SUPREME COURT OF QUEENSLAND

CITATION:	*TRG v The Board of Trustees of the Brisbane Grammar School* [2019] QSC 157
PARTIES:	**TRG** (applicant) **v** **THE BOARD OF TRUSTEES OF THE BRISBANE GRAMMAR SCHOOL** (respondent)
FILE NO/S:	BS No 6267 of 2018
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	21 June 2019
DELIVERED AT:	Brisbane
HEARING DATE:	4 October 2018
JUDGE:	Davis J
ORDERS:	**1. Application dismissed.** **2. The parties are to be heard on the issue of costs.**
CATCHWORDS:	STATUTES – ACTS OF PARLIAMENT – INTERPRETATION – INTERPRETATION ACTS AND PROVISIONS – where the applicant reached a settlement agreement with the respondent in 2002 in relation to claims of institutional sexual abuse at Brisbane Grammar School during 1987 and 1988 – where the applicant applied under s 48(5A) of the *Limitation of Actions Act* 1974 for an order setting aside the settlement agreement – where the Act provides that a court may set aside a previous settlement agreement if it is "just and reasonable" to do so – where the parties disagreed on the meaning and scope of "just and reasonable" under the Act – whether it was just and reasonable for the court to set aside the settlement agreement *Acts Interpretation Act* 1954 (Qld), s 14A, s 14B *Civil Liability Legislation Amendment (Child Sexual Abuse Actions) Act* 2018 (WA) *Grammar Schools Act* 2016 (Qld) *Justice and Community Safety Legislation Amendment Act* 2017 (No 2) (ACT)

Limitation Amendment Act 2017 (Tas)
Limitation Amendment (Child Abuse) Act 2016 (NSW)
Limitation of Actions Act 1974 (Qld)
Limitation of Actions and Other Legislation (Child Abuse Civil Proceedings) Amendment Bill 2016 (Qld)
Limitation of Actions (Child Abuse) Act 2015 (Vic)
Limitation of Actions (Child Abuse) Amendment Act 2018 (SA)
Limitation of Actions (Institutional Child Sexual Abuse) and Other Legislation Amendment Act 2016 (Qld)

Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (NT) (2009) 239 CLR 27; [2009] HCA 41, followed
Bell v SPC Ltd [1989] VR 170; [1989] VicRp 15, cited
Briginshaw v Briginshaw (1938) 60 CLR 336; [1938] HCA 34, cited
Brisbane South Regional Health Authority v Taylor (1996) 186 CLR 541; [1996] HCA 25, cited
Crime and Corruption Commission v Swindells [2009] QSC 409, cited
Dick v University of Queensland [2002] 2 Qd R 476; [1999] QCA 474, cited
Federal Commissioner of Taxation v Consolidated Media Holdings Ltd (2012) 250 CLR 503; [2012] HCA 55, cited
Hoch v The Queen (1988) 165 CLR 292; [1988] HCA 50, cited
Hegarty v Queensland Ambulance Service [2007] QSC 90, cited
In re Stuart [1893] 2 QB 201, cited
Jones v Hamersley Resources Ltd [2005] NSWCA 371, cited
Longman v The Queen (1989) 168 CLR 79; [1989] HCA 60, cited
Makin v Attorney-General for New South Wales [1894] AC 57; [1893] UKPC 56, cited
McNamara Business & Property Law v Kasmeridis (2007) 97 SASR 129; [2007] SASC 90, cited
Minister for Aboriginal Affairs v Peko-Wallsend Ltd (1986) 162 CLR 24; [1986] HCA 40, followed
Moriarty v Sunbeam Corp Ltd [1988] Qd R 325, cited
Muir v Franklins Limited [2001] QCA 173, cited
New South Wales v Lepore (2003) 212 CLR 511; [2003] HCA 4, cited
Norbis v Norbis (1986) 161 CLR 513; [1986] HCA 17, followed
Pfennig v The Queen (1995) 182 CLR 461; [1995] HCA 7, cited
Port of Melbourne Authority v Anshun Pty Ltd (1981) 147 CLR 589; [1981] HCA 45, cited
Prince Alfred College Inc v ADC (2016) 258 CLR 134; [2016] HCA 37, followed
Purnell v Medical Board of Queensland [1999] 1 Qd R 362; [1997] QCA 253, followed
R v Dossett (1846) 2 C & K 306; [1846] EngR 889, cited
R v Geering (1849) 18 L.J. (N.S.) (M.C.) 215, cited
R v Gray (1866) 4 F & F 1102; [1866] EngR 21, cited
Rich v State of Queensland & Ors [2001] QCA 295, cited

Sapwell v Lusk & Anor [2010] QSC 344, cited
SAS Trustee Corporation v Miles (2018) 92 ALJR 1064; [2018] HCA 55, cited
SZTAL v Minister for Immigration and Border Protection (2017) 262 CLR 362; (2017) 91 ALJR 936; [2017] HCA 34, followed
Unions NSW v New South Wales (2019) 93 ALJR 166; [2019] HCA 1, followed
Walla v State Transport Authority [1985] VR 327; [1985] VicRp 32, cited
Wolters v University of the Sunshine Coast [2012] QSC 298 cited
WAQ v Di Pino [2012] QCA 283, cited
Watts v Rake (1960) 108 CLR 158; [1960] HCA 58, cited

COUNSEL:	R J Lynch with J P D Trost for the applicant J McKenna QC, with K Holyoak, for the respondent
SOLICITORS:	McNamara and Associates for the applicant Corrs Chambers Westgarth for the respondent

[1] The respondent[1] operates Brisbane Grammar School (the School) which the applicant attended as a student between 1986 and 1989.

[2] Kevin Lynch (Lynch) was employed at the School as a counsellor. He was a sexual deviant and sexually assaulted the applicant on numerous occasions in 1986 and 1987.

[3] In 2001 the applicant sued the respondent (the 2001 proceedings) for damages for personal injuries (including psychiatric and psychological damage) suffered as a result of Lynch's abuse. Those proceedings were settled in late 2002 by written agreement (the settlement agreement) and the applicant was paid a sum of money.

[4] The applicant applies, pursuant to amendments made in late 2016 to the *Limitation of Actions Act* 1974[2] (the *Limitation Act*) for an order setting aside the settlement agreement so that he might commence fresh proceedings against the respondent for damages upon causes of action arising from Lynch's assaults.

Background

[5] At the time of Lynch's offending, the headmaster of the School was Dr Max Howell.[3] Dr Howell held the position of headmaster at the School from 1965 until his retirement. He was responsible for Year 12 students.[4] Others had responsibility for boys in other grades.

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1 A body corporate: *Grammar Schools Act* 2016.

2 *Limitation of Actions (Child Sexual Abuse) and Other Legislation Amendment Act* 2016.

