes that the liability for child sexual abuse exists beyond the perpetrator of the crime. The perpetrator has the primary liability for the crime committed, but institutions and systems that allow the perpetrator access and cover have a level of liability for the abuse.

47. As such, VSS proposes a three tiered funding model for a national redress scheme.

48. VSS submits that the primary responsibility for child sex abuse lies with the perpetrator, and that, as far as is practicable, perpetrators should be liable for compensation paid to their victims.

49. With this in mind, where there has been a criminal conviction in institutional child sex abuse cases, the assets of the perpetrator should be seized and either a direct monetary payment is made to the victim, or the assets should be allocated to the national redress scheme funding pool.

50. Where a person has been convicted of non-institutional child abuse, asset seizure should still take place to pay compensation firstly to the victim, and secondly to the redress scheme. This would ensure that punishment for offences impacts on both the perpetrator and the institution where the offence took place.

51. Given the above, institutions need to be made responsible for all abuse that occurred within their organisations. We believe that all institutions where child sexual abuse has taken place should be required to pay a mandatory contribution to the National Redress Scheme. This could be based on a sliding scale, with all institutions required to pay a base percentage into the scheme, plus additional contributions based on the amount and severity of the failings of the institution. This structure would ensure that all victims could benefit, including those who were abused in institutions that no longer exist or retain assets.

52. With regard to institutions that no longer exist, if the institution has been rebranded, merged with another institution, dissolved and reformed with the same people etc, or in some other way a current institution has a tangible and traceable connection to an institution where abuse took place, the current institution should be held partially liable for the previous institution's failings. The extent to which this liability would extend would depend on the level of connection to the previous institution and would have to be assessed on a case-by-case basis.

53. In the South Australian VOCC scheme, offenders pay a levy that contributes to the fund to compensate victims of crime. If this type of approach was implemented by all states and territories, VOCC schemes could partially fund a national redress scheme for survivors of institutional child sexual abuse.

54. A portion of the VOCC fund in each state could be diverted to fund the national redress scheme, ensuring that all who breach the laws of Australia contribute to the ongoing care and compensation of survivors of institutional child sexual abuse.

Recommendation 13

The mandatory contribution to a redress fund by non-government institutions where child sexual abuse has taken place.

Recommendation 14

Where the perpetrator has been convicted, mandatory seizure of assets to contribute to the National

Redress Scheme Fund, and/or direct payments to the victim.

Recommendation 15

Where an institution that no longer exists has a traceable and tangible connection to a current institution, the current institution should be partially liable for contribution to the National Redress Scheme.

Recommendation 16

The South Australian Victims of Crime fund model to be extended to all States and Territories to provide a partial funding stream for the redress scheme.

Interim Arrangements

55. In line with recommendations 3 and 4, interim funding should be continued for psychological care and counselling services, and for legal services that have developed expertise in institutional child sex abuse and received training in complex trauma.

Civil Litigation

56. Child sexual abuse is often not revealed until the victim is well into adulthood. Both criminal and civil courts have been dogged by limitation periods relating to sexual assault cases; however the criminal courts have retrospectively abolished time limits in South Australia.[3] Civil time limits, however, remain in force.

57. VSS submits that it is incongruous with the nature of child sex abuse and justice to continue the current system of limiting the time in which action may be taken. Child sex abuse presents a unique challenge for the survivor in seeking redress, and the time limit serves to re-victimise survivors, and impede the delivery of justice. To deem some survivors worthy of civil redress and others not worthy based purely upon the date when they were abused is contrary to the essence of justice. Thus, VSS recommends that limitations of action are removed for child sex abuse matters.

58. Aligned with removing the limitation of action on child sex abuse matters, a retrospective duty should be imposed on institutions. This approach has precedent. PGA v The Queen4 held that a defendant could be charged with marital rape that occurred in 1963, thirteen years before South Australia statutorily abolished the marital immunity on rape. In essence, this case retrospectively created a duty on spouses to gain consent.

59. The civil system is a state based system, and therefore varies between jurisdictions. In order to achieve equal access for victims regardless of jurisdiction, the states and territories of Australia must undertake to work together in implementing reforms to the civil system that will lead to the consistent treatment of survivors.

60. In the absence of consistent approaches, cross-jurisdictional cases will become overly complex and costly to resolve, which will negatively impact upon survivors and the courts.

[3] S72A *Criminal Law Consolidation Act SA* (1935).
[4] (2012) 245 CLR 355.

61. VSS submits that it is appropriate to impose a duty upon institutions. The lack of a statutory duty on institutions is prejudicing victims in the civil system, as their claims are being judged by the standards of the time in which the abuse occurred – standards that today are universally accepted to be inadequate. A recent South Australian case, *A, DC v Prince Alfred College Incorporated*[5] saw an adult survivor denied compensation based on the standards of the 1960s.

62. Attached as Appendix A is the judgement for this case as VSS believes this demonstrates the inadequacies of the current law. Findings by Vanstone J found that the plaintiff was sexually abused by an institutional representative and that this abuse caused profound suffering, but due to the lapse of time, she found that the defendant (the institution) would suffer prejudice, thus declining to exercise her discretion to extend time under the *Limitations Act.*

63. As a retrospective duty has precedent in Australia, and the absence of one with regards to institutional abuse is seeing injustice done to survivors, VSS recommends that a retrospective duty be imposed on institutions unless the institution took reasonable precautions to prevent the abuse.

64. In addition, VSS recommends that a separate and higher standard be imposed prospectively, requiring institutions to take significant precautions to prevent abuse in order to discharge their duty.

65. Given the current understanding of sexual abuse and the way in which perpetrators operate, VSS contends that it is reasonable to require institutions to take stringent precaution against child sexual abuse, and that reasonable precaution is an insignificant threshold for prospective matters.

66. VSS would encourage collaboration between insurance companies and the Royal Commission to develop an outline of minimum precautions that insurance companies would require to insure an institution, which would be the basis for significant legal precaution.

67. In the event that smaller organisations are unable to comply with these regulations, VSS contends that they be declared unsuitable to keep children safe from harm.

68. VSS notes that one of the most prevalent issues for survivors seeking civil redress is the absence of an appropriate defendant in the case of some religious institutions. It is unacceptable that some institutions can evade their legal responsibilities because they are not part of an entity that can be sued.

69. In order to rectify this injustice and ensure that all institutions can be held responsible for their actions, VSS recommends that the proposal in the Consultation Paper at p. 224 be retrospectively adopted, whereby a statutory property trust is a proper defendant where a more appropriate defendant cannot be found.

70. In order to complement the removal of limitations to action, legislation amending the records keeping requirements should be enacted in order to assist in future claims and take account of the absence of a statute of limitation.

71. VSS therefore recommends that improved digital records management and standards be implemented for government and non-government records that are likely to be relevant in claims of sexual abuse including cessation of State Archive record destruction and compliance audits by the relevant Commissioner or Ombudsman.

[5] [2015] SASC 12.

72. These amendments would function both as a review and standards mechanism for institutions, as a source of evidence in future claims.

73. Finally, VSS notes that civil claims are subject to a number of pre-action procedures in jurisdictions across Australia. VSS contends that these procedures are unsuitable in matters of child sexual abuse.

74. VSS particularly addresses the legislation in Queensland and the ACT, and soon-to-be enforced in the Northern Territory that subjects claims to pre-action notice requirements within timeframes that apply retrospectively and operate essentially to bar historical claims from being heard. VSS submits that child sex abuse claims are exempted from these requirements.

75. Further, VSS recommends that child sexual abuse matters are generally exempted from pre-action procedures such as negotiation and mediation, as these forced procedures, intended to decrease the burden on the court system, operate to re-victimise and traumatise survivors of child sexual abuse. In particular the requirement to mediate with the institution is potentially traumatic for the victim, especially in the context of the power imbalance that exists between survivors and institutions.

76. Pre-action procedures also unnecessarily extend the time that child sex abuse matters will take to progress through the courts, and as these matters are already time consuming and costly, pre-action procedures are an overly onerous burden on the judicial process.

Recommendation 17

That all statutes of limitation in relation to sexual abuse are abolished, and abolished retrospectively.

Recommendation 18

That all legislative recommendations be implemented nationally and consistently.

Recommendation 19

That there is a retrospective legislative liability imposed on institutions, unless the institution proves that it took reasonable precautions to prevent abuse.

Recommendation 20

That there is a prospective legislative liability imposed on institutions, unless the institution proves that it took significant precautions to prevent abuse.

Recommendation 21

That there is retrospective legislative reform to enable the identification of a proper defendant. VSS endorses the options for reform as outlined in the Consultation Paper (224) whereby a statutory property trust is a proper defendant where no more appropriate defendant can be found.

Recommendation 22

That improved digital records management and standards be implemented for government and non-government records that are likely to be relevant in claims of sexual abuse including cessation of State Archive record destruction and compliance audits by the relevant Commissioner or Ombudsman.

Recommendation 23

That legislation is enacted to exempt claims related to child sexual abuse from pre-action procedures, such as the requirement to mediate or enter into negotiations with the perpetrator(s) and/or Institution(s). These are too prohibitive and onerous for survivors and have the potential to re-traumatise.

APPENDIX A

SUPREME COURT OF SOUTH AUSTRALIA

(Civil)

A, DC v PRINCE ALFRED COLLEGE INCORPORATED

[2015] SASC 12

Judgment of The Honourable Justice Vanstone

4 February 2015

EMPLOYMENT LAW - RIGHTS AND LIABILITIES AS BETWEEN EMPLOYER AND THIRD PARTIES - LIABILITIES OF EMPLOYER - FOR TORTS OF EMPLOYEE - ACT IN COURSE OF EMPLOYMENT AND WITHIN SCOPE OF AUTHORITY - PARTICULAR CASES

TORTS - NEGLIGENCE - ESSENTIALS OF ACTION FOR NEGLIGENCE - DUTY OF CARE - SPECIAL RELATIONSHIPS AND DUTIES - SCHOOLS

LIMITATION OF ACTIONS - EXTENSION OR POSTPONEMENT OF LIMITATION PERIODS - EXTENSION OF TIME IN PERSONAL INJURIES MATTERS - GENERALLY

Claim for personal injury loss and damage arising from being sexually abused by a master in 1962 as a 12 and 13 year old when a boarder at the defendant school - claim in negligence and on the basis of vicarious liability - claim that cause of action did not arise until 1996 when plaintiff was diagnosed with post traumatic stress disorder - whether plaintiff suffered injury loss and damage arising from the sexual abuse - if he did when did the cause of action arise - did the defendant breach the non-delegable duty owed to the plaintiff - did the defendant breach its duty of care to the plaintiff in employing or supervising the offending master or in the way it dealt with the matter after discovery of the sexual abuse - whether the sexual abuse was committed in the course of the master's employment so as to make the defendant vicariously liable - whether the plaintiff was under a disability in terms of s 45 of the Limitations of Actions Act from the time of his diagnosis in 1996 so as to extend the time for bringing the action - whether the plaintiff was in need of an extension of time under s 48 of the Limitations Act - whether an extension should be granted -

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Plaintiff: A, DC Counsel: MR R A CAMERON WITH MR J B TEAGUE - Solicitor: ASTRID MACLEOD
Defendant: PRINCE ALFRED COLLEGE INCORPORATED Counsel: MR M C LIVESEY QC WITH MR K G HANDSHIN - Solicitor: WALLMANS LAWYERS

Hearing Date/s: 03/11/2014, 05/11/2014 to 07/11/2014, 10/11/2014 to 13/11/2014, 17/11/2014 to 18/11/2014, 20/11/2014 to 21/11/2014, 24/11/2014 to 25/11/2014, 27/11/2014 to 28/11/2014, 09/12/2014 to 11/12/2014

File No/s: SCCIV-08-1767

whether the delay resulted from conduct of the defendant - whether the plaintiff discovered facts material to his case within 12 months prior to instituting the action - whether it was just to grant an extension of time in all the circumstances.

Held: plaintiff's claim dismissed - negligence on the part of the defendant not proved.

Limitation of Actions Act 1936 (SA) s 36, s 45, s 48; *Evidence Act 1929* (SA) s 34; *Limitation Act 1969* (NSW) s 11(3); *Law Reform (Ipp Recommendations) Act 2004* (SA) s 1, Schedule 1, referred to.
The Commonwealth of Australia v Introvigne (1982) 150 CLR 258; *State of New South Wales v Lapore* (2003) 212 CLR 511; *Modbury Triangle Shopping Centre Pty Ltd v Anzil* (2000) 205 CLR 254; *Withyman v State of New South Wales* [2013] NSWCA 10; *Pointon v Walkley* [1951] SASR 121; *Curic v Sprudzans* (1980) 91 LSJS 232; *Johnson v State of South Australia* (1980) 26 SASR 1; *State of South Australia v Johnson* (1981) 42 ALR 161; *Wright v Donatelli* (1995) 65 SASR 307; *Sola Optical Australia Pty Ltd v Mills* (1987) 163 CLR 628; *Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 541; *Ulowski v Miller* [1968] SASR 277; *Lovett v Le Gall* (1975) 10 SASR 479; *State of South Australia v Lampard-Trevorrow* (2010) 106 SASR 331, considered.

A, DC v PRINCE ALFRED COLLEGE INCORPORATED
[2015] SASC 12

Civil

VANSTONE J: In 1962 the plaintiff was enrolled as a boarder at Prince Alfred College (PAC). He was then 12 years of age, being born on 18 July 1949.

In the same year a teacher at PAC of one years standing, Dean Bain, was appointed as a housemaster of the boarding house.

It is the plaintiff's case that in 1962, "in the course of his employment" with PAC, Bain sexually assaulted him on a number of occasions both at the school and elsewhere. What I shall call the abuse continued for some months, but not more than eight months. Shortly after the plaintiff reported the abuse Bain was dismissed. In the ensuing year or so the plaintiff claims to have been subjected to bullying, which he believes was causally connected to the abuse. No counselling or other assistance was rendered to the plaintiff.

The plaintiff claims that PAC is liable for consequent personal injury, loss and damage sustained by him, either because PAC owed him a non-delegable duty of care, or because it breached its duty of care to him in employing Bain and in failing to have in place adequate systems to protect the plaintiff from Bain, or because it is vicariously liable for Bain's criminal conduct.

For many years the plaintiff experienced a range of difficulties. In 1996 his various symptoms intensified and he sought specialist help. He was diagnosed with post traumatic stress disorder by a psychologist, Ian Coats. Particularly from that time he experienced difficulties which pervaded his relationships with his wife, family and friends and his ability to run his business. Since that year he has been counselled by both psychiatrists and psychologists (often concurrently) as well as by his general practitioner. He has also sought out and seen alternative therapists.

There is a dispute about whether the plaintiff requires an extension of time within which to bring this claim, and if so, whether it should be granted.

On 16 October 2014 I ordered that the issues of any necessary extension of time and liability should be separated from quantum and tried first. I gave brief reasons for that ruling. However, in order to assuage the plaintiff's concern at the prospect of giving evidence twice on occasions separated by potentially many months, it was agreed that he could complete his evidence during the first hearing. His evidence occupied almost eight sitting days. If it becomes relevant to weigh as a factor in consideration of the extension of time the matter of the magnitude of the claim, I propose to assume that on the plaintiff's case his damages would run to more than $1m.

The plaintiff's claim was lodged in this Court on 4 December 2008.

Since 1962 when the events giving rise to the cause of action occurred there have been several amendments to the *Limitations of Actions Act 1936* (SA) (the Limitations Act). On the face of s 36 of the Limitations Act the plaintiff's claim had to be instituted within three years of his attaining the age of 21 years, which he did on 17 July 1970. However, the plaintiff argues that the cause of action did not arise until many years later.