3 Lennox affidavit para [4].

4 Lennox affidavit para [11].

Dr Howell was also responsible for dealing with any complaints levelled at any member of staff.[5]

[6] Lynch commenced employment at the School on 1 January 1973 as a teacher in History and Economics[6] and became the full time school counsellor in 1977.[7]

[7] Later in 1973 the applicant was born.[8] The applicant commenced at the School in 1986 as a student in Grade 8.

[8] The applicant was experiencing difficulties both at home and at school and was counselled by Lynch when he (the applicant) was in Grades 9 and 10. This was in the years 1987 and 1988. Because the applicant's birthday is towards the end of the year, he was 13 and 14 years of age when he was sexually assaulted by Lynch.

[9] In 1989, while in Grade 11, the applicant left the School.

[10] Lynch resigned his employment at the School in November 1988 so he did not return to the School for the 1989 academic year.[9]

[11] Lynch then took up employment at St Paul's school in Bald Hills. Dr Howell retired in 1989 and Dr Peter Lennox became headmaster.[10]

[12] In 1997 Lynch was charged with seven counts of indecently dealing with a student at St Paul's school.[11] After being criminally charged, he committed suicide.[12]

[13] In mid-2000 allegations began to emerge that Lynch had sexually offended against students of the School while he was employed there:

(i) Newspapers reported in May 2000 that Nigel Parodi, a former student who had gone on a rampage in Chermside shooting police officers before committing suicide had been sexually assaulted by Lynch while a student at the School.[13]

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5 Lennox affidavit para [17].

6 Stack affidavit para [9], Abernathy affidavit (Ex DJA-12, p 24).

7 Stack affidavit para [9], Abernathy affidavit (Ex DJA-13, pp 45, 47, 49 and 51).

8 Applicant's first affidavit, para [2].

9 Stack affidavit para [9]; Abernathy affidavit (Ex DJA-12, p 36).

10 Lennox affidavit para [3].

11 Abernathy affidavit (Ex DJA-2, p 3).

12 Abernathy affidavit (Ex DJA-2, p 3).

13 Abernathy affidavit (Ex DJA-2, p 3).

(ii) Newspapers reported that Shine Roche McGowan (Shine) had received instructions to act on behalf of a former student of the School who alleged that Lynch sexually assaulted him.[14]

(iii) On 2 June 2000 Shine gave notice to the School that they were acting for various claimants, not at that stage named.[15] These all made allegations of sexual misconduct against Lynch.

(iv) On 6 June 2000 a former student called in the material BQP emailed Dr Lennox asserting that he (BQP) had been a student at the School between 1976 and 1980 and that in 1979 or 1980 he had been sexually assaulted by Lynch. He further asserted that he had made complaint about the assault to Dr Howell a couple of days after the assault occurred.[16]

[14] There was then communication between the School and Shine about, amongst other things, counselling to be provided by or through the School to Lynch's victims.[17] In the course of that correspondence, Dr Lennox made it clear that the School was not admitting legal liability. In one letter he said:

> "The School's agreement to facilitate this system of counselling arises from the School's acknowledgement of its moral responsibilities to its former students. It does not in any way, nor should it be construed as, an admission of any legal liability in respect of any matter giving rise to the counselling."[18]

[15] In a pro-forma letter to former students offering counselling:

> "Finally, on behalf of the School, I would like to again express regret in relation to these matters. Although the School does not accept any legal liability for any inappropriate behaviour by Mr Lynch, it does acknowledge its clear moral responsibility to all of its students, both past and present. The decision to facilitate this counselling is, we hope, a sign of the School's sincerity in meeting that moral responsibility."[19]

[16] That denial of liability was made, in part at least, upon the understanding of the law at that time as to the School's vicarious liability or lack thereof for the actions of its employee Lynch.[20]

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[14] Abernathy affidavit (Ex DJA-2, p 3).

[15] Abernathy affidavit (Ex DJA-2, p 3).

[16] Abernathy affidavit, para [78] and Ex DJA-15, p 62.

[17] Abernathy affidavit (Ex DJA-3-DJA-6, pp 6-12).

[18] Abernathy affidavit (Ex DJA-4, p 7).

[19] Abernathy affidavit (Ex DJA-4, p 10).

[20] *Rich v State of Queensland & Ors* (2001) Aust Torts Rep 81/626 [2001] QCA 295 affirmed on appeal in *State of New South Wales v Lepore* (2003) 212 CLR 511.

[17] By this stage the respondent had engaged Corrs Chambers Westgarth (Corrs) to act on its behalf in the claims arising from Lynch's criminal activity. Mr David Abernathy, then a partner of Corrs, had primary conduct of the matters with Ms Julie Cameron. Mr Howard Stack, also a solicitor, was at this time the chairman of the respondent. Corrs' instructions came from Dr Lennox and Mr Stack.

[18] By early 2001 about 38 students had retained Shine who then began negotiating with Corrs. What was proposed by Shine was a grouping of claimants into categories of extreme, severe or moderate loss and then a group settlement rather than dealing with each case on its merits.[21]

[19] By 28 April 2001 proceedings had been instituted by Shine on behalf of about 50 former students including the applicant.[22] Initially, none of those proceedings were served.[23] Further correspondence then passed between Corrs and Shine.[24] I examine that correspondence later.[25]

[20] On 17 October 2001 proceedings brought by two former students who I shall call AB[26] and CD[27] were served on the respondent.

[21] In due course defences were filed and served, and AB and CD filed and served replies to the defences.[28]

[22] Of the proceedings commenced by AB and CD, Mr Abernathy says in his affidavit:

> "… I inferred at that time that these two claims had been selected by Shine as test cases through which they would seek to demonstrate the strength of their claims, including overcoming any limitation period defence which might be raised."[29]

[23] That was a fair inference for Mr Abernathy to draw. It was also a sensible approach for Shine to take. While at some stage each case would have to be determined on its particular merits,

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21 Abernathy affidavit (Ex DJA-23, p 73).

22 Abernathy affidavit (Ex DJA-24, p 100).

23 Abernathy affidavit para [108].

24 Abernathy affidavit (Ex DJA-25, p 102), Abernathy affidavit (Ex DJA-26, p 104) and Abernathy affidavit (Ex DJA-27, p 138).

25 Paragraphs [30]-[34] of these reasons.

26 Abernathy affidavit (Ex DJA-28, p 140).

27 Abernathy affidavit (Ex DJA-28, p 160).

28 Abernathy affidavit, paras [117-120] (Exs DJA-29, p 177 and DJA-30, p 189).

29 Paragraph [118].

it was a sensible move to proceed with two of the claims initially so as to test the prospect of overcoming legal obstacles which the claims faced.[30]

[24] Various causes of action were pleaded by AB and CD. Apart from a conventional plea of a claim in tort, the statements of claim alleged causes of action founded in a breach of fiduciary duty, misleading and deceptive conduct and unconscionable conduct.