The plaintiff argues that, although from the time of the abuse and as a young man in his 20s or 30s he suffered some ill effects from the sexual abuse, his symptoms did not then amount to a recognisable psychiatric illness so as to have been actionable. It was only later, when his symptoms became debilitating and when he went to Mr Coats and received the post traumatic stress disorder diagnosis, that the cause of action arose. That was in August 1996. The plaintiff further argues that since that time he has been under a legal disability within the meaning of s 45 of the Limitations Act. If so, then the time for bringing the action was extended by the period or periods for which the disability existed; although not for more than 30 years from when the right to bring the action arose: s 45(3).

In the alternative, and to the extent necessary, the plaintiff seeks an extension of time under s 48 of the Limitations Act. In this regard he pleads first that his failure to institute the claim within the limitation period resulted from the defendant's conduct. Then he pleads that two separate facts material to his claim were not ascertained by him until December 2007. The first of those was that his treating psychiatrist, Dr Kelly, expressed the opinion that the plaintiff would not make a full recovery. The second was that the plaintiff learned during the sentencing of Bain in the District Court, that Bain had been convicted in 1954 (as a juvenile) for gross indecency, that is, seven years before he was employed by PAC. Before granting an extension under this section the court must be satisfied that it is just in all the circumstances to do so: s 48(3)(b). I propose to deal with these questions after the substantive issues.

Apart from giving evidence himself, the principal witnesses called by the plaintiff were his former wife, his current partner, three psychiatrists and a psychologist, three former fellow boarders from PAC and employees from the plaintiff's business. Three men who were students at the Cummins Area School in 1960, where Bain taught before joining the PAC staff, were also called.

The perpetrator, Bain, was not called to give evidence. There was no issue but that the abuse occurred as described by the plaintiff. Bain was convicted in 2007 for two counts of indecent assault committed upon the plaintiff, as well as for offences against two other PAC boys.

The defendant called Mr Geoffrey Bean AM, the headmaster of PAC between 1970 and 1987. His evidence encompassed his own practice in relation to the extent of enquiry undertaken before employing a teacher. There was also evidence from the Deputy Chief Executive of the Independent Schools Association of South Australia concerning practices in employing prospective teachers among those schools in more recent times.

There were admissions pursuant to s 34 of the *Evidence Act 1929* (SA) as to the death of persons who might otherwise have been expected to be called to give evidence. They included the headmaster of PAC in 1962, Mr Dunning, the then senior master of PAC, Mr Smith, the then school chaplain, The Rev Waters, and the headmaster of the Cummins Area School at the time of Bain's departure from that school, Mr Dawes. It was also admitted that the principal boarding house master at PAC in 1962, Mr Prest, was extremely unwell at the time of trial and unable to give evidence.

There are a number of questions for decision. Principal among them are:

1. did the abuse cause the plaintiff injury, loss and damage, and, if so, when did the cause of action arise;

2. did PAC breach the non-delegable duty of care owed to the plaintiff;

3. did PAC breach the duty of care owed to the plaintiff in employing Bain, or in supervising Bain or in the way it dealt with the matter and with the plaintiff once the abuse was discovered;

4. were the acts of abuse committed in the course of Bain's employment so as to make PAC vicariously liable for those acts;

5. if the cause of action arose in 1996, was the plaintiff under a disability in terms of s 45 of the Limitations Act from that time, either continuously, or for some period or periods, such as to extend the time for bringing the action; and, if so, did that extension operate to the time when proceedings were instituted in 2008;

6. Should an extension of time be granted?

    (a) did the plaintiff's apparent failure to institute the action within the limitation period result from the conduct of the defendant; or

    (b) did the plaintiff discover facts material to his case within 12 months before instituting the action; and,

    (c) is it, in all the circumstances of the case, just to grant an extension of time.

On all issues in need of proof, the standard is on the balance.

1. Did the abuse cause the plaintiff injury and when did the cause of action arise?

As noted, the plaintiff's evidence was led in great detail. He essentially told his life story in a frank and comprehensive manner, imparting a depth of information which necessarily went far beyond that which the psychiatric witnesses could have acquired. The plaintiff's manner of relating his story showed a familiarity with the process of interrogation and a preparedness to be very candid about events. Although the

plaintiff plainly found the process extremely tiring and at many stages stressful, at the same time he appeared pleased to have the opportunity to discuss his life at such depth.

I found the plaintiff to be an honest and usually reliable witness. It must be extremely hard to give an accurate history of emotional responses and conditions over a period of 52 years and to do so accurately. Moreover, the very fact that the plaintiff has given his history on innumerable occasions to a host of health professionals must have generated some degree of reconstruction. It was suggested to me by the defendant's counsel that having discovered the condition of post traumatic stress disorder in 1996, the plaintiff had researched it and effectively manufactured some symptoms to give the diagnosis weight. I do not accept that that is so. Understandably the plaintiff was interested in the diagnosis first made by Mr Coats in August 1996, because it seemed to make sense of many of the signs and symptoms which he had experienced over many years, as well as his current ones. But I do not accept that he deliberately set about claiming symptoms with a view to lending weight to that diagnosis.

The plaintiff was plainly well aware of areas where his evidence might be attacked and he quickly appreciated lines of cross-examination and was alive to protecting his interests. I do not detect in that a wish to obfuscate though. As I said, I found the plaintiff to be a truthful witness and, on the whole, reliable. I propose to set out in some detail the chronology of his life as it emerged through the evidence and then to briefly summarise the evidence of the psychologist, Mr Coats, and Dr Kelly, the plaintiff's treating psychiatrist between 2002 and 2008, Dr Ford, his current treating psychiatrist, and Professor McFarlane. I shall then make findings about the cause of action.

The plaintiff gave evidence that he was born in Pinnaroo in 1949 and there completed his primary schooling. In 1962 when he was 12 years old his parents sent him to PAC where he commenced his junior year, now called Year 8, and resided in the boarding house. He said at that time Mr Jack Dunning was the headmaster of the school and Mr David Prest was the senior housemaster in charge of the boarding house. Bain and two others were housemasters. He said that the housemasters were present during meal times. The prefects supervised day to day activities of juniors including study, showering and "lights out" in the evenings and also disciplined them when rules were broken. The prefects would send boys to Mr Prest for discipline if they were considered "out of control". There were three dormitories for Year 8 boys. The plaintiff said that in 1962 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. He said that the other housemasters did not supervise lights out and did not come into his dormitory.

The plaintiff gave evidence that the abuse started in about April 1962 when Bain was telling a story in the dormitory after lights out. He said Bain sat on his bed and placed the plaintiff's hand around his erect penis. The next incident occurred about two weeks later when Bain fondled the plaintiff's genitals under the bedding while telling a story after lights out. The plaintiff said that throughout the year he visited Bain's room at Bain's request on about 20 occasions and there was molested by Bain who

stimulated him to ejaculation and performed oral sex on him. Bain's bedroom was located close to Mr Prest's room. He was always scared of meeting a prefect or master on the stairs on his way there, especially after lights out. The time of his visits varied between after school and before dinner, after lights out or during weekends. He said when he would leave after sexual interaction Bain would give him "sloppy" kisses. On one visit to Bain's room, Bain instigated sexual activity with the plaintiff and another boy together and the plaintiff was worried that the other boy would tell people about it. He said that other boys started commenting about Bain's "special treatment" towards him. On one occasion he found chocolates in his locker, put there by Bain, and other boys knew of this. On an exeat weekend Bain accompanied him to his Pinnaroo home. During the weekend they drove together towards the border, but the plaintiff thought there was no sexual interaction between them. The plaintiff described being taken by Bain on the journey back to Adelaide to a house on Devereux Road, Beaumont where Bain tried to get him to perform oral sex on him. The plaintiff said the two of them stayed the night there.

In October of that year the plaintiff disclosed the abuse to another boarder, JC, who in turn told the school chaplain, Reverend Kyle Waters. Waters called the plaintiff to his office to discuss what Bain had been doing. One or two days later Bain approached the plaintiff outside the school grounds and said that he had been dismissed. That night or the following night an assembly was held for all secondary school boarders, about 150 boys in total. Waters announced Bain's dismissal and told the boarders that no one was to talk about it and that it must be kept within the school. When cross-examined about this, the plaintiff recalled that Waters had told him to come and speak to him if he needed any help, though he never had any counselling. He said that neither Mr Dunning nor the housemasters had ever spoken to him about it or offered any support. He felt humiliated because he thought all the boarders knew and gossiped about his activities with Bain.

The plaintiff described an incident of "sexual contact" with another boy from the boarding house at the boy's home during the May holidays of 1963. He said their respective parents found out and had a meeting with Reverend Waters. The plaintiff felt ashamed. After that he was teased at school, physically bullied and isolated from his friends. He said he was sat on and punched by a particular boy on the back oval and in the locker room. He said he nevertheless enjoyed his later school years. He matriculated in 1966.

In 1967 the plaintiff started an arts degree at Flinders University. He left after failing his second year. He then started an accounting course but dropped out after a short time. Over the next three years he played football for the PAC Old Scholars team, even though this made him feel uncomfortable because he thought his association with Bain was common knowledge. At the age of 19 he started working in a stationery business on Jetty Road, Glenelg purchased by his father. In 1973 he and his father purchased another newsagency business on Jetty Road. The plaintiff's father died in 1977 and the plaintiff continued to manage and develop the newsagency for another 10 years. He sold the original stationery business in 1978 and bought a jewellery store in

Glenelg the following year. During the same year he bought a block of six units at Hove.

In 1972 the plaintiff married. He and his wife, whom I shall call Jane, built a home at West Beach. On 27 October 1980 their first child, a daughter, was born. In 1981 the plaintiff bought another newsagency business on Moseley Square, Glenelg. The following year the plaintiff and his wife sold their West Beach home to raise funds for renovations of rented premises at Moseley Square. There was a flat above the newsagency in which they intended to live. Their son was born on 23 November 1982 by which time they had moved into the flat. During the year that followed the plaintiff sold the jewellery business and purchased a large family home in Moseley Street, Glenelg.

The plaintiff described experiencing fear for his young children which "seemed unnatural". He also felt increasingly trapped within himself. He said that during the early 80s he suffered anxiety and had a drinking habit, at times becoming intoxicated at social functions. He felt anxious and "out of place", more so when mixing with friends from PAC. From about 1980 to 1981 he attended the Elura and Joslin Clinics for counselling for his anxiety and drinking problem. He ceased drinking for one year.

The plaintiff gave evidence that in the early 80s he used, for the first time, the services of a prostitute. He also described going to a massage parlour soon after seeing Mr Coats and disclosing the fact of the abuse. He said it was to relieve some of the horrendous feelings he experienced after speaking of the abuse. I do not propose to detail the evidence on the topic of prostitutes.

The plaintiff said that in 1984 he sold the Moseley Square business because his anxiety was "starting to creep up" and long working hours were leaving him with "minimal" time for his family. At about that time he learned that Bain was working at the Phil Hoffman travel agency in Glenelg. He said he made efforts to avoid that area for fear of bumping into him. Late that year he sold the units at Hove at a considerable profit. He purchased a commercial property in Brighton and a block of six flats in Glenelg as investments. He managed the tenancies of these himself.

In 1986 the plaintiff became president of the Holdfast Bay Rotary Club. In 1987 the plaintiff sold the newsagency. He decided to take a year away from work and spend time with his family travelling in Australia. The following year he bought a supermarket and hardware store in Morgan. He wished his children to experience the freedom of growing up in a country town. They only intended staying for five years. During cross-examination he agreed that he had described the move as "doing a geographical", implying a strategy to curb drinking by moving to a different area. In Morgan his marriage was good but his drinking continued. By the end of 1990 the plaintiff had acquired an office stationery business in Black Forest. For some time he commuted between Adelaide and Morgan managing both businesses.

He said he began attending AA meetings in Adelaide and stopped drinking in around 1990 or 1991. In 1992 the Morgan supermarket was sold and the family returned to

Adelaide. The Black Forest business continued to grow steadily during the early 90s. He said that in the years leading to 1996 he was happy, fit, worked a lot, spent time with the children at their events and was not drinking. At work he considered himself very much the leader and was well in control.

In 1996 the plaintiff's son enrolled at PAC in accordance with family tradition. The plaintiff explained that he had blocked out the bad years at PAC. The plaintiff said that when he began watching his son play cricket at PAC he felt uncomfortable and inferior. He struggled to interact with other parents. He said he stopped going to his cricket matches because he would experience "flashbacks and memories" about Bain and the teasing from his school days. As the school term progressed he described feeling like his head "would be in one place and [his] body would be elsewhere". Later he learned that this was called "dissociation". The plaintiff said that prior to his son's first term at PAC he had not experienced this. However, he went on to say: "I think I did that to survive in the boarding house when I was afraid ... in fear for going to Mr Bain's room". He said that "little David would go off and bad David would be molested", explaining that it was "so you can cope as a child and not always feel bad".

From that time he left it to Jane to attend most PAC functions. Going there triggered flashbacks, which he said were "like movies in [his] head" of the abuse or teasing. He identified many other triggers for his feelings of fear, sadness, shame and dissociation such as news articles on child abuse, advertisements for Phil Hoffman travel, invitations to functions at PAC, the maroon uniform of PAC, Devereux Road, Bains Road and the Botanic Park, where he had recalled abuse taking place.

By mid 1996 the plaintiff said he was "panicky" and was "having more nightmares". He described having had at one time a nightmare about being trapped in a room with Bain. He said he began struggling to concentrate and solve problems at work. In the mornings he would find himself crying and shaking. He said he gradually began employing people to take over roles he previously filled himself, such as bookwork and ordering stock. Despite his personal struggles his business continued to grow.

On 21 August 1996 the plaintiff saw his general practitioner, Dr Maxwell, who referred him to a psychologist, Ian Coats. He continued to see Mr Coats for about two years. Mr Coats was the first person who the plaintiff told about the abuse. The plaintiff said that after his disclosure the nightmares and flashbacks became worse. He felt guilty and angry because no one previously had told him that the abuse was not his fault.

In February 1997 he heard Bain on the radio. Bain was promoting an offer of free travel for children accompanying their parents on behalf of Phil Hoffman travel. Hearing Bain's voice made the plaintiff panicky and shaky. That year he resumed drinking to "numb" himself.

He said that after disclosing the abuse to Mr Coats he consulted a solicitor, Ms Lincoln of Finlaysons. On 21 August 1997 he instructed Ms Lincoln to commence civil proceedings against Bain. During cross-examination the plaintiff agreed that he had

instructed Ms Lincoln that he started drinking while at university and that it led to promiscuous behaviour and arguments. He agreed that he compensated for his low self esteem with "grandiose ideas" and business decisions to "build [himself] up".

During cross-examination he agreed that in March and April 1997, he had meetings with Ms Lincoln and a barrister, Mr Krupka, during which the need for an extension of time in which to bring a claim was discussed. He agreed that he was warned about the risk that time would not be extended and of the costs involved. He agreed that the advice was that his chances of success were less than 50 per cent. He said he decided not to sue PAC at that time as he considered PAC had done the right thing by dismissing Bain.

Throughout 1997 the plaintiff had dealings with PAC. On 24 February 1997 he went to PAC and told the chaplain, Reverend Adrian Brown, about the abuse. He thought the disclosure might help him. On 13 May the plaintiff attended a meeting at PAC with his lawyers. He stated that it was not then his intention to sue PAC. He said at that time he was seeking PAC's "acceptance of what happened" and some financial assistance.