[25] Importantly, the defences pleaded:

(i) that if Lynch did sexually assault AB and CD he did so without the knowledge of the respondent and did so otherwise than in circumstances where the respondent ought to have known the danger;[31]

(ii) the claims were statute barred by the provisions of the *Limitation Act*.

[26] On 6 February 2002 Corrs filed an application in each of AB and CD's proceedings. The applications were identical and sought:

(i) that the paragraphs pleading the causes of action other than the case in tort be struck out;

(ii) judgment for the respondent be given on the basis that the limitation defence was unanswerable;

(iii) ancillary and alternative relief.[32]

[27] Shine responded by applications on behalf of both AB and CD for orders pursuant to s 31 of the *Limitation Act* seeking an extension of the period of limitation.[33]

[28] The applications though were never heard. It was agreed between the parties that the applications should be adjourned to enable a formal mediation to proceed in relation to all of the claims.

[29] Negotiations were then undertaken as to the way the mediations should proceed. In due course prominent Brisbane barrister and expert mediator, Ian Hanger QC, was suggested as the mediator.[34]

[30] On 2 April 2002, Shine provided a proposed framework for the mediations. There were proposals for the appointment of psychiatrists to examine each claimant and timeframes were suggested. The proposal included:

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[30] The limitation issue and the vicarious liability issue.

[31] Paragraph 14 of the defence of the proceedings brought by CD, Abernathy affidavit (Ex DJA-29, p 187-188).

[32] Abernathy affidavit (Ex DJA-32, pp 195-200).

[33] Abernathy affidavit (Ex DJA-33, pp 201-204).

[34] Abernathy affidavit, paras [136]-[137] and [149].

(i) "The settlement of each claim to be conditional upon 'all' claims, for which proceedings shall have been issued reaching settlement at mediation ('all or none')"; and

(ii) "None of the plaintiffs to attend at the mediation unless it be agreed between the parties that good reason merits the individual plaintiff's attendance."[35]

[31] Corrs expressed some views about the logistical proposals and, perhaps unsurprisingly, rejected the two proposals recorded above. It is, with respect, difficult to see how, in the circumstances then existing, Shine could have advised their group of clients that an "all or none" approach was appropriate. There was always the danger that some claimants may have stronger cases than others and therefore a danger those cases would be compromised in order to obtain settlement in others. Similarly, the proposed ban on claimants attending at the mediation seems a very odd suggestion.

[32] On 3 April 2002 there was a meeting with Mr Hanger QC. That meeting was attended by solicitors from both Shine and Corrs and also barristers who had been briefed. Richard Douglas QC[36] and Rebecca Treston of counsel (as Treston QC then was)[37] represented the interests of the claimants and Sidney Williams QC represented the School. Perhaps inevitably Mr Hanger QC was not prepared to mediate on Shine's proposed "all or none" basis, and was not prepared to mediate unless the claimants were present at their mediations.[38]

[33] By 12 April 2002 the terms of the mediation agreement had been settled. Mr Hanger QC was appointed as the mediator, there were provisions for the disclosure of documents and information, and several clauses that may be regarded as standard and uncontroversial. They need not be recorded specifically here. The agreement contained the following significant clauses:

> "3 The Defendant[39] pay the mediator's costs of and incidental to the mediations and confirm to [Shine] it has reached an agreement in respect of those fees within seven days of the date of the signing of this Agreement.
>
> …
>
> 6 Within 28 days of the date of signing this Agreement by each of the parties, the Plaintiffs will provide signed Statements of Loss and Damage to the Defendant in each action.
>
> …

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[35] Abernathy affidavit (Ex DJA-38, p 216).

[36] Then Douglas SC.

[37] I will refer to Treston QC as Ms Treston.

[38] Cameron affidavit (Ex JPC-2).

[39] The respondent in the current application.

14 All psychiatric examinations, by a psychiatrist agreed between the parties, will be concluded by 30 June 2002. Prior to each examination the appointed psychiatrist will be provided with any relevant material including documents referred to in paragraphs 6 to 10 hereof,[40] the parties hereby giving an undertaking to use their best endeavours to ensure all such documents are available prior to examination. In the event any such document is not available prior to examination, such documents are to be provided as and when received by either party, but before the commencement of the mediations, for the psychiatrist's comment and for the purposes of an addendum to the individual plaintiff's medical report if appropriate, such addendum to be provided before 30 September 2002.

…

16 Each party reserves the right to:

16.l place before the examining psychiatrist any additional material which they consider appropriate; and

16.2 request the psychiatrist address any additional issues which that party considers relevant by 30 September 2002.

…

18 The Defendant agrees to meet the costs of and incidental to the psychiatric examination and supply of a report in respect of each of the Plaintiffs, such costs to include travel and accommodation expense for each of the Plaintiffs where appropriate, provided arrangements are agreed prior to the incurrence of the expenses. Should a matter not settle during the mediation process, then such costs in respect of the examination of that Plaintiff will be costs in the cause in the action by that Plaintiff.

…

20 No later than fourteen days prior to 30 September 2002:

20.l the Plaintiffs provide the Defendant with a quantum schedule and an offer of settlement in respect of each claim;

20.2 the parties agree an order in which the claims are to be mediated, failing agreement the matters to be mediated in alphabetical order.

21 No later than seven days prior to 30 September 2002 the Defendant provide a quantum schedule and an offer of settlement in respect of each claim.

22 At the commencement of the mediations, the Plaintiffs representatives make their submissions on issues common to all claims in respect of liability and limitation of time issues.

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[40] The statements of loss and damage and supporting material.

23 The Defendant's representatives thereafter follow with their submissions in reply.

24 Day one of the mediation process be set aside to accommodate these respective party's submissions.

25 The balance of the three week period, following discharge of the matters referred to in paragraphs 22, 23 24 hereof be allocated to the mediation of the damages and any individual issues in each of the claims in the order determined in accordance with paragraph 20.2 hereof.

26 <u>If any claim is not settled, the mediation costs of each party to that proceeding including the mediators fees, for which the defendant has agreed to be responsible pursuant to paragraph 3, will be costs in the cause in that proceeding</u>."[41] (emphasis added)

[34] The number of claimants represented by Shine continued to grow and by the time the mediation agreement was reached there were 64 claimants, including the applicant.[42]

[35] In his statement of claim the applicant particularised a damages claim[43] of $389,360.[44]

[36] On 24 May 2002, pursuant to the mediation agreement, the applicant supplied the respondent with his statement of loss and damage. Perhaps understandably, as these things go, the statement of loss and damage did not exactly match the damages claimed in the statement of claim. However, the claim for past and future economic loss was significantly increased in the statement of loss and damage by comparison to the statement of claim. The economic loss claimed in the statement of loss and damage was based primarily on an assertion that the psychiatric and psychological damage caused by Lynch's assaults upon the applicant had resulted in him being unable to pursue a career in medicine.

[37] Relevantly, the statement of loss and damage alleged:

"(b) Particulars of amounts the plaintiff claims for loss of income to date of this statement are:

(i) In the absence of the incident and injury, the plaintiff intended to pursue a career in medicine.

(ii) The plaintiff claims loss of income in the sum of $289,920.95, being the difference between income earned from 1990 to present ($70,079.05) and income he could have earned for the same period as a Medical Practitioner (excluding six years for University) as follows:

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41 First Arends affidavit (Ex AWA-4).

42 Abernathy affidavit paras [167]-[168].

43 Which included interest.

44 First Arends affidavit (Ex AWA-1).

(1) 1990 - 1996 - the plaintiff would not have been earning an income as he would be required to gain requisite qualifications.

(2) From 1997 to 2002, the plaintiff had the potential to earn approximately $60,000.00 net per year.

(3) The plaintiff had the potential to earn $360,000.00.

(c) Particulars of any disability resulting in a loss of earning capacity and the amount of any future economic loss claimed are:

(i) The plaintiff was a student at the time of the incidents and injury, intending to complete high school and pursue a career as a Medical Practitioner. The plaintiff is now 28 years of age.

(ii) Having regard to the interference with the plaintiff's earning capacity to date, which is reflected in the information contained herein, and having regard to the circumstances, the plaintiff's capacity to earn income will be significantly interfered with.

(iii) The plaintiff claims a sum of $816,527.00 by way of future economic loss calculated for a period of 37 years at the rate of $1,075.00 net per week, using the 5% tables. This amount has been discounted by 15% to take into account the contingencies and vicissitudes of life.

(iv) The weekly rate in paragraph (iii) above reflects the difference between what the plaintiff is earning at present, $125.00 net per week, and what it is anticipated the plaintiff would have been earning in the event of pursuing a career as a Medical Practitioner ($1,200.00 per week)."[45]

[38] In due course, the terms of a letter to a psychiatrist, Dr Gary Larder, was settled between the respective solicitors and Dr Larder was retained to examine the applicant.[46]

[39] Dr Larder examined the applicant on 5 June 2002 and his report was produced on 15 July 2002.[47] The doctor diagnosed "Chronic Depression, Alcohol and Stimulant abuse, Opioid Dependence and Anxiety Disorder and Severe Personality Vulnerability".[48]

[40] Between July and September 2002, Corrs sought disclosure of further documents and sought non-party disclosure from various entities.[49]

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[45] First Arends affidavit (Ex AWA-3).

[46] Abernathy affidavit (Exs DJA-50, p 253 and DJA-52, p 258).

[47] First Arends affidavit (Ex AWA-5).

[48] Page 5 of the report.

[49] Abernathy affidavit (Ex DJA-55, p 264) and paras [191]-[192], [194], [196]-[199] and [201].

[41] On 17 September 2002, the applicant through Shine made an offer to settle his claim for $150,399 plus costs.[50] A "damages schedule" was attached to the offer to explain how the offer was calculated. That schedule was:

"General damages	$ 30,000.00
Interest (on $20,000.00 at 2% for 15 years)	$ 6,000.00
Past Economic Loss (global assessment)	$ 40,000.00
Interest (at 5% for 5 years)	$ 10,000.00
Future Economic Loss	$ 40,000.00
Past Superannuation Losses (7%)	$ 2,800.00
Future Superannuation Losses (9%)	$ 3,600.00
Past Special Damages	
Pharmaceutical expenses - $70.00	
Travelling expenses - $1,040.00	
HIC refund - TBA	
Treatment expenses (Fairhaven Rehabilitation Centre) - $11,700.00	
Total - $12,810.00	$ 5,000.00
Interest on Past Special Damages	TBA
Future Special Damages (psychiatric costs)	$ 25,000.00
Past *Griffiths v Kerkemeyer* (claimed at $2,600 but reduced by 30% to 50%)	$ 1,820.00
Future *Griffiths v Kerkemeyer* (claimed at $4,129 but reduced by 30% to 50%)	$ 2,890.00
Subtotal	$167,110.00
The amount of $167,110.00 discounted by 10%	**Total $150,399.00**
Exemplary Damages	......"[51]

[50] Abernathy affidavit (Ex DJA-64, p 364)

[51] Abernathy affidavit (Ex DJA 64 at 365).

[42] Of particular significance is the position that the applicant was prepared to adopt in settlement negotiations concerning the claim for past and future economic loss. In stark contrast to the claims made in the statement of loss and damage, the applicant was prepared to accept $40,000 for past economic loss and $40,000 for future economic loss.

[43] Also on 17 September 2002, the respondent became aware of further evidence that Dr Howell had, in the 1980s, acquired some knowledge of Lynch's sexual predation of boys at the School. BQH was a parent of the boy, BQJ and his brother, also a student at the School. BQH swore a statutory declaration deposing to communications he had with Dr Howell. BQJ was in Grade 8 at the School in 1981. BQJ was born in 1968 and was therefore 13 at the time. BQJ had made complaint to BQH's wife that Lynch had fondled his penis.[52]

[44] In his statutory declaration, BQH swore that upon BQJ's complaint, he, BQH, travelled with his wife to the School to speak to Dr Howell. BQH swore this:

> "18. We attended on Max Howell in the morning sometime. I estimate that it would have been approximately 11.00am. My wife waited outside Mr Howell's office whilst I went in to speak with him.
>
> 19. When I went in to see Howell, I advised him of the purpose of my visit. I told him, 'My son, BQJ, has told us that Kevin Lynch has been fiddling with his (BQJ's) penis'.
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> 20. Howell's first sentence to me, after hearing my complaint was to say, 'Are you going to tell the police?' Howell did not express surprise at hearing what I had said but did seem concerned that I might tell someone else.
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> 21. I told him that I did not intend to tell the police as I did not think that the offence was as serious as that. However, I told him that l felt that I should tell someone who was in charge of the school. I then said words to the effect, 'If it was an isolated incident, it is up to you (Howell/the school) to speak with Lynch. If others are complaining as well, I would expect the school to take appropriate action to protect our children'.
>
> 22. I do not think that I asked Howell whether he had had previous complaints made about Lynch.
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> 23. Howell's attitude remained non-committal. In response to my statements, he said words to the effect, 'Yes. Righto. Thanks for telling me'. He indicated that he would look into the matter. He then engaged in some pleasantries about how my sons were going generally. The meeting was all over in about five minutes.
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> 24. I am not aware of any follow-up of the matter. I was never contacted by Howell about this subject again. In fact I had no direct contact with Howell during the rest of my sons' schooling at Brisbane Boys Grammar."