On 1 September 1997 the plaintiff and his lawyers attended a further meeting with PAC representatives. He said he discussed systems in place to protect and educate boys about sexual abuse, as well as financial assistance. The school offered to pay his 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.

He said that after receiving a letter on 23 September from the then headmaster, Dr Brian Webber, setting out PAC's offer, and after attending a further meeting with PAC on 29 September, he replied by letter accepting the offer. He thought this letter had been written with Ms Lincoln's assistance. The school made good its offer.

In the late 90s the plaintiff became involved in an organisation called Advocates for Survivors of Child Abuse. He was active in agitating for the removal of the statutory immunity in relation to prosecutions for sexual offences committed before December 1982. (That immunity was removed in June 2003.) He said he began reading self-help books about victims of child abuse in 1997. He became familiar with the symptoms of PTSD. The plaintiff said his marriage was deteriorating during this period. He was less able to help around the home and became more detached. He recommenced drinking.

The plaintiff said that by April 1998 he was under pressure from his bankers over increasing debt. He decided to sell the Moseley Street home. The family moved into a series of rented properties. He said dealing with the civil action against Bain at this time was "horrible".

On 23 October 1998 the plaintiff attended a meeting with Bain at the Finlaysons' offices accompanied by his wife and Mr Coats. He said he wanted to question Bain about what had happened. In September 1999 the plaintiff reached a settlement with

Bain, in which Bain agreed to pay the plaintiff a total of $15,000 being an initial sum followed by half-yearly instalments of $1,500.

By 1999 the plaintiff was going to work every day but was cutting back his hours. He was still seeing Mr Coats as his depression was getting worse. He tried several alternative therapies and counsellors as he was "desperate" to see if anyone could help him. He said that in about 2000 he was still expecting to get better.

The plaintiff said by early 2002 he felt very debilitated. He struggled to get out of bed, was on medication and could not cope with normal working hours. He described difficulty sleeping and increasing nightmares. He reported cutting his wrists, in the hope that the physical pain would distract him from his mental "torment".

From 11 June to 9 July 2002 he was admitted to a psychiatric facility, Kahlyn hospital. He began seeing a psychiatrist, Dr David Kelly. He said by then his alcoholism had become a real problem. He returned to work after being discharged from Kahlyn, and continued seeing Dr Kelly and Ms Silvana Shafik, a psychologist, at Kahlyn regularly. However his mental state deteriorated. The plaintiff's drinking problem worsened.

On 23 December 2002 the plaintiff wrote to Ms Lincoln advising he wanted to challenge the settlement with Bain as his problems were continuing.

By early 2003 the plaintiff said he was still hoping he would get better and be able to "stick it out" at work. In February of that year he employed Mr Greg Barraclough to help run the business.

By August 2003 the plaintiff was again suicidal and was readmitted to Kahlyn. He returned to work after his discharge but found it hard to function. He described seeing specialists for panic attacks at that time. At the end of 2003 the office supplies business moved to larger premises at Royal Park to accommodate the increase in sales and stock. He said that while sales continued to increase, profits were "minimal". He appointed Mr Barraclough as general manager in January 2004. He was losing control because of spending so much time at Kahlyn.

In November 2004 the plaintiff stopped going to work. He arranged for his brother-in-law to take over his role. He said he was not coping, felt suicidal, and "couldn't see any future in life". His marriage was deteriorating and he was not interested in sexual relations. He said that by December 2005 he felt he could no longer work.

In 2004 the plaintiff again made contact with PAC. He agreed during cross-examination that in July he wrote to the chairman of the school council, Mr Bruce Spangler, outlining the ongoing effects of the abuse on him and his medical expenses to date and seeking further financial assistance. In the letter he described suffering dissociation as a 12 or 13 year old child and anxiety and panic disorders "for decades". He acknowledged having suggested to PAC that compensation could be paid to him as a "wage or pension" as opposed to a lump sum. In an agenda of matters for discussion with Mr Spangler prepared in early September 2004, the plaintiff noted that his ability to work in the previous year was "almost zero". He agreed that

Dr Maxwell's opinion that he would qualify for the disability pension contributed to that view.

At the September 2004 meeting at PAC the plaintiff asked the chairman for ideas for help with his business and financial help. However, no offer followed and he felt belittled. He also approached the Uniting Church for assistance, but had no success. After these "rejections", the plaintiff again became suicidal. In early December 2004 he was admitted to the Adelaide Clinic.

The plaintiff said that he kept small pocket diaries since about 1990. He was cross-examined on notations made in his diary on 2 December 2004. He accepted he had made a notation on that date which referred to his consideration of suing PAC. He agreed during cross-examination that by now he felt angry at PAC.

Following discharge from the Adelaide Clinic, the plaintiff's anxiety, depression, suicidal thoughts and PTSD symptoms became more severe. He agreed in cross-examination that he was devastated to read in Ms Shafik's 7 March 2005 report that she believed he would never work full-time again.

In April 2005 the plaintiff's office supplies business went into voluntary liquidation. It was eventually sold. He said he had little to do with the administrators and that "it just happened all around [him]". The family home in Glen Osmond, purchased in 2001, was sold to ease growing debt.

On 26 April 2005 the plaintiff once more wrote to PAC setting out his suffering over the years and financial losses and asking for the sum of $1m plus a refund of his school fees. He agreed in cross-examination that he was desperate and wanted PAC to get him out of the financial hole he was in.

Later in that month the plaintiff was readmitted to the Adelaide Clinic and he stayed until 31 May. He underwent electroconvulsive therapy, which he said affected his short-term memory. He said that some weeks before he had told Dr Kelly about drink-driving on his way home from work. Dr Kelly arranged for his driver's licence to be withdrawn.

In June 2005 the plaintiff returned to PAC to try to speak with the headmaster about assistance for his family. He said he was left extremely frustrated by the lack of support. By August he was suicidal and readmitted himself to the Adelaide Clinic. That year his marriage broke down and he moved out of the family home and into a flat in Hawthorn by himself. He started a relationship with his current partner, a woman he had met through his business.

Throughout 2005 the plaintiff was the subject of a claim for money by a Victorian creditor of the office supplies business. It arose from a personal guarantee he and his wife had given several years earlier. He was represented by Victorian solicitors. He said it did not occur to him at the time to tell his solicitors he required a litigation guardian. During cross-examination he conceded that, in an offer to settle the claim, he had asserted that his mental illness was preventing him from working and operating

the business and that he would not earn income in the future. He further said that this was technically a lie, because he was still hoping he would be able to work again. He claimed that he did not understand the various documents coming to him relevant to those proceedings.

By October 2005 the plaintiff wanted to issue legal proceedings against PAC and planned to speak to a solicitor, Mr M Byrne, about it. He said that by late 2006 he felt frustration, anger and disappointment in relation to PAC, noting that, despite there being many old scholars who were good businessmen, no one would apparently assist him with employment.

In May 2006 the plaintiff was admitted to the Adelaide Clinic. In November 2006 the plaintiff took a job at Bunnings. However, after his first few days of work there he was re-admitted to the Adelaide Clinic.

The June 2003 removal of the statutory immunity against pre 1982 offences left Bain exposed to being charged. The plaintiff gave evidence that Bain's February 2005 arrest raised more feelings of fear and sadness about what happened to him as a boy. He said he attended the hearings in the Magistrates Court and District Court because he was determined to get used to being in the same room as Bain. He was present when Bain pleaded guilty on 14 December 2005 to two charges of indecent assault, representing the first two incidents concerning him. A dispute about the facts delayed the sentencing process. He recalled the trauma of reading out his victim impact statement in court (on 28 September 2007) but said he could not now remember the detail and dates of some of the hearings and thought he might have missed one or two. When cross-examined on this, he said he could not recall whether the judge was given Bain's antecedent report on the occasion when the plaintiff read out his statement; nor could he recall Bain's prior conviction for gross indecency being discussed at the next hearing on 29 October 2007, although he remembered Bain's neighbour giving evidence, which she did on that day. He agreed that his diary entry of 7 October 2007 noted the date "1958" in connection with Bain's criminal proceedings, but said that he did not now know why he had noted that and did not know whether the note indicated knowledge at that time of Bain's prior conviction.

The plaintiff was present in December 2007 when Bain was sentenced. He said that it was on that occasion that he learned that Bain had a 1954 conviction for gross indecency. He was stunned and upset that PAC had employed Bain without, presumably, checking his background. This is one matter relied on by the plaintiff as a s 48 Limitations Act material fact. The other is the receipt in December 2007 of a psychiatric report from Dr Kelly. The plaintiff said the opinion in the report that he would probably never be able to run another business was very distressing and gave rise to feelings of "helplessness and hopelessness". He said he had been trying to push himself and had hoped he would recover.

In November 2008 the plaintiff said he left Dr Kelly, whom he had seen for about six years, and started consulting a Dr Nicholas Ford.

The plaintiff continued to work part-time at Bunnings until his employment was terminated on 8 September 2011. He had been stealing money and gift cards from his employer for some time. He said he could not understand his conduct and it made him feel worse about himself. When cross-examined about it he agreed that, at the time, it gave him a "buzz" and that it became addictive.

In 2012 he stopped seeing Ms Shafik and began consulting another psychologist, Mr William Hough, whom he continues to see.

In August 2014 he flew to Sydney for a medico-legal assessment by a Dr Phillip Brown at the request of the defendant's solicitors. He agreed he told Dr Brown that these proceedings were about loss of money and that if his business had not failed, he might not have taken action. He told Dr Brown that he had lost around $3.5m. He told him that he had previously been set up to enjoy a good retirement, but in the last 15 years, that had all gone. It was put to him that this current claim simply represented his "change of mind" about suing, to which he replied: "Yes, change of situation."

In September 2014 the plaintiff was admitted to the Fullarton Private Hospital for eight days. He said he was admitted to the Adelaide Clinic at the end of October for support throughout the trial, in case he became overwhelmed and wanted to take his own life.

I mention several of the most prominent topics of cross-examination.

The plaintiff's own belief about when he began suffering a mental illness was explored in cross-examination. Under cross-examination he acknowledged that he has been troubled by anxiety and suffered from mental illness for decades before 1996. Those feelings had plagued him for a "vast number of years". He agreed that from his 30s he had a sense of a foreshortened future, although he did not understand why until later. He agreed that he had problems with alcohol since second year university.

He was cross-examined on a diary entry of 23 June 2002. He agreed he had written of his "insanity in late 80s, fear and anxiety about survival in the early to mid 90s". He had also described "over-the-top goals", "grandiosity" and his "running to the country". He agreed these notations represented his then contemporaneous analysis.

The plaintiff was cross-examined extensively about the varying level over the past decade or so of his disclosure of his family's psychiatric history. He agreed he told Kahlyn staff during his first admission in June 2002 that there were anxiety problems on his mother's side, that his eldest brother had anxiety in his 60s and that his second brother had been a binge drinker. He said he did not know why he did not give Professor McFarlane the same history. He told Dr Brown in 2014 only that his mother was "edgy". He denied purposefully withholding information from either psychiatrist. He knew when he saw Professor McFarlane and Dr Brown that their reports were to be prepared for the purposes of this trial.

Mr Ian Coats has an honours science degree as well as qualifications in theology. He has conducted a private practice as a psychologist since 1992 as well as conducting

some lecturing in ethics and psychology at various teaching institutions. The plaintiff was referred to him by the plaintiff's general practitioner, Dr Maxwell. The referral letter is dated 21 August 1996. It described the plaintiff as "experiencing a period of destructive anxiety with feelings of being 'locked in', 'inadequacy', fear of 'losing his mind', and inability to concentrate, make decisions and handle pressure plus the physical symptoms of tremor".

It was during their first session that the plaintiff disclosed that he had been sexually abused as a child. Over a period Mr Coats sought further specific details about the abuse. However he found that the plaintiff became overtly distressed and partly disorientated. In his report of July 1997 he records that at one point they discussed the possible value of using hypnotherapy as "a vehicle for coming directly to terms with [the] abuse". Apparently this was tried but abandoned as the plaintiff experienced acute anxiety between sessions. Mr Coats saw the plaintiff weekly for about 22 weeks and then fortnightly. Mr Coats administered various psychological tests. On the basis of the history he took he described "numerous occasions on which painful recollections of the abuse" were triggered. He described avoidance of stimuli associated with the trauma. He referred to symptoms of low self-confidence, suicidal thoughts, chronic emotional dissociation and feelings of being "different" and "dirty". Mr Coats also referred to chronic alcohol abuse.

Mr Coats reported the plaintiff saying that he felt emotionally distant, in what Mr Coats described as a "chronic fashion", even from his family whom he loved. The plaintiff told Mr Coats of long standing difficulties with sleep, which Mr Coats interpreted as "persistent symptoms of increased arousal". The plaintiff reported feelings of shame and worthlessness which he had bottled up for years. On the basis of the history he took, Mr Coats said that all these symptoms had been present at various stages subsequent to the abuse. He expressed the opinion that it was only in the first half of 1996 that the "full PTSD symptom pattern became clear and debilitating in [the plaintiff's] everyday life". He went on to say that the plaintiff had "thus experienced chronic PTSD for at least 12 months".

Mr Coats described the effects of the abuse throughout the plaintiff's life as being "considerable and pervasive". He found no other traumas which would account for the condition.

Mr Coats expressed the view that the plaintiff did not seek psychological assistance much earlier both because he could avoid it and also because in general he had been able to manage his life, at least outwardly. Mr Coats said that the plaintiff had spent "half his life trying to run away from the effects of the abuse because he could not manage the accompanying emotional disturbance".

In his July 1997 report Mr Coats opined that the plaintiff's prognosis for improvement was very good, but that he would need regular support and psychological assistance for at least a year or so.

Mr Coats' second report purports to follow the form of a victim impact statement prepared for the plaintiff's October 1998 meeting with representatives of PAC, the plaintiff's solicitors and Bain. In this report Mr Coats enumerated the diagnostic criteria for chronic post traumatic stress disorder as outlined in the DSM-IV and identified corresponding symptoms experienced by the plaintiff.

In cross-examination it was put to Mr Coats that he had, in effect, schooled the plaintiff in the symptoms of post traumatic stress disorder and that he had, perhaps unconsciously, made the plaintiff's symptoms fit the diagnostic criteria. Because Mr Coats had destroyed the notes he had kept during consultations it was not possible to examine the progression of disclosure of the various symptoms. Mr Coats agreed that he had made no mention in his reports of a differential diagnosis, although he said he must have considered it. It was put to him that his reports were "making a case for PTSD" but he said he did not believe so. He agreed that in 1996 post traumatic stress disorder was a topic of interest and he himself was still learning about it. He agreed that the plaintiff was confused about his symptoms until post traumatic stress disorder was suggested. When it was suggested to Mr Coats that he quite simply lacked the training and experience to make this diagnosis, he replied that he did the best he could clinically at the time.

Dr David Kelly has been working as a psychiatrist since the late 80s. His patients are adults and he has among his areas of interest mood and anxiety disorders, post traumatic stress disorder and addiction medicine. His association with the Kahlyn private hospital brought him into contact with the plaintiff in mid 2002 and he continued to see the plaintiff until November 2008. In his report of 23 January 2006 Dr Kelly described the plaintiff's adult life as being marked by recurrent bouts of depression and alcohol abuse. He expressed the view that the year 2005, when the plaintiff became largely abstinent, coincided with the clearer emergence of symptoms consistent with a post traumatic stress disorder arising from the sexual abuse, bullying and harassment which the plaintiff had experienced at school. Dr Kelly noted recurrent nightmares and flashbacks along with depression associated with suicidal ideation. Dr Kelly said that the sexual abuse had affected the plaintiff's development as an adult and culminated in the development of a depressive illness associated with a post traumatic stress disorder. The plaintiff had effectively been using alcohol to self-medicate. His condition and the alcohol abuse had contributed to his business failure and the breakdown of his marriage. Dr Kelly considered but rejected a "biological predisposition to depression in the form of a family diathesis" as accounting for the plaintiff's condition.