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[52] Abernathy affidavit (Ex DJA-69, p 392).

[45] In his affidavit sworn in April 2002,[53] Dr Howell, when dealing with allegations of BQP,[54] said:

> "8 At no time did I ever receive any complaint from students, staff, parents or any other person, in relation to Kevin Lynch's behaviour or counselling techniques. Had I done so, I would have investigated those complaints and if the type of behaviour now alleged was established, then his contract of employment would have been terminated immediately and the matter reported to the appropriate authorities.
>
> 9 There was an occasion in 1969 when I received a report from a parent of alleged sexual misconduct by a teacher. It was not alleged the misconduct directly involved students. I immediately put the allegation to the teacher, who admitted the allegation and resigned immediately. Had the teacher not resigned his employment would have been immediately terminated."[55] (emphasis added)

[46] When the allegations concerning BQJ arose, the School's insurers were informed and reacted badly by withdrawing their agreement (previously obtained) to contribute to settlements.[56] That position was altered by the insurers after a meeting attended by representatives of the school and Dr Howell. An inference can be drawn that Dr Howell communicated to the insurers his denial of the allegations made by BQH. In the end though I doubt whether any admissible evidence can be drawn from that meeting as to the knowledge or otherwise which Dr Howell had, at any time before the applicant was assaulted by Lynch, of any allegations made by other students against Lynch.

[47] On 23 September 2002, Mr Douglas QC and Ms Treston produced a written advice to Shine as to both prospects and quantum of the applicant's claim.[57] It is necessary to examine that advice in detail and I do so later.[58] For now it is sufficient to note that the range of damages suggested was $95,565 to $167,100 and because of difficulties in proving liability (including overcoming limitation issues), a discount of between 40% and 50% was thought to be appropriate in any settlement negotiations. Therefore, applying a 50% reduction to the lower figure and a 40% reduction to the higher figure, a range of $47,782.50 to $100,260 is produced.

[48] Arrangements had been made that Mr Hanger QC would meet each claimant before the mediation began.[59] The applicant does not in his affidavit mention such a meeting but it is clear from his first affidavit that he does not have a complete and detailed recollection of the

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[53] Abernathy affidavit (Exs DJA-105, p 780 and DJA-112, p 822).

[54] Referred to in these reasons at para [13].

[55] Abernathy affidavit Ex DJA-112, p 824-5.

[56] Abernathy affidavit, para [220].

[57] Applicant's second affidavit, Ex 1.

[58] Paragraphs [221]-[225] of these reasons.

[59] Cameron affidavit paras [26]-[28].

mediation process.[60] This is, with respect, understandable. He has had difficulties in his life and by the time of the mediation he had been diagnosed by Dr Larder as suffering, amongst other serious conditions, chronic depression. Ms Cameron in her affidavit deposes to conversations she had with Mr Hanger QC from which it is clear that he intended to speak to all complainants and that by 25 September 2002 he had spoken to eight, although none of those were the applicant.[61] It is I find, more likely than not, that the applicant did meet with Mr Hanger QC prior to the mediation.

[49] The mediation was by any standard a sophisticated process. There was significant preparation.[62] An opening session was held on 30 September 2002.[63] No claimants were present at this session. Apart from Mr Hanger QC, the participants were Mr Douglas QC and Ms Treston, who along with solicitors of Shine represented the claimants, Mr Williams QC with his junior Mr Holyoak and solicitors from Corrs, Mr Stack, Dr Lennox, and solicitors representing the various insurers of the respondent. At this session, Mr Douglas QC for the claimants and Mr Williams QC for the School put their respective positions.[64] It is necessary to analyse the detail of what was said in that session later.[65]

[50] After the initial session, individual mediations commenced. By this point, there were issues with the respondent's insurers and the respondent was unsure as to whether it would be indemnified. Therefore, no offers were made before the mediation commenced but Corrs told Shine that settlements could be reached subject to indemnity or the raising of funds from some source independently of the insurers.[66]

[51] There is some conflict of evidence as to what occurred at the mediation of the applicant's claim which was conducted on 7 October 2002. The solicitors from Corrs instructing Mr Williams QC and Mr Holyoak were Mr Abernathy and Ms Cameron. The defence was divided into two teams: Mr Williams QC with Mr Abernathy and Mr Holyoak with Ms Cameron. One of those teams attended every mediation.[67] It was Mr Holyoak and Ms Cameron who represented the School in the applicant's mediation.[68]

[52] Ms Cameron kept detailed notes of the mediation of the applicant's claim.[69] As already explained, the applicant's memory of the mediation is compromised by reasons that are

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60 Applicant's first affidavit, paras [35]-[38].

61 Cameron affidavit paras [26]-[29] (Ex JBC-4).

62 See paragraph [33] of these reasons as to what was anticipated by the mediation agreement.

63 Cameron affidavit para [31].

64 Abernathy affidavit, para [227]-[239].

65 Paragraphs [209]-[215] of these reasons.

66 Cameron affidavit para [35].

67 Abernathy affidavit para [242].

68 Abernathy affidavit para [242].

69 Cameron affidavit paras [62]-[85] (Ex JBC-9).

understandable. Where Ms Cameron's version of events[70] differs from the applicant's, I accept Ms Cameron's version.

[53] Ms Cameron's recollection of the applicant's mediation, as refreshed by her file notes, is:

> "66 My recollection is that the most significant issues discussed in this mediation were causation and quantum. In accordance with our instructions, the fact of the abuse or the extent of the abuse was not challenged by BGS.[71]
>
> 67 Dr Larder's report, which is exhibit 'AWA5' to the affidavit of Abraham William Arends sworn on 25 June 2018, stated 'There is considerable evidence that this condition could have resulted from many other life experiences.'
>
> 68 The focus of submissions made by [Ms] Treston on the Applicant's behalf was therefore on establishing causation. For example, my file note records that she made submissions that the Applicant and his siblings all faced the same prejudicial issues in life, and yet the Applicant's siblings 'have done OK' while the Applicant had not. It was submitted that the differentiating factor was Lynch.
>
> 69 The Applicant and his mother both contributed to the discussion.
>
> 70 The Applicant made comments as I recorded in my notes and disputed the accuracy of some of the matters recorded in Dr Larder's report (as to his reporting to Dr Apel).[72]
>
> 71 I believe the Applicant 'said his situation ('not a pretty picture') was much poorer than that of siblings'.
>
> 72 The reference in the last sentence of my file note to 'reporting' was a reference to the Applicant's statement that he had not told Dr Apel anything and that he had written about the abuse in a letter to his father.
>
> 73 I cannot recall any mention being made of limitation issues during the Applicant's mediation.
>
> 74 I cannot recall whether the parties split up into individual rooms during the Applicant's mediation and my file note does not record this occurring.
>
> 75 To the best of my recollection, no offer was made by BGS at the mediation."[73]

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[70] With her memory refreshed by her notes.