On 6 December 2007 Dr Kelly provided a second report. It is this report which the plaintiff relies upon as a material fact in terms of s 48 of the Limitations Act. This was essentially an updated report with an emphasis on Dr Kelly's view of the prognosis. I set it out.

> It is likely that [the plaintiff] will continue to have, in the foreseeable future, ongoing difficulties in coping with stresses encountered, however it is likely that this will be to a lesser extent than it had been previously. As a result of this he will continue to be at risk of having recurrences of

> his disorder of mood as well as the alcohol abuse. In view of this he will require ongoing support and antidepressant medication.
>
> In view of this it is my opinion that it is unlikely that [the plaintiff] will at any stage in the future be able to return to the level of functioning that he had had during much of his adult life. In particular it is my opinion that he will not be able to own and manage his own business, as he had been able to previously. It is likely that the type of employment that he has currently obtained will be appropriate for him through the rest of his working life.

In cross-examination Dr Kelly agreed that, on the information he had, it was hard to be confident about whether this case was an example of a true late onset post traumatic stress disorder, as opposed to the plaintiff having the full range of post traumatic stress disorder criteria for decades but those remaining undiagnosed until 1996. Dr Kelly acknowledged that the episode of homosexual behaviour which occurred with another student after Bain's abuse finished, as well as the bullying he sustained at the school in the following year were capable, standing alone, of explaining the post traumatic stress disorder diagnosis.

Dr Nicholas Ford has worked as a psychiatrist since the early 90s. He works in private practice with a focus on the treatment of post traumatic stress disorder. Dr Ford began seeing the plaintiff in November 2008 after he ceased seeing Dr Kelly. Dr Ford expressed the opinion that the plaintiff suffers from chronic post traumatic stress disorder complicated by major depression. He accepted that these conditions could well pre-date the plaintiff's 1996 crisis. During cross-examination he agreed that the plaintiff had suffered symptoms for decades and it was his suspicion that the plaintiff suffered post traumatic stress disorder long before 1996. He expressed doubts about the occurrence of "delayed onset" post traumatic stress disorder, considering such a diagnosis to be a rare event. He preferred the expression "delayed diagnosis" rather than delayed onset. He did not expressly link the diagnosis with the abuse by Bain, although it could be implied that he made the link.

Dr Ford stated that the plaintiff is "bound up" with feelings of "ambivalence and doubt" towards Bain, as a figure who, on the one hand, provided the plaintiff with pleasure and acceptance as a homesick child and on the other hand caused the plaintiff to feel disgust and guilt. Interestingly, Dr Ford noted that research has demonstrated that a high proportion of boys who are sexually abused – something like 60 to 65 per cent – go on to develop post traumatic stress disorder. Whether they do or do not seems to depend in large measure on the contemporaneous acknowledgement of the abuse and on the level of support they receive from their families and friends.

Professor Alexander McFarlane is an eminent psychiatrist with a particular interest in post-traumatic stress disorder, which he has examined in contexts including of the Ash Wednesday bushfires as well as the armed services. He has a particular interest in the impact of childhood trauma on adult adjustment. His experience and learning are well known and need not be extensively set out here. Mr Livesey QC accepted Professor McFarlane's expertise in the relevant area. I note that he is a contributing editor to the Diagnostic and Statistical Manual, including in relation to the entries for post-traumatic stress disorder, which is now in its fifth edition.

Professor McFarlane saw the plaintiff at the request of the plaintiff's solicitors. He interviewed the plaintiff on two occasions, one in each of 2009 and 2010, the total time spent with him being a bit over four hours. He also reviewed numerous documents sent to him by the plaintiff's solicitors. In his report of 22 December 2010 he set out much of the history he took from the plaintiff. That history is necessarily brief, but broadly similar to that taken by other expert witnesses and with the plaintiff's own evidence. Professor McFarlane explained in his evidence that variations in an account of symptoms over a period were often explicable simply on the basis that patients are not inclined to describe their symptomology in identical terms on every occasion they are asked about it. In his interviews with the plaintiff Professor McFarlane did not detect any indication of exaggeration or invention.

The witness' conclusion about diagnosis is best set out in his own words in his report and I reproduce an excerpt from it:

> Using DSM-IV diagnostic category, it is my opinion that [the plaintiff] has suffered from a chronic post traumatic stress disorder with significant associated dissociative symptoms, a major depressive disorder, and alcohol abuse and dependence. He also had disruption of his personality development particularly in the domains of his modulation of affect and interpersonal relationships. [The plaintiff]'s post traumatic stress disorder has arisen from the multiple episodes of sexual abuse he suffered at the hands of Mr Bain whilst a student at Prince Alfred College. These were incidents that were the cause of considerable shame, fear, and apprehension, as well as feelings of helplessness. Child abuse of this nature is a recognised cause of post traumatic stress disorder.

In evidence Professor McFarlane expressed the view that the full gamut of post traumatic stress disorder symptoms was not apparent until 1996, soon after the plaintiff sent his son to PAC. However, he described a number of difficulties and symptoms which the plaintiff had experienced for some years before 1996. For example, he took a history of nightmares in the plaintiff's twenties. He reported the plaintiff's feelings of being "on the outer" as an ongoing issue. He noted that alcohol abuse was of longstanding. He reported that in the plaintiff's mid 20s the nightmares were related to the episodes of abuse. He reported that the plaintiff claimed what was interpreted as "a pervasive sense of hypervigilance", which became a particular issue when the plaintiff's children were born and when they were at school. A significant sleep disorder had commenced in the plaintiff's 20s. It was reported that the plaintiff's wife had commented about his distance and detachment in their marriage. In evidence the plaintiff's wife also observed that after their son was born (in 1982) the plaintiff had told her that he was having trouble bonding with his son. A parallel history was given by the plaintiff to Professor McFarlane, reporting that he distanced himself from his son until the boy was about two years old.

Professor McFarlane summarised his opinion about the symptomology, saying in effect that the symptoms had been an ongoing picture of distress and a source of disability in different ways throughout the plaintiff's adult life. He reported that the symptoms became more apparent in the last two decades (that is from 1990 to 2010) and particularly in the eight years leading up to 2010. He saw a progressive decline in the plaintiff's capacity to function effectively and manage his personal affairs. The

witness saw the plaintiff's premature and perhaps excessive experimentation with sexual relationships as being linked to the sexual abuse, as was his difficulty in the intimacy associated with his sexual partners. He noted that neurobiological research demonstrated that early sexual abuse was highly detrimental to the healthy development of individuals.

In his evidence Professor McFarlane expressed the view that the prognosis for the plaintiff was bleak, although there might be some improvement once litigation was at an end.

I mention that I do not propose to discuss the evidence of the plaintiff's former wife or his current partner. Although I found their evidence to be generally reliable it served only to contribute to a broad understanding of the plaintiff's personality and conduct. It did not directly affect any of the essential findings required.

At this point it is helpful to set out in brief terms the defendant's answer to the thrust of the plaintiff's case on injury, loss and damage. As foreshadowed, the defendant cross-examined both the plaintiff and his expert witnesses in an effort to demonstrate that the plaintiff's disorder, however characterised, was not shown to be linked to his abuse by Bain. The defendant established that other members of the plaintiff's family had suffered severely from anxiety and that there was evidence of alcohol abuse by some of his siblings. The defendant focused on the non-specific nature of many of the plaintiff's symptoms and on the imprecise nature of the history given by the plaintiff in the period between his school days and 1996 and cross-examined the witnesses with a view to establishing that the range of symptoms were just as likely to be indicative of a generalised anxiety disorder arising in his university days, as to a post traumatic stress disorder.

The defendant argued that either consciously or unconsciously the plaintiff had attributed every misfortune suffered in his life to the sexual abuse. The defendant disputed that the failure of the plaintiff's business was indirectly due to the abuse. Rather, it argued that it was equally referable to the plaintiff's general anxiety, coupled with poor decision making and the inability to cope with a rapidly expanding business and the demands associated with it. The defendant pointed to the fact that the differential diagnosis of generalised anxiety disorder could account for both symptoms exhibited since his time at university and also for the alcohol abuse which has plagued the plaintiff during his adult life. The defendant noted that it seemed that the plaintiff had put the sexual abuse and bullying behind him within a relatively short time of Bain's dismissal. By the time the plaintiff reached matriculation he was apparently happy and well adjusted and achieved a good measure of success academically, in sport and in terms of earning the respect of the other boys.

The defendant argued that if, on the other hand, the Court accepted that the sexual abuse accounted for the plaintiff's symptoms, then it should find that the cause of action arose in 1962.

The defendant argued that the value of the evidence of the three psychiatrists was diminished because of the plaintiff's interactions with Mr Coats and the suggestive way in which the idea of post traumatic stress disorder had been introduced. The defendant emphasised that the letter of referral from the plaintiff's general practitioner to Mr Coats referred to "destructive anxiety, inadequacy and inability to concentrate, make decisions and handle pressure plus the physical symptoms of tremor". The referring letter went on to attribute these symptoms to financial pressures and abuse of alcohol. The period leading to the reference to Mr Coats was one in which the plaintiff was working extremely hard in a new business which was different from his previous ventures and which involved management of employees on a scale which he had not previously encountered. In the plaintiff's own words the job was becoming "overwhelming".

The defendant contended that histories given to the various health professionals were intentionally selective. For example, the plaintiff did not disclose the history of anxiety or alcohol abuse within his family to either Dr Ford or Professor McFarlane. The defendant suggested that in all the plaintiff's dealings with his health professionals the phenomenon of "secondary gain" was present. The plaintiff's history demonstrated that money and the fruits of it had always impressed the plaintiff and that this concept was at work in the plaintiff's various presentations.

Findings regarding the cause of action

I find that Bain's abuse of the plaintiff caused injury, loss and damage to the plaintiff. Although the homosexual interaction with another boy and the bullying of the plaintiff after the abuse ended no doubt caused additional trauma to the plaintiff, that does not detract from my conclusion that the abuse by Bain was the substantial cause of the plaintiff's psychological injuries.

I find that the plaintiff suffered symptoms arising from the abuse as early as 1962 and they have continued, intensifying from time to time, including at university, but particularly in 1996. The early symptoms included dissociating himself from events, sleep disturbance, an inability to become emotionally involved with those closest to him, highly sexualised behaviour, anxiety and possibly a degree of hypervigilance. Whether those early symptoms amounted to a recognisable psychiatric illness and, if so, when they were comprehensive enough to amount to such an illness is a very difficult question. There are at least two reasons why that is so. As I have observed, it is difficult for a witness to cast his mind back over such a long period to describe his symptoms at various times with accuracy. It is also difficult because none of the experts has been asked to examine the comprehensive history given to me of the plaintiff's life until 1996 and to express a view as to when the post traumatic stress disorder became diagnosable.

I find on the basis of the evidence of Mr Coats, Dr Kelly, Dr Ford and Professor McFarlane that the plaintiff did indeed suffer from post traumatic stress disorder in 1996 and still does. While those witnesses were closely cross-examined about other possible explanations for the array of symptoms exhibited – in particular

as to a differential diagnosis of generalised anxiety disorder – all those witnesses rejected such an alternative explanation. It is perhaps unfortunate that none of the witnesses was asked to pinpoint the collection of symptoms upon which he particularly relied. However I accept the opinions of Mr Coats, Dr Kelly and Professor McFarlane that it was the sexual abuse by Bain which caused the symptoms described and that those symptoms, collectively, amount to post traumatic stress disorder. In this context, it is not to the point that the plaintiff may have been genetically more susceptible to anxiety than some others, or less resilient or have had other personality traits which made the abuse affect him more profoundly than it might have affected others. Although Bain's abuse and its sequelae cannot account for every negative feature of the plaintiff's life, I find that the abuse has had myriad profound impacts on the plaintiff's development and personality and that it has, in effect, overshadowed and tainted his life. Those impacts include effects on his emotional development: for example, his self-image and his ability to share intimacy. I find that the plaintiff's chronic anxiety and dependence on alcohol, and his feelings of inadequacy and isolation are due to the abuse.

I might say here that it is impossible not to feel a deep sympathy for the plaintiff, that these events should have befallen him, and that they should have so affected a young, innocent and promising boy. That this abuse should have occurred in a place where the plaintiff and his parents were entitled to expect he would be safe and secure is all but tragic.

Findings regarding when the cause of action arose

While I am satisfied that the plaintiff was suffering from post traumatic stress disorder when he saw Mr Coats in 1996, I am not satisfied that the condition arose in that year, or within the 12 months or so leading to August 1996 which was postulated by Mr Coats as the period of likely onset. In this respect I prefer the evidence of Dr Kelly and Dr Ford. Of the witnesses who treated the plaintiff, I found Dr Kelly's evidence most persuasive. I found his evidence to be thoughtful, balanced and down to earth. He saw the plaintiff before other psychiatrists and over a long period and helped him a great deal. He was in a position to make accurate judgments about the plaintiff and I have given his evidence significant weight. As mentioned, Dr Ford was inclined to the view that this was not a case of late onset post traumatic stress disorder but a case of delayed diagnosis. I also found his evidence to be generally helpful.

I find that the disorder had been with the plaintiff for many years, in varying degrees of intensity, and, on the balance of probabilities, ever since 1962. In the plaintiff's history it is possible to see that well before 1996 there were critical times, when his levels of anxiety and display of symptoms was more patent. One example is in the period following his father's death in 1977 and another is in late 1987 and early 1988 when the plaintiff sold his principal and longstanding newsagency and decided to move to the country and to run a supermarket.

For these reasons I reject the plaintiff's analysis of a delayed onset post traumatic stress disorder. I find that the cause of action arose well before 1996. I am unable to

say precisely when it arose, but in all likelihood it arose in 1962, soon after the abuse was suffered. The plaintiff described feelings of disassociation even during the abuse and, in the period following it, he described sleep disorder, aversion to things associated with the abuse, alienation and acute anxiety. I find that it is probable that from 1962 the plaintiff suffered a recognisable psychiatric illness which remained undiagnosed until 1996.

Therefore I find that the claim is substantially out of time. Whether it can proceed falls to be determined by a consideration of s 48 of the Limitations Act and a consideration of the facts material to the claim which the plaintiff argues he ascertained within 12 months of instituting proceedings; as well as in relation to the discretion. I shall deal with this issue in answer to question 6.

2. Did PAC breach the non-delegable duty of care owed to the plaintiff?

Although in his statement of claim the plaintiff alleged that the defendant breached its non-delegable duty to the plaintiff, there was next to no reliance on that contention in the trial. The plaintiff's counsel did not touch on it in opening his case. When the Court indicated that it would welcome further assistance in terms of a statement of the principles on which the plaintiff's claim relied, a written document entitled "Plaintiff's Supplementary Outline of Opening Submissions re Liability" was provided. This document dealt helpfully with the case in negligence and vicarious responsibility. In respect of non-delegable duty the submissions comprised the following; and these were repeated in the plaintiff's written "Outline of Closing Submissions".

> Non-delegable duty
>
> 15. In paragraph [15] of the Statement of Claim the plaintiff pleads that the defendant is liable for breach of its non-delegable duty of care to the plaintiff.
>
> 16. A school owes a non-delegable duty of care to its students: *The Commonwealth of Australia v Introvigne* [1982] HCA 40; (1982) 150 CLR 258 per Mason J at [26]-[32], 269-271, and per Murphy J at [5], p 275.
>
> 17. As Gleeson CJ held in *Lepore* (supra) at [25] p 530, the reason for the obligation of a non-delegable duty of care in the case of schools is the immaturity and inexperience of pupils and their need for protection.
>
> 18. In *Lepore* (supra), the High Court held that the non-delegable duty of care should not be extended to impose liability for the criminal conduct of an employee where the employer is not at fault: per Gleeson CJ at [36]-[39], Gummow and Hayne JJ at [264]-[270], Kirby J at [295]-[296] and Callinan J at [339]-[340].
>
> 19. A school's non-delegable duty of care does not, therefore, extend per se to cover criminal actions such as sexual assaults upon a student committed by the school's employee, a teacher.
>
> 20. Moreover, Gleeson CJ concluded that in circumstances where injury results from the criminal act of a teacher, where no fault is shown on the part of the school, liability should be determined according to the doctrine of vicarious liability.

21. The defendant in this case is liable for the breach by its servants and agents of its non-delegable duty of care to the plaintiff in the principal ways set out above in paragraph 4: i.e. through fault on the part of its employees and delegates.

22. As pleaded at paragraphs [11]-[14] of the Statement of Claim the plaintiff's claim not only involves the conduct of Mr Bain in abusing the plaintiff, but also involves the conduct of the defendant by its servants or agents in its aftermath. In respect of the latter conduct, the principles of non-delegable duty apply, according to the same factual matrix as that in the cause of action in negligence.

It is clear that the defendant owed a non-delegable duty of care to the plaintiff: *The Commonwealth of Australia v Introvigne* (1982) 150 CLR 258. It undertook to house, educate and generally supervise, control and care for him. However, that duty did not extend to a duty to protect him against the intentional criminal conduct of the defendant's employee, in the absence of fault on its own part: *State of New South Wales v Lepore* (2003) 212 CLR 511, per Gleeson CJ at [36]-[39]; Gummow and Hayne JJ at [254]-[263]; Kirby J at [292]-[295]. It follows that, in the circumstances of this case, the plea that the defendant was in breach of its non-delegable duty to the plaintiff adds nothing to its primary negligence case and its case based on vicarious liability.

3. Did the defendant breach of the duty of care owed to the plaintiff?

There is no doubt that the defendant owed a duty of care to its students. The relationship between a school and a pupil is one of the recognised relationships where the school has a duty to take reasonable care to protect students: *Modbury Triangle Shopping Centre Pty Ltd v Anzil* (2000) 205 CLR 254 at [26] per Gleeson CJ.

The plaintiff's counsel did not attempt to sketch the scope of the duty owed by the defendant to the plaintiff, beyond the statement that the school had a duty to take reasonable care to protect its students from the criminal behaviour of third parties. Indeed it is not easy to define the extent of the duty in the abstract. However it is clear that PAC had a special responsibility in relation to its students, and particularly for the boarding students whom it accepted into its care. The plaintiff's counsel alleged that the defendant breached that duty in three broad ways. First it employed Bain when it should not have. Then, it failed to have in place a system which would guard against inappropriate contact and failed to supervise Bain adequately. Then it is suggested that having discovered the sexual abuse the defendant breached its duty to the plaintiff in that it instructed the students not to speak to anyone about the events, failed to arrange counselling for the plaintiff and failed to report Bain's conduct to the police.

In relation to the employment of Bain, the plaintiff claims that had the defendant made any or proper enquiry into Bain's prior work history it could not have engaged him as a teacher, let alone have permitted him to enter the boarding house. These assertions rest on two principal factual matters, being first, evidence that Bain acted inappropriately in his previous school posting and that proper enquiry would have revealed those allegations to the defendant, and second, that Bain had a 1954 conviction for gross indecency which appropriate enquiry with the police would have

revealed. It is said that knowledge of this conviction would have led to PAC declining to employ Bain.

The plaintiff called three former students of the Cummins Area School. One of those was a retired bank manager whom I shall call "IM". In 1960 he was 15 years of age and was completing what was then the intermediate year. He was taught English by Bain and he also played tennis under his supervision after school. He was sexually abused by Bain in the sports shed on a number of occasions. He said it happened "very often". The witness was not asked whether he had reported the abuse to anyone at the school or to anyone else at all at any time.

A second student, whom I shall call "DK", also attended the Cummins Area School in 1960. He was then in Year 9. He recalled Bain taking his class for sporting events. He said there was an incident which occurred when several boys were returning sports equipment to the school sports shed. There, he was indecently assaulted by Bain. From that time on he avoided being alone with Bain or in an enclosed area with him. Again, he was not asked whether he had reported the matter to anyone at his school or anyone else.

The third student who was called to give evidence was Mr John Dawes who was the son of the then headmaster of the Cummins Area School, Mr Walter Dawes. Mr Dawes Senior died in 2005. Mr John Dawes said that his father took up the position of headmaster at that school in 1960. The witness was then in Year 9. He said he was taught a subject by Bain in that year, but could not recall which. He said there was a school trip to Tasmania in that year. Bain and a female teacher accompanied the group of girls and boys. There was a suggestion of sexual impropriety committed by Bain during that trip. After his return home, the witness, Mr Dawes, said that he had a brief conversation with his father about Bain. This evidence was given over objection. The witness said that his father came to him one evening and said something "along the lines that Ian, the senior master, Bob Pierson, had concerns about Dean Bain interfering with students at the school and he wanted to know what I knew about it." Explaining that he found it hard to be frank with his father while also maintaining good faith with his fellow students, the witness said that he told his father that he was not really sure. [Although the transcript appears as I have set out, I believe, on reflection, that the witness said not "Ian, the senior master" but "he and the senior master". I did not advert to this possible error until after counsel's submissions were completed, at which time I had the opportunity of checking my own notes against the transcript. This change is of some significance as it affects the admissibility of the evidence.]

Mr Cameron, counsel for the plaintiff, argued that this evidence went to prove the state of mind of Mr W Dawes. He submitted that it proved that the headmaster and Mr Pierson in fact had concerns about Bain's conduct. There are limits to the use to which this evidence can be put. I accept that the headmaster's state of mind in relation to Bain is potentially relevant and that this evidence tends to prove something about his state of mind, being a contemporaneous statement of it. But I do not treat it as

evidence of Mr Pierson's state of mind. To the extent that the statement goes to Mr Pierson's attitude, it is hearsay.

The plaintiff tendered an affidavit of Mr Pierson, who joined the staff of Cummins Area School as senior master in 1960. On an occasion in 1960 he observed Bain on yard duty. He said that from his own position at the cricket nets he had a clear view of the agricultural shed. He saw two boys aged 15 to 17 years leave the shed, followed by Bain. He said Bain did not teach agricultural science and he knew of no legitimate reason why Bain would be in that shed. This event struck him as "distinctly odd". He said that as a result of what he saw he directed Bain and the students to the headmaster's office.

Mr Pierson deposed that, quite apart from that incident, he was unhappy with the standards set in Bain's maths and science classes. He spoke with Bain about that and detailed the steps that he required to be taken the following year to improve Bain's performance. He did not mention the agricultural shed incident to Bain in the course of that discussion. He later became aware that Bain had resigned from the Education Department in the last week of term of 1960. Mr Pierson deposed that, had he been contacted by anyone associated with the defendant in relation to Bain's prospective employment, he would have focussed on Bain's teaching performance and would have expressed serious concern as to the appropriateness of Bain being taken on as a teacher. Mr Pierson did not say that he would have mentioned anything about the rumours he had heard or the incident he had observed. Mr Pierson was silent as to whether there was any report to police about Bain or about any attendance by a police officer at the school.

The other former teacher who provided an affidavit was Mr Keith Thiele. He deposed that he is 80 years of age and worked at the Cummins Area School during the years 1958 to 1962. His duties included providing instruction in woodworking and filling the role of scout master for the Cummins Scout Group. He said Bain helped out with the scouts. He deposed that he recalled a plain clothes police officer from the Vice Squad based in Adelaide attending at the school and interviewing him. He said the focus of the interview was to determine if he were aware of Bain interfering with boys at the school or scout group. Mr Thiele deposed that he had noticed that Bain had a particularly friendly relationship with one boy from the school who was about 14 or 15 years old. Mr Thiele did not assert that he had observed anything untoward himself, or that he spoke with the headmaster on the topic of Bain.

Mr Philip Brown was called by the plaintiff. He taught mathematics and coached sporting teams at PAC from 1961. His recollection was that he did not provide references at the time he applied for his job and was not asked by Mr Dunning, who interviewed him, to provide them. However, in cross-examination, Mr Brown acknowledged that he could not recall whether Mr Dunning asked him at which schools he previously taught or the names of his previous headmasters and he did not know whether or not Mr Dunning contacted personnel at the schools at which he formerly taught. In view of Mr Brown's age and medical history, combined with these

concessions, I do not consider his evidence adds anything to a knowledge of Mr Dunning's practices.

The defendant called evidence from Mr Geoffrey Bean who succeeded Mr Dunning as headmaster of PAC. He took up that role in 1970 and fulfilled it until 1987.

He described the procedure involved in his time in employing teachers. He said that positions were always publicly advertised and the names of three referees were sought. He said it was not the school's practice to require police checks. Referees would be contacted if the applicant was favoured, provided that they had come from within the independent system. Mr Bean said that if the applicant did not name the headmaster of his previous state school as a referee, he felt unable to contact that headmaster as he would potentially breach confidentiality.

The defendant suggested that steps taken under Mr Dunning's auspices would not likely have been any more extensive than during the later period. The defendant also relied on the evidence of Mr Anderson, who confidently asserted that when he took up employment with the Independent Schools Association in 2001 it was not the custom of any of the private schools to seek a report from police about the antecedents of prospective teachers.

The defendant tendered, without objection, a police statement of witness of Ms M Gleaves. This statement was provided to police in 2007 when police were conducting enquiries into Bain's criminal conduct. At that time Ms Gleaves was, according to the statement, executive assistant to the headmaster of PAC. She was asked to "confirm school records relative to the employment of … Bain". She located relevant records in the form of entries in the PAC *Chronicle* in several volumes. As I understand it, the *Chronicle* is the annual school magazine of PAC, or was at that time. Apart from a note in the Headmaster's Report to Council of 24 October 1962 relating to Bain's dismissal, these were the only specific references to Bain's employment with the college that Ms Gleaves was able to locate.

I turn to the issue of Bain's criminal record.

In an attempt to establish that criminal records were kept by the South Australian Police Force and that these would have been available to PAC if application were made, the plaintiff called Mr Kenneth Thorsen, a former commander of the police force and officer in charge of the Major Crime Squad. Mr Thorsen worked in a number of the specialist squads of the police force in the 60s, 70s and 80s, including in the Vice Squad in about the mid 50s. He said that in the second half of 1960 he worked in the Consorting Squad and that work required him to carry out criminal record checks on persons on a regular basis. He described the criminal records section of the police force on the third floor of the building then located at what was called "1 Angas Street, Adelaide". He said that records were kept on males, females and juveniles. In those days they were manual records and were kept in a card system in wooden filing cabinet drawers. If his work required him to research the criminal record of a person he would go to the counter of the records section and ask for the

particular record by use of the person's name. Indeed, Mr Thorsen said that he became so well known in the section that he was able to go into the storage area and consult the card record personally.

Mr Thorsen said that in the early 60s he would be approached by members of the public including business people such as bank managers. They were usually enquiring about a person's suitability to be employed in a bank or the like. Such persons would ask him to make enquiries about an applicant's suitability for work. Mr Thorsen said he had never given a copy of a criminal record to such people in response to these enquiries but was prepared to drop hints to the effect that it might be dangerous to employ such a person. He said this was done as a bit of a favour and in the knowledge that if he, in pursuing an enquiry, needed information this "two-way process" would facilitate his later acquiring information which he needed. He observed that others would act in the same way.

It was notable that there was no evidence of any process by which members of the public having a genuine interest in the record of a person could apply to the police force for information as to a person's criminal record. Mr Thorsen only described an informal arrangement between himself and persons who he knew or who might in the future be favourably disposed towards helping him. There is no evidence that an officer of PAC could have applied for and been given the criminal record of Bain in 1960.

As mentioned, the evidence of Mr Anderson suggests that there was no practice among private schools in this period of obtaining the criminal records of persons who applied for jobs within the private school system.

I accept that the scope of the defendant's duty of care to the plaintiff extended to taking reasonable care in employing persons who were suitable to teach and to care for him. I also accept that the duty extended to providing adequate supervision of the work of boarding house masters.

Findings regarding Bain's employment

I find that Bain sexually abused IM and DK in 1960 at the Cummins Area School. In all probability he abused other boys at that school as well. I find that Bain's activities there were the subject of rumour, and that the headmaster and senior master, and indeed Mr Thiele, were aware of the rumours. However, I am not satisfied that the police embarked on any investigation. The prospect of a Vice Squad member travelling to Cummins for this purpose is, I find, surprising. I note that the only deponent who speaks of a police investigation is said to suffer a moderate degree of Alzheimer's Disease.

I can make no finding about whether Bain was provided with a reference when he left Cummins Area School, nor, if so, what its contents may have been.

Because of the effluxion of time there is no proof as to whether in applying for the position at PAC Bain provided the names of referees and, if he did, who they were.

Further, there is no evidence as to whether any referees were contacted. Those matters remain unknown.

I am not persuaded that, even if one or more names of referees from the Cummins Area School were provided by Bain, any enquiry made by PAC with those referees would have resulted in information about the rumours or concerns focussing on him being provided. If there were any police investigation in relation to allegations against Bain at Cummins Area School, as Mr Thiele's affidavit alone suggests, then no conviction for any offence followed. Although I am satisfied that the headmaster was concerned about Bain's activities, I am not satisfied that these concerns ever solidified into information which he would have been prepared to impart, even if asked by a person with an interest in knowing of Bain's work.

I find that it is not proved that PAC could have obtained information about Bain's criminal record from the police force, even if it wished to. Mr Thorsen's evidence fell short of proof that members of the public – even those with a legitimate interest – could, in 1960, legitimately gain access to a person's criminal record. In any event, on the basis of Mr Anderson's evidence, I find that there was no practice among private schools – and it is likely no practice among public schools – at that time to apply for criminal record checks for prospective employees. That fact is not determinative of the scope of the duty upon PAC, but it is relevant to it.

I find that there is no evidence of what PAC did in investigating Bain before employing him and no evidence that, had it made enquiries, either with staff of the Cummins Area School or with the police force, that it would have been given information which indicated anything untoward about Bain.

I am satisfied that, had PAC learned of the rumours circulating in Cummins, it would not have employed Bain.

Furthermore, there is no evidence before me to the effect that there was any concern about Bain's performance at PAC in 1961. Bain became a master in the boarding house at the beginning of 1962. If Bain had, as far as the headmaster knew, performed satisfactorily in 1961 at PAC, and given that the school knew nothing untoward about his previous performance, then I find it was not negligent of PAC to place Bain in the boarding house.

In summary, whatever the precise bounds of its duty to the plaintiff, I am not satisfied that PAC was in breach of its duty to make reasonable enquiries about a prospective teacher or boarding house master before employing Bain, or placing him in the boarding house.

I turn to the question of whether supervision of Bain in the boarding house was negligent.