[71] A reference to the School.

[72] A transactional analysis therapist.

[73] Cameron affidavit paras [66]-[75].

[54] After each mediation, the claimant would be escorted to a different room for what was described as an "apology session". No lawyers were involved in this, just the claimant, any support person and Mr Stack and Dr Lennox on behalf of the respondent. The process was described by Mr Stack[74] in these terms:

> "30 Each mediation comprised two parts: the first part was the formal mediation attended by each claimant and involving lawyers for both parties, and the second part was the private apology session.[75] I did not attend the formal mediation session in any of the claims.
>
> 31 I participated in each apology session with Dr Peter Lennox and, on occasions, with the then school counsellor Kerryn Hurd.
>
> 32 There were no time constraints on any apology session. The length of the apology sessions varied considerably, with some lasting for well over an hour.
>
> 33 Prior to each apology session, I would review the claimant's personal record sheet and the psychiatric report prepared for the mediation. This provided me with some background information about each claimant so that I could better engage with them on a personal basis during the apology session. I did not have those documents with me during the apology session as I wanted to engage with the claimant without the distraction or concern they might cause.
>
> 34 At the start of each apology session, a representative of Shine would show the claimant into the room, almost invariably with a support person such as their spouse, partner, parent or friend. Sometimes the Shine representative would stay for the apology session, and other times they would not. There was no hard and fast rule either way.
>
> 35 After introductions, Dr Lennox and I started each session by expressing our dismay at what had happened, apologising to each claimant personally, and on behalf of the school, for what had happened to them while he was at BGS. We then invited each of them to tell us about his time at the school, the impact the abuse had on his life, and what he believed he needed to help him get his life back on track. Peter Lennox and I would let each claimant give us as much or as little information as he was comfortable with.
>
> 36 In addition to our apology, Dr Lennox and I advised each claimant that BGS would agree compensation with him, plus ongoing counselling as needed and for as long as it was needed.

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[74] Who has no recollection of the applicant's apology session: Stack affidavit paras [42]-[43].

[75] This is other evidence of a joint session involving lawyers and not claimants; see paragraph [33] and [49] and [209]-[215] of these reasons.

37 During each apology session, I also specifically raised with each claimant the conflicting evidence available to us as to whether BGS had been aware of the abuse by Lynch while he had been employed, because there was, understandably, a high degree of anger amongst the claimants. Most claimants believed BGS was aware of the abuse and chose to sweep it under the carpet. I thought it was important to address this issue because I did not want the claimants to leave with the impression that BGS was not prepared to confront this issue.

38 I also explained during each apology session the difficulties BGS was having with its insurers and that this inevitably had constrained our public response to the claims.

39 Many, if not most, claimants wanted to know what policies and procedures had since been put in place to prevent what had happened to them from happening to students in the future. Dr Lennox would explain how the culture of the school was now very different from what it was when the claimant attended, and Dr Lennox would generally talk about the system of pastoral care that had since been put in place for students. He would also invite each claimant to come back and visit the school if and when he was comfortable to do so, and that he would personally conduct such a tour.

40 While I found the apology sessions difficult, and many of them harrowing, I thought they were extremely important because, first and foremost, it was morally the right thing to do. Secondly, I wanted each claimant to know that BGS intended to support them through compensation and ongoing counselling."[76] (emphasis added)

[55] Dr Lennox took notes of the apology session with the applicant. He recalls the apology session but it is obvious that he has little recollection of the content of the conversation beyond his note. The content is not of great importance. He says in his affidavit though:

> "My best recollection is that the Applicant was engaged and responsive during the apology session. I recall he spoke freely during the session, as is recorded in my file note."[77]

[56] Mr Abernathy's recollection is that "very few if any, claims settled during the actual mediation".[78] The applicant's claim did not settle at mediation. After the mediation process was completed, negotiations continued. Mr Abernathy, in consultation with Ms Cameron, conducted the negotiations with Mr Morrison of Shine.[79]

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[76] Stack affidavit.

[77] Lennox affidavit, para [38].

[78] Abernathy affidavit, para [249].

[79] Abernathy affidavit, paras [250] and [251].

[57] Ultimately the claim settled for the sum of $47,000 plus costs calculated on the District Court scale and a written settlement agreement was signed.[80] It is that settlement agreement which the applicant seeks to have set aside.

[58] The settlement agreement contained three recitals:

> "A. The Plaintiff was a student at Brisbane Grammar School ('the School').
>
> B. The Plaintiff was abused at the School as a result of which the Plaintiff has issued Supreme Court proceedings [redacted] against the Trustees ('the Proceedings').
>
> C. The Plaintiff has agreed to settle the Proceedings and to give the release and indemnity referred to below on the terms set out in this Agreement."

[59] It then provided for the payment of the settlement sum on various conditions. It recorded an apology by the respondent and the School and contained fairly standard clauses giving a release and indemnity and a bar to future action:

> "4.1 Upon payment as referred to in paragraphs 1.1 and 1.4 the Plaintiff releases, indemnifies and forever discharges the Trustees (including past, present and future Trustees), the School, its past, current and future employees and agents from all claims, actions, causes of action and demands of any nature whatsoever which the Plaintiff has now or may have at any time in the future arising out of the subject matter of the Proceedings, any matters referred to in the joint psychiatric report prepared for the purpose of the Mediation before Mr Ian Hanger QC, any failure by the Trustees or the School to provide education or counselling, any bullying or abuse by staff or students of the School or any failure by the Trustees or the School to deal with bullying.
>
> 5.1 This Agreement may be pleaded as a bar to any claims, actions, causes of action, demands or legal proceedings instituted by any party in respect of any matter whatsoever referred to in this Agreement except for any proceedings instituted for breach of this Agreement."

[60] There was a provision:

> "7.2 The parties also acknowledge they are aware that they or their legal advisors, agents or servants may discover facts different from or in addition to the facts that they now know or believe to be true with respect to the subject matter of this Agreement and that it is their intention to fully, finally and absolutely settle according to the provisions of this Agreement all claims, liabilities, disputes and differences as provided by this Agreement."[81]

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[80] Applicant's affidavit, Ex 1.

[81] Applicant's first affidavit, RT 1. There were other provisions to which I need not refer.

[61] There is little evidence as to the details of the negotiations which were conducted after the mediation and which led to the settlement. What there is comes from Mr Abernathy.