The second limb of the plaintiff's case on primary negligence is that the defendant had an inadequate system of supervision in place within the boarding house. It is pleaded that the defendant breached its duty to the plaintiff by failing to have a system in place

which ensured that Bain did not come into personal contact with the plaintiff without supervision and without being accompanied by another adult; that it failed to supervise him in his role as housemaster; that it failed to avoid having a lone carer or supervisor involved in supervising the young boys at night and that it failed to have in place an adequate system for the monitoring of the behaviour of its employees.

Most of the evidence directed to establishing the regime within the boarding house in 1962 came from the plaintiff himself. That evidence included that the boarding house was overseen by the headmaster, Mr Dunning, and the boarding house senior master, Mr Prest. Then there were housemasters, namely Mr Connell, Mr Hamley and Bain. Mr Connell, like Bain, was a member of the teaching staff. Mr Hamley was a university student who resided in the boarding house. I accept these facts.

Mr Prest and Bain had quarters in close proximity to each other located on the first floor of the boarding house. Mr Connell had an attic room on the floor above. I accept this evidence.

On the basis of the evidence of the plaintiff, as well as that of JC and RE, two former boarders who were also sexually abused by Bain and who were called by the plaintiff, I make the following findings. I am satisfied that the prefects had general responsibility for the supervision of the Year 8 boarders. They would ensure that the boarders attended for breakfast in the dining room as scheduled. They would supervise homework sessions after school and they would supervise the boys' showering. They would supervise the preparations for bed and "lights out". Sometimes they would walk through the dormitories after lights out to ensure that the boys were in their beds and not talking. The prefects also administered punishment to the boarders as required. None of the former boarders suggested that any housemaster, apart from Bain, would be present in the dormitories after lights out.

In his pleadings the plaintiff asserts that there should have been a policy in place prohibiting contact between young boarders and masters where no third person was present. It may be accepted that there was no such policy. The defendant argues that to suggest that such a rule should have been in place ignores the reality of boarding house life, both in 1962 and later. The former headmaster, Mr Bean, gave evidence touching this issue. He said that a policy requiring that no boy should be alone with a master could not have been implemented without a dramatic change in the staffing of the school. Mr Bean referred to the "incredible number of interactions that take place" between masters and boarders and said that such a policy would have required the availability of "a very considerable body of adults" at all times. No such policy was in place during Mr Bean's years at PAC.

The plaintiff submitted that the evidence that the abuse of the plaintiff and other boys in the boarding house became well known among the boys, but not among the boarding house staff, indicated that there was a lack of ordinary supervision by the masters. The plaintiff argues that the fact that much of the abuse of the plaintiff by Bain was carried out in Bain's room and the proximity of that room to that of Mr Prest indicates a lack of supervision and a lack of awareness of events by Mr Prest.

Findings regarding supervision

I find that until JC and the plaintiff reported abuse to the Reverend Waters, neither Waters nor any responsible master in the boarding house knew of the abuse. The fact that Bain was dismissed within a very short time of that information being received by the Reverend Waters indicates as much. I cannot go so far as to find that the abuse of the plaintiff was common knowledge within the boarding house. I accept that Bain interfered with at least two other boarders, and probably many more than two others, but just as those three witnesses did not discuss the abuse of themselves with other boys, so it was likely that other victims did not discuss their own abuse.

I find that there was some discussion among some groups of boarders about Bain's conduct and that that was particularly so in the short period immediately prior to his dismissal, but I am unable to infer that adequate supervision of the boarders would have meant that this knowledge was shared by the masters. In this context it is to be remembered that, like almost all sexual predators, Bain groomed his victims and carried out his activities in a way designed to prevent discovery of his practices.

I have insufficient information to make any finding at all about the level of Mr Prest's supervision, either of his masters or of the boys. I do not infer from the fact that the abuse took place and might have involved a number of boys that supervision was inadequate.

I find that the primary supervision of the Year 8 boarders was performed by the boarding house prefects. I do not infer that Bain's particular practice of telling stories to the boys in their dormitories after lights out was either in accordance with the practices of other boarding house masters, or sanctioned by Mr Prest. I find that on most occasions when Bain abused either the plaintiff or other boys, he did so under the cover of darkness and in the presence of a number of boys, yet in a manner which meant that other boys were not aware of his activities. That conclusion flows from the evidence of the plaintiff, RE and JC.

As to his practice of inviting groups of boys to his room to watch television, particularly at weekends, I do not draw any inference that it was inherently undesirable or something which should have been known to other boarding house masters. I do not infer that this practice should have alerted the other masters to Bain's covert activities, even if they knew of it.

I am unable to find on the evidence before me that the systems in place in the boarding house or the level of supervision of the behaviour of masters and of Bain in particular was so deficient as to amount to a breach of duty by the defendant. I find, in accordance with Mr Bean's evidence, that it would have been wholly impractical to insist that a boarder should never be alone with a master.

I turn to the allegation that the defendant was negligent in its response to learning of the abuse. Again, it is clear that the defendant's duty to the plaintiff extended to taking reasonable steps to care for the plaintiff's welfare once the abuse was discovered by it.

The plaintiff's counsel referred to this body of evidence as "the cover up". The statement of claim used the same term. The plaintiff's evidence was that during 1962 he began to be friendly with a slightly older boarder who has already been mentioned, JC. He said that JC started pestering him about telling the Reverend Waters what was happening to him. The plaintiff said he himself was too frightened to go to the chaplain and so JC decided to go. Shortly after, the Reverend Waters called the plaintiff out of class and they discussed it. This was in October 1962. The chaplain asked the plaintiff questions to ascertain whether Bain had been stimulating him or committing acts of fellatio upon him – not using those words – and the plaintiff agreed that he had been. The plaintiff said he was very embarrassed but he thought the answers he had given were truthful. One or two days later the plaintiff was leaving premises in Rundle Street where he attended music lessons and was met by Bain. He was told that Bain had been dismissed. This was one or two days after his conversation with the chaplain. Either that night or the following night there was a special assembly in the boarding house which all the boarders attended. The plaintiff said he recalled only the Reverend Waters being on the dais and addressing the boys. He said they were told that Bain had been dismissed. He could not recall what else was said about it. The plaintiff said he felt humiliated and ashamed and guilty even though, as far as he recalled, the name of no boy was mentioned, and no reason for Bain's dismissal was given. The plaintiff said he was fearful of getting into trouble and possibly being teased over this. He did remember that the boys were told that they were not to talk about it among themselves or to tell anyone outside the school.

A week or so later the plaintiff again attended his music lesson and again Bain met him afterwards. They walked together to Bain's car near East Terrace and Bain gave him a box of chocolates.

The plaintiff said that he only ever discussed the matter with the Reverend Waters on that one occasion and he never discussed the topic with the headmaster or anyone else in authority at the school. He said "there was no help".

Not long after the assembly the plaintiff said his parents came to the school, having travelled from their farm. The plaintiff believed they had received a telephone call from someone at the school. They took him out to dinner. The plaintiff said his mother raised the issue obliquely but his father did not mention it. The matter was not raised with either parent again.

The plaintiff said that after Bain's dismissal he was teased about the fact that he had been Bain's favourite and he felt isolated and ashamed. He said that he started "detaching" from that sort of comment, which he explained as "living in a different world". Early in the following year, during the holidays, he went to stay at a fellow boarder's home near Broken Hill and he and the friend had some "sexual contact". That boy's parents found out and, according to the plaintiff, that led to another special trip by his parents to the city to speak with the chaplain, as well as to difficulties and isolation during that year at school.

Returning to the topic of the assembly, JC and RE also recalled that particular assembly when they were advised of Bain's departure. JC said that the headmaster, Mr Prest, the Reverend Waters and the matron were present. The headmaster spoke first, saying that Bain had been dismissed for interfering with boys. He said the matter needed to be kept within the boarding house. He said that the matter should not be discussed either among the boarders or in the wider school. He said the tone was serious. He mentioned the need for the school's reputation to be upheld. The Reverend Waters also spoke. He said things along the same lines, but added that if any boy felt upset about the matter then either he or the matron was available to talk it over.

RE recalled both the headmaster and the chaplain being at the special assembly. Both spoke to the assembled boys. RE recalled the chaplain wearing his academic gown, which he only did on reasonably formal occasions. He said that the message left with the boys was that Bain's tenure at the school was discontinued and that they were not to speak about the matter. Beyond that he could not recall. One or other of the two men spoke about protecting the image and the name of the school. In cross-examination he agreed that it was implicit in the message that the boys were to "move on" and "look forward". He accepted that it was likely that the Reverend Waters told the boys to speak to him if they were having problems.

There is no evidence that anything was done about reporting the matter to police. (Several decades would pass before a report of such conduct became mandatory.) Nothing is known of exactly what the plaintiff's parents were told about the matter, or what were their wishes in relation to it. The defendant does not suggest that anything beyond the offer of counselling by the Reverend Waters or the matron was offered to the boys. It is not known whether any boy took up that offer.

The plaintiff's own evidence was that after a difficult year in 1963 he was successful at PAC. He was a gifted sportsman and this drew admiration from others. In his final year at PAC he was awarded the McBride prize for the most respected boarder. The defendant points out that for those in authority in the boarding house who plainly knew of what had happened, there may have been nothing about the plaintiff's demeanour or behaviour which would have warranted an overtly interventionist approach by the school. It may well have seemed that the plaintiff, like others, had apparently put the matter behind him as the headmaster had encouraged them to do.

The succeeding headmaster, Mr Bean, gave evidence that, even in his period of leading the school, resort to professional counsellors or psychologists was not known. Mr Bean related how Mr Prest (the brother of the senior housemaster already mentioned) whom the boarders were said to much admire, became ill while living in the boarding house, and died. Much later, Mr Bean regretted that professional assistance had not been given to the boarders to manage their grief. The defendant further argues that it has only been in recent times that independent schools have developed a comprehensive policy for managing allegations of sexual abuse within the school environment. Mr Anderson's evidence established that institutional developments of this kind are of modern origin. The defendant argues that its conduct

in 1962 must be measured against the prevailing standards and customs, which were far removed from those now applicable.

Findings regarding the defendant's response to Bain's conduct.

I find that once the conduct became known to the Reverend Waters and to the headmaster, Bain was very quickly dismissed. I am only able to make a few bare findings about what information was imparted to the boarders in the assembly and what help was offered to them. I find that the boys were told that Bain had been dismissed for misconduct, or inappropriate conduct, or words similar to that and that the topic should not be discussed either among them or in the wider school. I find that there was mention, probably by the headmaster, of the need to uphold the school's reputation. I find that the Reverend Waters advised the boys that he, and possibly the matron as well, were available to speak to any boy who needed any help in relation to the issue and, indeed, this was in accordance with the chaplain's usual role.

I can make no finding about what information was given to the plaintiff's parents or what, if any, views they expressed about any assistance for the plaintiff. I can make no finding about any discussions within the school, or with the plaintiff's parents regarding whether any report should be made to the police. I can make no finding about any particular steps which Mr Prest or any of the other housemasters took to make themselves aware of the plaintiff's reaction to the event, or as to any extra attention given him. Indeed, I can make no finding as to whether the school was apprised of the fact that other students, apart from the plaintiff, had been abused. Knowing next to nothing of the school's reaction to the situation I cannot find that there was a want of care for the plaintiff's plight.

I accept that the standards to be applied to this issue are those which prevailed in 1962 and not the standards which prevail 52 years later. While by contemporary standards it appears that more could have been done for the plaintiff, that perhaps counselling should have been insisted upon, and that the police should have been advised (if that is what the plaintiff's parents wished) I cannot find that the school's response to the situation was in breach of its duty of care in terms of the standards then prevailing.

I find that the plaintiff has failed to prove that the school was in breach of its duty to the plaintiff in its response to learning of the abuse.

4. Is the defendant vicariously liable?

The plaintiff rests his claim on the further basis of vicarious liability. The plaintiff asserts that his sexual abuse by Bain in the boarding house was perpetrated in circumstances where there was such a close connection between what was done by Bain and what he was employed to do in the boarding house, involving as it did a relationship with the plaintiff characterised by trust, dependence and vulnerability, that the defendant cannot escape vicarious liability for the abuse.

I draw the following statement of principle from the judgment of Gleeson CJ in *State of New South Wales v Lepore* (2003) 212 CLR 511 particularly at [40] to [54].

An employer is vicariously liable for a tort committed in the course of or within the scope of employment. Liability may arise even though the tort was committed for the benefit of the employee and not for the employer. Not every act performed by an employee during working hours is sufficiently connected with his duties as to fall within the scope of his employment. Conversely, that an act occurs away from the workplace or outside working hours is not conclusive against liability. If it can be said that the tort was committed by the employee "on a frolic of his own" that can tell against liability. On the other hand, if the act under consideration is so connected with the authorised acts that it may be regarded as an improper mode of doing an authorised act, then liability will probably arise: [42]. Where the responsibilities of an employer relate to the protection of persons and harm is caused by an intentional, wrongful act to such persons, it is necessary to closely examine the responsibilities of the employee: [52]. Gleeson CJ noted that this element of protection within the relationship under consideration – instancing the relationship between a school authority and pupil – gave rise to difficulty in defining the limits of vicarious liability. At one end of the spectrum teachers might be engaged merely to teach, while others "may be charged with responsibilities that involve them in intimate contact with children, and require concern for personal welfare and development": [53]. At [54] Gleeson CJ adverted specifically to a consideration of sexual abuse. His Honour said:

> Sexual abuse, which is so obviously inconsistent with the responsibilities of anyone involved with the instruction and care of children, in former times would readily have been regarded as conduct of a personal and independent nature, unlikely ever to be treated as within the course of employment. Yet such conduct might take different forms. An opportunistic act of serious and random violence might be different, in terms of its connection with employment, from improper touching by a person whose duties involve intimate contact with another.

Even where the tortious act of the employee is contrary to instructions of the employer; even a "flagrant breach of the employment obligations", the employer may still be vicariously liable: [43].

Although the Justices making up the court in *Lepore* stated the relevant principles in different ways, these statements of principle were generally in accord with the views of Gaudron J and Kirby J and were said by the New South Wales Court of Appeal in *Withyman v State pf New South Wales* [2013] NSWCA 10 to amount to an uncontroversial statement of the relevant principles: [134].

The plaintiff argues that there is "ample evidence" of the close connection between the sexual abuse of the plaintiff by Bain and what Bain was employed to do in the boarding house. The plaintiff puts that Bain's responsibilities included supervising the evening and bedtime routines of the Year 8 boarders which included supervising the boys' showering, going to bed, and lights out. He argues that Bain's bedtime supervision duties included settling the junior boarders after "lights out" and telling them bedtime stories. It is said that Bain's role was marked by the trust, dependence and vulnerability of the plaintiff and his fellow boarders, many of whom were new to the boarding house and aged only 12 or 13 years. It was put that Bain's role included socialising with the boarders, including in his room, and fostering close relationships.

However, the plaintiff's arguments about Bain's role and the scope of what was expected from him by the school in carrying out his duties as housemaster, proceed on the basis of an assumption that the things Bain did were the things that he was required to do. That assumption seems to me to be fallacious. As has already been outlined, the evidence from the three boarders including the plaintiff about the routines in the boarding house made it clear that the primary responsibility for supervising the younger boarders lay with the prefects. It was their responsibility to ensure that the younger boarders attended breakfast in a timely manner, completed their homework and were in bed ready for "lights out" at the appointed time. There was no mention of the other housemasters either supervising the boys' showering activities or attending in the dormitories after "lights out". Indeed, the plaintiff said that it was only Bain who came into the dormitories after "lights out" and only Bain who told the boys stories at that time. The only mention of Mr Prest being in the boys' dormitories at all was before "lights out" and then, only rarely.

The fact that the abuse happened, not only in the boarding house, but also off campus and including during an exeat weekend when Bain took the plaintiff to a house at Beaumont (after a weekend spent at the plaintiff's home), would not have inclined me against a finding of vicarious liability. However, I consider that there is simply insufficient evidence of a reliable nature about Bain's designated role – as opposed to assumed role – upon which to base a conclusion that what he did was done in the course of employment.

In any event, although it may be accepted that when rostered on duty overnight Bain had a role which involved responsibility for and overall supervision of the boarding house, that is very far from amounting to a duty to engage in intimate physical behaviour with a student.

As Allsop P said in *Withyman* at [143]:

> That the children at the school were or may have been more emotionally vulnerable than ordinary school students may perhaps be accepted. But the enterprise of teaching and guiding the young, even using gentle and forgiving familiarity does not create a new ambit of risk of sexual activity. Sexual activity is as divorced and far from the gentle caring teacher's role as it is from the stern, detached disciplinarian's. The connection and nexus was not such as to justify imposition on the State for Ms Blackburn's, apparently out of character, sexual misconduct. The school did not create or enhance the risk of such by her duties.

I respectfully accept that statement and I find it applies (with slight modification) to this case.

Findings regarding vicarious liability

I am unable to find that Bain's conduct in the boarding house conformed to the role which the defendant assigned to him. In a number of respects, including his supervision of showering of the boys and his presence in their dormitories after "lights out", I am inclined to think that those activities were unauthorised. However, there is no direct evidence on this point and a conclusion based on inherent likelihood or

general knowledge remains speculative; especially in view of the fact that practices have inevitably changed markedly in the ensuing years.

Even so, were I to assume that Bain acted in accordance with the defendant's instructions in these activities, it would make no difference to my conclusion that the defendant is not vicariously liable for Bain's abusive conduct.

I find that notwithstanding that the relationship between boarding house master and boarding student would likely be a closer one than that of a day student and teacher of like age, the ordinary relationship was not one of intimacy and 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. I find that the defendant did not, by means of any proven requirement of Bain, create or enhance the risk of Bain sexually abusing the plaintiff.

Liability on this basis is not made out.

5. Was the plaintiff under a disability in terms of s 45 of the Limitations Act?

The plaintiff's resort to provisions of s 45 of the Limitations Act allowing for an extension of time due to legal disability relies on a finding that his cause of action arose in 1996. Because I have found that the cause of action arose much earlier and probably in 1962, s 45 is not available to him. That is because s 45(3) precludes an extension beyond 30 years. Therefore, on my reasoning, this question does not arise. However, I plan to deal with it in relatively brief terms.

The plaintiff argues that because he has at all times since August 1996 been a person under a mental disability within the meaning of the section, he is not in need of an extension of time within which to bring the action. The Court was asked to consider the evidence going to the plaintiff's mental state "in the broad". First, it was suggested that the totality of evidence bearing on the plaintiff's condition since 1996 demonstrated his debilitated state. Then, the extensive treatment he has undergone since 1996 was underlined. Since that time he has been under the care of a psychiatrist and a psychologist and, additionally, he has seen and sought the assistance of a number of other therapists. The treatment he has received has included electro convulsive therapy. As seen, his condition remains extremely fragile. Next it is pointed out that throughout the period since 1996 the plaintiff has been unable to function either at work or at home. It is further suggested that the plaintiff's dealings with Bain and the defendant since 1996 reveal an ambivalence towards the defendant and an unwillingness to detach the "umbilical cord". It is said that a rational person would have broken the attachment with the defendant, would have realised that the defendant would act in its own best interests, would not have allowed himself to be steered towards a solicitor whose husband apparently worked at PAC and would not have chosen to sue Bain – a man of straw – as opposed to suing the defendant. It is suggested that the plaintiff's long standing family ties to PAC and the public esteem enjoyed by the school's leaders caused the plaintiff difficulty in rationally considering action against it.

The section upon which reliance is based provides as follows:

> **45—Persons under legal disability**
>
> (1) Where the time for bringing an action or proceeding is limited by this Act, or any other Act or law, and the person who is entitled to bring the action or proceeding is under a legal disability, the time for bringing that action or proceeding shall, subject to subsection (3) of this section, be extended by the period or periods for which the disability exists or continues after the time at which the right to bring the action or proceeding arose.
>
> (2) For the purposes of this section a person is under a legal disability in relation to an action or proceeding while he remains a child or while he is subject to a mental deficiency, disease or disorder by reason of which he is incapable of reasoning or acting rationally in relation to the action or proceeding that he is entitled to bring.
>
> (3) No period of limitation shall be extended by this section to more than thirty years from the time at which the right to bring the action or proceeding arose.

There are few South Australian cases which consider the terms of s 45 at any length. In *Pointon v Walkley* [1951] SASR 121 Mayo J found that permanent brain damage as a result of an assault had led to legal disability. Plainly, under the test as it then was, or as it now is, such brain damage would qualify. Then, in *Curic v Sprudzans* (1980) 91 LSJS 232 Walters J found that "grave cerebral injury and consequent brain damage" established the relevant disability.

The plaintiff argues that a broad interpretation of the expression in the section should be used and pointed to a series of New South Wales decisions which set a much lower threshold in relation to parallel but, it must be said, less demanding legislation. There, it is sufficient if the litigant is "substantially impeded in the management of his or her affairs in relation to the cause of action": s 11(3) *Limitation Act 1969* (NSW).

It is unnecessary for me to evaluate the precise differences between the respective legislation. It is sufficient to say that on the facts before me I am not satisfied that the plaintiff is properly considered as a person who has been under a legal disability in the relevant period. True it is that he may well have been mentally deficient or disordered from time to time during that period. Particularly that is so when his state has necessitated admission to psychiatric facilities, and no doubt there are other periods as well. However, I am not satisfied that there was such continuity between those periods as to amount to legal disability as comprehended by the section. Indeed, I am not confident that he would have qualified even under the more benevolent New South Wales test.

Against the plaintiff's arguments are a number of what I find to be telling factual matters which emerged in evidence. I find that since 1997 the plaintiff has been involved in no less than eight legal disputes, some of them proceeding to hearing, and in none of them has he been represented by a litigation guardian. I find that in 1997 the plaintiff took legal advice about the prospect of suing the defendant for negligence

and, having received counsel's advice, made a considered and, in my view, prudent decision not to sue the school. Instead he entered into an informal settlement involving significant benefits flowing to him, a settlement which could be seen to indicate sound judgment. I have also had regard to the plaintiff's manner during cross-examination. His presentation and his response to cross-examination showed an intelligent man who is well able to comprehend complex issues and to respond to them appropriately and indeed to protect his own interests. His evidence was, and I accept, that he had spent many, many days in an office taken by him to serve the purpose of a "war room" where preparation for this trial took place. Although the plaintiff became distressed from time to time during his evidence and occasionally sought an early adjournment or the like, his evidence impressed me as being that of a mentally able and rational person who well understood the issues at stake and the evidence relevant to them.

I should add that Professor McFarlane expressed the view that since 1996 the plaintiff had been under a disability. However, the basis for the expression of that opinion was unclear and, moreover, the relevant legal test was not adequately explained to him. In any event, there is far more material before me than was ever presented to Professor McFarlane going to this issue. In my view I am in a better position to reach a conclusion on this point, even given Professor McFarlane's far superior understanding of the post traumatic stress disorder.

I reiterate that I do not find that the plaintiff was under a legal disability as contemplated by s 45 of the Limitations Act for any periods of time of sufficient length to affect the time within which he was required to bring the action.

6. Should an extension of time be granted?

As seen, I have found that the plaintiff's injury, loss and damage is not proved to be attributable to negligence of the defendant. Accordingly, the question of the plaintiff's right to an extension of time becomes academic.

The first question is as to the applicable iteration of the Limitations Act. In the 70s two significant amendments to the extension machinery found within the Limitations Act were enacted and it is necessary to determine whether these apply to the plaintiff's claim.

As previously set out, the conduct of Bain giving rise to the claim occurred in 1962 and, as I have found, the cause of action in all likelihood accrued in that year. Section 36 of the Limitations Act required that the plaintiff institute his action within three years. Time did not begin to run, however, until the plaintiff ceased to be an "infant", which according to the Act at that time was when he attained the age of 21 years: s 45(2) Limitations Act. Accordingly, the limitation period expired three years after his twenty-first birthday, namely on 17 July 1973.

Section 48 of the Limitations Act was amended in 1972 and from that time provided for an extension of time in circumstances where the claim was instituted within 12 months of the plaintiff ascertaining facts material to his case. Since this

amendment came into force at a time when the plaintiff's claim was not barred he enjoys the benefit of the amendment.

In 1975 s 48(3)(b)(ii) was introduced. It provided for a second basis for an extension of time in circumstances where the delay resulted from conduct of the defendant. By the time of the enactment of this provision the time within which the claim had to be made had expired. However, the defendant appears to have conceded that the plaintiff can nevertheless utilise the 1975 amendments, citing *Johnson v State of South Australia* (1980) 26 SASR 1 at 31 per Zelling J and *State of South Australia v Johnson* (1981) 42 ALR 161 at 168.

Section 48 remained unchanged from 1975 until the insertion of subsections (3a) and (3b) in 2004. These applied additional criteria limiting the discretion to grant an extension of time. However, these do not affect the plaintiff's claim as they only apply to actions arising after their commencement: s 1, *Law Reform (Ipp Recommendations) Act 2004* (SA), Sch 1.

I now set out s 48 of the Limitations Act as it is accepted applies in this case:

48—General power to extend periods of limitation

(1) Subject to this section, where an Act, regulation, rule or by-law prescribes or limits the time for—

(a) instituting an action; or

(b) doing any act, or taking any step in an action; or

(c) doing any act or taking any step with a view to instituting an action,

a court may extend the time so prescribed or limited to such an extent, and upon such terms (if any) as the justice of the case may require.

(2) A court may exercise the powers conferred by this section in respect of any action that—

(a) the court has jurisdiction to entertain; or

(b) the court would, if the action were not out of time, have jurisdiction to entertain.

(3) This section does not—

(a) apply to criminal proceedings; or

(b) empower a court to extend a limitation of time prescribed by this Act unless it is satisfied—

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

(ii) the plaintiff's failure to institute the action within the period of the limitation resulted from representations or conduct of the defendant, or a person whom the plaintiff reasonably believed to be acting on behalf of the defendant, and was reasonable in view of those representations or that conduct and any other relevant circumstances,

and that in all the circumstances of the case it is just to grant the extension of time.

I now turn to the specific questions which arise in this context.

(a) Did the plaintiff's apparent failure to institute the action within the limitation period result from the conduct of the defendant?

The plaintiff pleaded that his "failure to institute the action within the period of the limitation resulted from the conduct of the defendant and was reasonable in view of that conduct". During the trial and in written closing submissions the plaintiff's counsel clarified that the defendant's conduct under consideration was confined to its conduct at the time the abuse came to light in 1962 and in the immediate aftermath. It was argued that the conduct of the headmaster and chaplain at the assembly held soon after the abuse was discovered had the effect of imposing a "heavy burden of secrecy" on the plaintiff and the other boarders. By encouraging the boarders never to speak about Bain's wrongdoing and his dismissal at a time when the plaintiff was young, fragile and impressionable, the defendant is said to have caused the plaintiff to suppress the trauma of Bain's abuse for several decades. The plaintiff also claims the defendant's failure to provide counselling and its failure to report Bain to the police resulted in the plaintiff's failure to disclose the abuse and to take legal action earlier.

In evidence the plaintiff said the boarders were told at the assembly not to talk of Bain's dismissal. The plaintiff said he felt humiliated at the assembly, even though his name was not mentioned. During cross-examination he agreed that the chaplain told all the boys to come and speak to him if they needed help. He said no-one else offered help and he received no counselling. After the assembly he felt guilty, ashamed, and afraid that what happened with Bain was his fault. He said no-one told him otherwise.

I am not satisfied that the failure to institute the action in a timely manner is shown to have been caused by the defendant's conduct at the assembly, or immediately thereafter. There must have been many influences upon the plaintiff that would explain his decision not to disclose what had occurred and not to pursue a claim earlier. The evidence suggests that the plaintiff's failure to take action in the 60s or 70s was because of his own determination to put the matter aside and get on with his life, both at school and university, and later. There is no evidence suggesting that the plaintiff was "lulled into a sense of false security" in relation to his potential claim by representatives of PAC in 1962: *Johnson v South Australia* at 52 per Mitchell J. The considerable lapse of time between the plaintiff's disclosure of the abuse and diagnosis in 1996 and his institution of these proceedings in 2008 undermines the plaintiff's argument that his failure to bring the claim earlier was a consequence of the defendant's 1962 conduct. Moreover, the plaintiff made an informed decision in 1997, which in my judgment was a rational and sensible one, not to sue PAC. He had clear legal advice at that time that such a course would have involved substantial risks. I am not persuaded that the conduct of the defendant in the aftermath of learning of Bain's abuse resulted in the failure to act earlier such as to enliven the discretion to extend time under this provision.

(b) Did the plaintiff discover facts material to his case within 12 months before instituting the action?

The plaintiff claims to have ascertained two facts material to his case within 12 months before instituting the action on 4 December 2008. The first was Dr Kelly's opinion,

found in his 2007 report, that the plaintiff would never fully recover or manage a business again. The second was Bain's 1954 conviction for gross indecency, of which he learned during Bain's sentencing proceedings.

The section does not define "material facts". However, there is a good deal of case law on the provision as it was. The requirements of the paragraph in terms of what amounts to ascertainment of a material fact are modest: *Wright v Donatelli* (1995) 65 SASR 307 per Cox J at 310. A fact is material if it is both "relevant to the issues to be proved if the plaintiff is to succeed … and is of sufficient importance to be likely to have a bearing on the case": *Sola Optical Australia Pty Ltd v Mills* (1987) 163 CLR 628 at 636. The facts must be material to the plaintiff's case, as opposed to his cause of action, but need not be decisive: *Sola Optical*. The inquiry into whether a fact is material is an objective one and does not involve consideration of whether it affected the plaintiff's decision to sue: *Sola Optical* at 636; *Wright v Donatelli* at 309 per Cox J and 320 per Lander J.

The plaintiff gave evidence that he read Dr Kelly's report shortly after the date it bears, namely 6 December 2007. In that report Dr Kelly expressed the view:

> "… it is unlikely that [the plaintiff] will at any stage in the future be able to return to the level of functioning that he had had during much of his adult life. In particular it is my opinion that he will not be able to own and manage his own business, as he had been able to previously."

The plaintiff said that learning this made him "very distressed". To this time he still hoped he would get better. He said he was left feeling that it was a "real possibility" he would never recover fully. During cross-examination, the plaintiff conceded that prior to this time he had experienced periods of real doubt concerning his ability to work. He accepted that Dr Kelly's opinion was "probably not" a surprise to him. He qualified this evidence, however, by reiterating that, despite his doubts, he had maintained the belief that he "might get better by some stage".

The plaintiff contends that this material fact relates to his loss of earning capacity, which bears on the issue of damages.