[62] There is a file note[82] evidencing offers being exchanged on 7 October 2002 (the day of the mediation) of $98,000 plus costs on the District Court scale[83] and a counter offer from the respondent at $35,000 plus costs on the Magistrates Court scale.

[63] There is a document which Mr Abernathy says is a schedule which he used to keep track of offers and counter offers made in all of the claims.[84] That shows an offer by Mr Morrison of $75,000 (presumably with costs) but is undated.[85]

[64] On 18 October 2002, Corrs sent a letter to Shine concerning several of the claims including the applicant's. The letter included this paragraph:

> "I will set out below details of signed settlement agreements which I will enclose with this letter. The signed settlement agreements are a combination of matters where we had reached agreement in principle, matters where we have accepted your last offer, matters where we have split the difference between yours and our last offer and other matters where we have made an offer to the limit of instructions. On that basis we enclose settlement agreements in the following matters:"[86]

[65] On the second page of the letter appears the applicant's name and beside the name Mr Abernathy has written "46½". Having regard to the paragraph in the letter set out above, Mr Abernathy was of the view that the applicant's claim had been settled "in principle" by an acceptance of an offer to settle for the sum of $46,500 plus costs. Enclosed with the letter was a settlement agreement executed by the respondent agreeing to settle at that sum.[87] It may be that there was no agreement but Mr Abernathy "split the difference" between offers which are not recorded. It is clear that these records are sketchy.

[66] There was obviously some confusion between the solicitors as Shine clearly did not think that agreement had been reached on the applicant's claim. On 24 October 2002, Shine sent a letter to Corrs offering to settle the claim for $49,000 plus costs.[88]

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[82] Abernathy affidavit (Ex DJA-73).

[83] On behalf of the applicant.

[84] Abernathy affidavit (Ex DJA-74).

[85] Abernathy affidavit, para [254].

[86] Abernathy affidavit (Ex DJA-75, p 451).

[87] Abernathy affidavit, para [255] (Ex DJA-76, p 455).

[88] Abernathy affidavit (Ex DJA-77, p 458 at 459).

[67] On that same day Corrs sent a letter to Shine enclosing a settlement agreement signed by the respondent agreeing to pay $47,000 plus costs on the District Court scale.[89]

[68] The exact mechanism by which the figure of $47,000 was settled upon is somewhat of a mystery. Mr Abernathy kept different schedules showing the offers being made by the applicant and the respondent. I have already referred to the schedule which mentions an offer from Mr Morrison of $75,000. Another schedule[90] shows offers being made by the applicant of $98,000, $75,000, $65,000, $51,000 and $49,000. The same document shows offers being made by the respondent of $35,000 plus costs on the Magistrates Court scale, $42,000 plus costs on the District Court scale and then shows "settlement" at $47,000.[91] The schedules cannot be regarded as a complete record of all offers made. There is no notation of an offer of $46,500 (even though the respondent actually signed a settlement agreement in those terms) and splitting the difference between $49,000.00 (the previous offer from the applicant) and $42,000.00 (the respondent's offer), does not give $47,000.00.

[69] There is no evidence of what was discussed between Mr Abernathy and Mr Morrison except for Mr Abernathy's limited recollections as deposed in his affidavit and the documents exhibited thereto.[92] No affidavit of Mr Morrison (or any other representative of Shine) was in evidence before me and there are no documents from Shine except those which were sent to Corrs during the litigation and which are exhibited to Mr Abernathy's affidavits. Shine's files have probably been destroyed.[93] However, Mr Abernathy swore in his affidavit "My recollection is that during my negotiations with Simon Morrison, the liability and limitation period issues were not further agitated between us".[94]

[70] The settlement agreement is dated 17 October 2002 but the applicant's claim appears to have been settled in principle on 24 October and the agreement signed by the respondent on that day. The signed document was not returned to Corrs until 9 December 2002[95] and the settlement sum was paid on 20 December 2002.[96] Costs were ultimately agreed at $12,000 and that sum was also paid leading to the proceedings being discontinued by the filing of a notice of discontinuance on 10 January 2003.[97]

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89 Abernathy affidavit, para [257] (Ex DJA-78).

90 Abernathy affidavit (Ex DJA-79).

91 Abernathy affidavit, para [258] (Ex DJA-79, p 463 at 465).

92 Abernathy affidavit paras [253]-[260].

93 Abernathy affidavit, paras [24]-[33] (Ex DJA-1).

94 Abernathy affidavit, para [251].

95 Abernathy affidavit, para [261].

96 Abernathy affidavit, para [262] (Ex DJA-81).

97 Abernathy affidavit, paras [262]-[265] (Ex DJA-82).

[71] Dr Howell passed away on 8 August 2011.[98]

[72] In 2012, the Commonwealth government announced an intention to establish a Royal Commission into institutional responses to child sexual abuse. That Royal Commission was established and it conducted extensive investigations including many weeks of public hearings.

[73] The applicant provided a statement to the Royal Commission[99] and gave evidence in hearings of the Commission in what became known as "Case Study 34". Those hearings were conducted in November 2015.[100] While the applicant participated in the mediation and in the apology session, the Royal Commission provided the applicant with his first opportunity to give evidence about Lynch's criminal assaults upon him. The applicant's evidence was accepted by the Royal Commission.

[74] In his statement to the Royal Commission the applicant said this:

> "44. I believe that the statute of limitations should be removed for victims of child sexual abuse offences wanting to claim damages. It makes no sense to me why a person can be charged for child sexual abuse offences that happened 20 years ago but their victim can't make a claim for damages."[101]

[75] That view of the applicant's was widely held and in one of the Royal Commission's interim reports entitled "Redress and Civil Litigation Report" delivered in September 2015, the following recommendations appeared:

> "**Limitation periods**
>
> 85. State and territory governments should introduce legislation to remove any limitation period that applies to a claim for damages brought by a person where that claim is founded on the personal injury of the person resulting from sexual abuse of the person in an institutional context when the person is or was a child .
>
> 86. State and territory governments should ensure that the limitation period is removed with retrospective effect and regardless of whether or not a claim was subject to a limitation period in the past.
>
> 87. State and territory governments should expressly preserve the relevant courts' existing jurisdictions and powers so that any jurisdiction or power to stay proceedings is not affected by the removal of the limitation period.
>
> 88. State and territory governments should implement these recommendations to remove limitation periods as soon as possible, even if that requires that

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98 Abernathy affidavit, para [268].

99 Applicant's first affidavit (Ex 2).

100 Applicant's first affidavit (Ex 4, p 83).

101 Applicant's first affidavit (Ex 3, p 9).

> they be implemented before our recommendations in relation to the duty of institutions and identifying a proper defendant are implemented."