The defendant argues that there was nothing new to the plaintiff in Dr Kelly's report and for that reason it cannot amount to a material fact. The defendant highlights the plaintiff's own evidence revealing relatively long standing pessimism about his capacity to run his business and work at all several years before reading Dr Kelly's report. In particular, the defendant points to the plaintiff's prior knowledge of the written 2005 opinions of Dr Maxwell (the plaintiff's general practitioner) and Ms Shafik (his psychologist) that he suffered a "permanent residual disability" and would never return to full time work. The defendant also notes the plaintiff's evidence that his working capacity in 2003 was "almost zero".

It is evident that the plaintiff was pessimistic about his recovery and ability to work at various stages prior to reading Dr Kelly's report. His evidence about whether Dr Kelly's prognosis was entirely new to him was rather equivocal. There is a difference, however, between the plaintiff having his own perceptions about his

condition and reading of the firm opinion of his experienced treating psychiatrist. The plaintiff was entitled to place greater weight of the opinion of Dr Kelly than upon the earlier opinions of Ms Shafik and Dr Maxwell. Moreover, his condition is not readily comparable with a physical disability, which, after treatment and perhaps surgery, might be expected to stabilise, or even improve. The plaintiff's situation in these years was more fluid. On the plaintiff's evidence, only in December 2007 did he fully appreciate the permanency of his illness and its deleterious effect on his capacity to work in the future in the same way as before. I am satisfied that Dr Kelly's prognosis has a bearing on the issue of damages and is a fact properly viewed as material to his case. I am also satisfied that he ascertained his bleak prognosis as a result of reading the report within 12 months of bringing the claim.

The second fact said to be material is knowledge of Bain's prior conviction for gross indecency.

The plaintiff said he attended most of Bain's District Court hearings, but might have missed one or two. He said he was in court when Bain was sentenced on 7 December 2007 for offences including those committed against himself. He said he learned only then of Bain's 1954 conviction. He learned of it by means of Judge Herriman's remarks on sentence delivered on that day. He recalled being "very upset" upon learning that the offence involved Bain in sexual activity with another man and recalled being "stunned" that PAC had employed as a teacher a man with such a record. He said he could not recall Bain's conviction being discussed in earlier hearings. Later in the trial the defendant tendered transcript of a hearing in the same proceedings which took place on 29 October 2007. The transcript revealed that on this occasion Bain's 1954 conviction was specifically raised by his counsel in open court.

During closing submissions the plaintiff's counsel conceded that the plaintiff was present during the October hearing. Counsel contended that it must have taken some time for the gravity of the prior conviction to "settle in". Thus he argued that despite the fact that the plaintiff might have heard of it before the December hearing, it was still a material fact. He submitted that this fact had a bearing on the issue of negligence, tending to support the contention that PAC did not make proper enquiries about Bain, as, had the conviction been known, the defendant should not have employed Bain.

Consistent with the plaintiff's concession that he was present at the October hearing, I find that the plaintiff knew about Bain's 1954 conviction prior to 7 December 2007. The transcript of 29 October 2007 makes plain that Bain's previous conviction was openly discussed in court. I do not accept that the plaintiff did not take in this discussion. He acknowledged a recollection of a neighbour of Bain's giving character evidence for Bain at the very same hearing. In addition to that there is the earlier reference in his diary which, although lacking accuracy, is plainly a reference to Bain's prior criminal history.

In view of my finding that the plaintiff ascertained this fact more than 12 months prior to instituting his claim, the plaintiff does not, in this instance, satisfy section

48(3)(b)(i). For this reason it is unnecessary to discuss whether this conviction for a consensual sexual act with another man, as a 19 year old might have been seen as material in terms of s 48.

(c) Is it in all the circumstances of the case just to grant an extension of time?

In support of the plaintiff's argument that the discretion found to be enlivened should be exercised in his favour he puts two main arguments. First that the defendant's conduct was a "material cause" of the plaintiff not commencing the action earlier and second, that, in any event, the defendant has not suffered significant prejudice through the delay.

In support of his contention that the defendant's conduct contributed to the delay, the plaintiff points to the conduct of the headmaster of PAC and its chaplain, in imposing upon the plaintiff at the assembly of boarders in October 1962 the "heavy burden of secrecy". It is common ground that the plaintiff was then only 13 years of age. It is said that the direction by representatives of the defendant to the boarders that they remain silent about what had occurred and move forward, the failure to report the matter to police and the failure to provide counselling and other care to the plaintiff after Bain's dismissal was conduct such as to engender in the plaintiff a disinclination to take redress, or indeed even to disclose what had befallen him. The plaintiff's own evidence was to the effect that the assembly had a profound and lasting impact on him and the fear, shame, humiliation, guilt and self-loathing arising from it was instrumental in his taking no action in relation to the matter for many years.

In addition, the plaintiff submits that the defendant suffered no significant prejudice through the delay and that, indeed, the greater prejudice was suffered by the plaintiff. The plaintiff suggests that such prejudice to the defendant as there was went mainly to defence of the primary negligence case and could not readily be seen to affect the defence to the case based on vicarious liability.

The exercise of the discretion contained in s 48 of the Limitations Act must proceed by reference to the purpose fulfilled by limitation periods generally. In *Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 541 at 551, McHugh J summarised the rationale for limitation periods as follows:

> For nearly 400 years, the policy of the law has been to fix definite time limits (usually six but often three years) for prosecuting civil claims. The enactment of time limitations has been driven by the general perception that "[w]here there is delay the whole quality of justice deteriorates." Sometimes the deterioration in quality is palpable, as in the case where a crucial witness is dead or an important document has been destroyed. But sometimes, perhaps more often than we realise, the deterioration in quality is not recognisable even by the parties. Prejudice may exist without the parties or anybody else realising that it exists. As the United States Supreme Court pointed out in *Barker v Wingo*, "what has been forgotten can rarely be shown". So, it must often happen that important, perhaps decisive, evidence has disappeared without anybody now "knowing" that it ever existed. Similarly, it must often happen that time will diminish the significance of a known fact or circumstance because its relationship to the cause of action is no longer as apparent as it was when the cause of action arose. A verdict may appear well based on the evidence given in the proceedings, but, if the tribunal of fact had all the evidence concerning the matter, an opposite result may have ensued. The longer the delay in

> commencing proceedings, the more likely it is that the case will be decided on less evidence than was available to the parties at the time that the cause of action arose.
>
> (footnotes omitted)

There is no presumptive entitlement to an extension of time: *Brisbane South* at 544 per Dawson J, 547 per Toohey and Gummow JJ, 554 per McHugh J, 564 and 567 per Kirby J. It is for the plaintiff to establish that an extension of time would, in all the circumstances, be just. As McHugh J said in *Brisbane South* at 555:

> Legislatures enact limitation periods because they make a judgment, inter alia, that the chance of an unfair trial occurring after the limitation period has expired is sufficiently great to require the termination of the plaintiff's right of action at the end of that period. When a defendant is able to prove that he or she will not now be able to fairly defend him or herself or that there is a significant chance that this is so, the case is no longer one of presumptive prejudice. The defendant has then proved what the legislature merely presumed would be the case. Even on the hypothesis of presumptive prejudice, the legislature perceives that society is best served by barring the plaintiff's action. When actual prejudice of a significant kind is shown, it is hard to conclude that the legislature intended that the extension provision should trump the limitation period.

In *Ulowski v Miller* [1968] SASR 277 Bray CJ outlined what he called "five paramount matters" which might inform the exercise of the discretion. They were the length of the delay, the explanation for it, the hardship to the plaintiff if the action were dismissed, the prejudice to the defendant if the action were allowed to proceed notwithstanding the delay and the conduct of the defendant in the litigation. In *Lovett v Le Gall* (1975) 10 SASR 479 his Honour added to that list two further matters, namely the conduct of the plaintiff and the nature, importance and circumstances surrounding the ascertainment of the new material facts. I proceed on the basis that relevant matters include the factors enumerated, but may include others as well. Of course the weight to be afforded to any particular consideration will vary from case to case. I shall mention those factors which, in my mind, are the most significant of all of them.

In this case the length of the delay is extraordinary. Although the plaintiff claims that the defendant's conduct in 1962 had a marked impact on the plaintiff's failure to institute proceedings, there is no suggestion that the defendant's conduct subsequent to that had any effect in that regard. While it is plain that the impact of the abuse upon the plaintiff was rather diffuse in the early years of his adulthood, its insinuation into his equilibrium was certainly apparent and dramatically affecting his life decisions by the mid to late 80s; and it was patent by 1996. The explanation for the delay since that time is perhaps in need of greater examination than the delay in the 60s and 70s.

In this context it is necessary to recall that for the decade from 1997 the plaintiff was in a litigious frame of mind.

He had explored the possibility of suing Bain and the school in 1997 and decided to sue only Bain. He had accepted counsel's opinion that any claim against the school was attended by significant risk and he had determined that he was not prepared to take that risk. However, he continued to seek the assistance of those within the school

community and to accept financial benefits from it. He pursued his civil claim against Bain to its end and, with others, he agitated for the removal of the statutory immunity against prosecution for historical sexual offenders. Ultimately that removal allowed for Bain to be charged by police. The plaintiff co-operated with the police investigation and followed the criminal proceedings against Bain closely. He gave evidence during the disputed facts hearing. Those proceedings did not conclude until December 2007. In 2005 the plaintiff again explored suing the defendant. He saw a new solicitor, Mr Byrne, for that purpose. In the same year he was defending an action taken in Victoria over a guarantee given by himself and his wife.

I find that in the decade or so leading to the institution of this claim the plaintiff, though equipped to engage the defendant in litigation, chose not to do so. His decision was informed by professional advice of a good calibre and his evaluation of it was entirely rational.

I find that the plaintiff reversed that decision, not because of any event or development which affected the claim, but because he simply ran out of money and ran out of options for improving his financial position.

I find that the delay since 1996 especially tells against any exercise of discretion in favour of the plaintiff. Although it is true that during that period the plaintiff was hospitalised from time to time and was suffering from varying levels of depression and anxiety, he was able to marshal the energy and application to pursue other targets and to defend other claims. I consider that he could have, had he so chosen, sued the school much earlier.

When viewed against the entirety of the plaintiff's history, including the history of his treatment, the significance of the material fact ascertained by him relating to Dr Kelly's ultimate prognosis can be easily overstated. By the time of learning of the 2007 report of Dr Kelly the plaintiff had been treated by mental health professionals for almost ten years. He well knew of the impacts upon him of his signs and symptoms. He well knew of the pervasive impact of his various disorders upon his relationship with his wife and children and upon his ability to function as a businessman and provider, husband, father and friend. In the overall scheme of the events which befell him, I do not consider that the 2007 report could be considered to be of much significance.

Most importantly, this is a case of actual prejudice to the defendant. I wholly reject the plaintiff's submission that the prejudice suffered by him was comparable to that suffered by the defendant. Notwithstanding that I have not found the defendant liable for Bain's abuse, I find that the defendant was put at a marked disadvantage in defending the action by reason of the absence, either by death or ill health, of a number of critical witnesses. For example, witnesses critical to the unfolding of events at the time were the headmaster, the late Mr Dunning, the senior boarding house master, Mr Prest (who was too ill to give evidence) and the late Reverend Waters. I find that the defendant was incapable of proving what process it followed in employing Bain, that is, what researches were undertaken and references obtained. No records apart

from the annual school magazine were available to it. I find that the defendant was incapable of proving what instruction was given to Bain in terms of how he was to conduct himself in the boarding house and to what extent he was supervised. It was incapable of proving what, if anything, it knew of his practice of being in the boys' dormitories after "lights out" and what, if any, complaints it received about his conduct in the period prior to his dismissal. The absence of those witnesses together with the absence of the plaintiff's parents meant that there could be no evidence about what communications passed between the school and the plaintiff's parents in relation to the abuse and what decisions were taken about how it should be addressed. Similarly, I find that the defendant was incapable of proving what degree of observation and supervision it focused upon the plaintiff, and possibly other known victims, after Bain's dismissal to ensure that they seemed to be putting the incidents behind them.

These are substantial deficits and substantial impediments to the defendant in answering the claim, in circumstances where the plaintiff asked that I draw adverse inferences against the defendant solely on the basis of what Bain was seen to have done and upon the limited view of events available to the boarding students.

I find that the preponderance of the lost evidence and materials occurred since 1996.

Then there was the issue of the events at the Cummins Area School. The headmaster, Mr Dawes, was dead. Evidence from him might have fortified the plaintiff's case that no enquiry was made of him about Mr Bain. However, on the other hand, it might have proved that nothing was revealed to PAC about the reasons for Bain's dismissal there. Other evidence from persons who taught at the Cummins Area School in Bain's time was given only by affidavit and was in many respects deficient.

There is the additional matter of the loss or destruction of the notes of Mr Coats dating back to 1996. He explained the absence of the notes on the basis that he was not required to keep them beyond a certain number of years, which had long elapsed. In the context of the defendant's claim that Mr Coats had inadvertently schooled the plaintiff in the features of post traumatic stress disorder and that the list of symptoms had grown longer due to the knowledge the plaintiff acquired, the lack of Mr Coats' notes was of great significance.

I reject the plaintiff's argument that such prejudice as was suffered by the defendant through the effluxion of time was less in relation to the vicarious liability claim. Fundamental to that issue was a close examination of the role played by Bain in the boarding house. Direct evidence of that came only from former students, who were then very young. Even though I consider that, because of the dearth of evidence, no conclusion could be drawn about his role, the fact remains that the defendant was left in a position of warding off inferences and being unable to call evidence on that issue.

I find that the prejudice to the defendant due to the plaintiff's delay in instituting proceedings is of the greatest magnitude.

In *State of South Australia v Lampard-Trevorrow* (2010) 106 SASR 331 the Full Court considered an appeal by the State against a finding that Mr Trevorrow could prosecute his claim notwithstanding the lapse of some 50 years since the cause of action accrued. In finding that the decision of the trial judge to grant a s 48 extension was not in error, the Full Court referred to the fact that the treatment of Aboriginal children and their removal from their homes had in recent years become a matter of national concern and controversy. The Court appeared to have regard to that fact as relevant to the exercise of discretion under s 48. It is true, as the plaintiff points out, that historical sexual abuse in institutions has attained a similar topicality and place in the public interest. However, in light of the fact that I have found that there is actual prejudice to the defendant accruing from the lapse of time in the present case, I need not grapple with what weight might be afforded such a factor.

In the circumstances of this case I would have declined to grant an extension of time even had I found that the defendant was otherwise liable.

Conclusion

I have found that the plaintiff was subjected to sexual abuse by a boarding house master, Bain, over a period in 1962 when he was aged 12 or 13 years. I have found that throughout his life and particularly in the period since about 1996 he has suffered profoundly in a range of ways from that abuse. I have found that the loss of his marriage and the loss of his previously successful business are substantially attributable to the sexual abuse he suffered; for many years he has suffered from post traumatic stress disorder arising from the abuse.

However, the plaintiff has failed to prove that the defendant was negligent either in employing Bain, or in the level of its supervision of him, or in the steps it took to address the issue after it was discovered. I have been unable to make such a finding in the absence of evidence from a number of witnesses who had direct responsibility for the boarders and knowledge of the relevant circumstances and events. I have been unable to find that what the defendant did to address the situation once discovered was other than in accordance with the prevailing standards of the time. I have found that it is not proved that the sexual abuse occurred within the course of Bain's employment so as to make the defendant vicariously liable.

Irrespective of my findings on the question of negligence, because of actual prejudice suffered by the defendant arising from the lapse of time since the relevant events, I would have declined to exercise my discretion to extend the time for institution of proceedings under the Limitations Act.

There is no utility in hearing the balance of the plaintiff's evidence on quantum.

The claim must be dismissed.