[76] Those recommendations were acted upon by the Queensland Parliament in 2016.[102] That resulted in the *Limitation of Actions (Institutional Child Sexual Abuse) and Other Legislation Amendment Bill* 2016 which was enacted (as amended) in November of that year. That Act effected the amendments to the *Limitation Act* pursuant to which the present application is brought.

[77] While various of the other State and Territories have enacted legislation[103] consistently with the Commission's recommendations on limitation periods, none have enacted provisions like s 48 of the Queensland *Limitation Act*, except the Northern Territory. By the *Limitation Act* 1981 (NT) as amended by the *Limitation Amendment (Child Abuse) Act* 2017 (NT), limitations on actions for damages arising from child sexual abuse were removed.[104] By s 54 the court may set aside certain judgments on previous actions arising from child sexual abuse if it is just and reasonable to do so. "Judgments" include "settlements" of those claims.[105]

[78] In December 2015, solicitors (not Shine and not the solicitors acting in the present application) wrote to Mr Stack advising that the applicant had given evidence at the Royal Commission and that he was still suffering the effects of Lynch's abuse of him. The letter inquired of the preparedness of the respondent to make a financial contribution to the applicant's ongoing treatment expenses. Mr Abernathy spoke to the solicitor then acting for the applicant and subsequently sent an email in these terms:

> "[The respondent] is prepared to consider assisting [the applicant] with ongoing counselling/treatment. In the first instance, it was agreed you would obtain details of the treatment which he is presently receiving, and the impact of private insurance/Medicare refund, so that [the respondent] can consider the matter further."[106]

[79] No response was received by Mr Abernathy to that email.[107]

[80] The present application was filed on 14 June 2018.

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[102] The legislative history is analysed at paragraphs [99] to [130] of these reasons.

[103] *Limitation Amendment (Child Abuse) Act 2016* (NSW); *Limitation of Actions (Child Abuse) Act 2015* (Vic); *Limitation of Actions (Child Abuse) Amendment Act 2018* (SA); *Civil Liability Legislation Amendment (Child Sexual Abuse Actions) Act* 2018 (WA); *Limitation Amendment Act 2017* (Tas); *Justice and Community Safety Legislation Amendment Act 2017* (No 2) (ACT).

[104] s 5A.

[105] s 53(2).

[106] Abernathy affidavit, paras [271]-[274] (Exs DJA-83 and 84).

[107] Abernathy affidavit, para [275].

The statutory provisions

[81] Part 2 of the *Limitation Act* prescribes periods of limitation which apply to different classes of action. Generally, actions in contract and tort must be commenced within six years of the date of the cause of action arising.[108] The limitation for personal injuries actions is prescribed by s 11. That section prescribes a limitation period of three years and is in these terms:

> "**11 Actions in respect of personal injury**
>
> (1) Notwithstanding any other Act or law or rule of law, an action for damages for negligence, trespass, nuisance or breach of duty (whether the duty exists by virtue of a contract or a provision made by or under a statute or independently of a contract or such provision) in which damages claimed by the plaintiff consist of or include damages in respect of personal injury to any person or damages in respect of injury resulting from the death of any person shall not be brought after the expiration of 3 years from the date on which the cause of action arose.
>
> (2) However, a right of action relating to personal injury resulting from a dust-related condition is not subject to a limitation period under an Act or law or rule of law.
>
> (3) To remove any doubt, it is declared that personal injury resulting from a dust-related condition does not include personal injury resulting from smoking or other use of tobacco products or exposure to tobacco smoke.
>
> (4) In this section—
>
> ***dust-related condition*** see the *Civil Liability Act* 2003, schedule 2."

[82] Here there is little doubt that but for the 2016 amendments, any cause of action which the applicant had against the respondent had become statute barred before the year 2000 revelations about Lynch.

[83] A cause of action which has become statute barred may be saved by order of the court under s 31 which provides:

> "**31 Ordinary actions**
>
> (1) This section applies to actions for damages for negligence, trespass, nuisance or breach of duty (whether the duty exists by virtue of a contract or a provision made by or under a statute or independently of a contract or such provision) where the damages claimed by the plaintiff for the negligence, trespass, nuisance or breach of duty consist of or include damages in respect of personal injury to any person or damages in respect of injury resulting from the death of any person.

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[108] s 10.

(2) Where on application to a court by a person claiming to have a right of action to which this section applies, it appears to the court—

(a) that a material fact of a decisive character relating to the right of action was not within the means of knowledge of the applicant until a date after the commencement of the year last preceding the expiration of the period of limitation for the action; and

(b) that there is evidence to establish the right of action apart from a defence founded on the expiration of a period of limitation;

the court may order that the period of limitation for the action be extended so that it expires at the end of 1 year after that date and thereupon, for the purposes of the action brought by the applicant in that court, the period of limitation is extended accordingly.

(3) This section applies to an action whether or not the period of limitation for the action has expired—

(a) before the commencement of this Act; or

(b) before an application is made under this section in respect of the right of action."

[84] By the 2016 amendments, s 11A was added to the Act. It is in these terms:

"**11A No limitation period for actions for child sexual abuse**

(1) An action for damages relating to the personal injury of a person resulting from the sexual abuse of the person when the person was a child—

(a) may be brought at any time; and

(b) is not subject to a limitation period under an Act or law or rule of law.

(2) This section applies whether the claim for damages is brought in tort, in contract, under statute, or otherwise.

(3) This section applies to an action for damages—

(a) arising under the Civil Proceedings Act 2011, section 64; or

(b) that has survived on the death of a person for the benefit of the person's estate under the *Succession Act* 1981, section 66.

(4) This section does not limit—

(a) any inherent, implied or statutory jurisdiction of a court; or

(b) any other powers of a court under the common law or any other Act (including a Commonwealth Act), rule of court or practice direction.

Example—

This section does not limit a court's power to summarily dismiss or permanently stay proceedings if the lapse of time has a burdensome effect on the defendant that is so serious that a fair trial is not possible."

[85] Section 48 is a transitional provision in these terms:

"**48 Transitional provision for Limitation of Actions (Child Sexual Abuse) and Other Legislation Amendment Act 2016**

(1) Section 11A applies to an action for damages whether the right of action accrued before or after the commencement of that section (the commencement).

(2) An action on a previously barred right of action may be brought even if—

(a) a limitation period previously applying to the right of action has expired; or

(b) another action has been started in the right of action but not finalised before the commencement; or

(c) another action was started in the right of action and discontinued before the commencement; or

(d) a judgment was given in relation to the right of action on the ground that a limitation period applying to the right of action had expired; or

(e) an action in the right of action was dismissed on the ground that a limitation period applying to the right of action had expired.

(3) If an action on a previously barred right of action is brought after the commencement, the court hearing the action may, if the court decides it is just and reasonable to do so, do either or both of the following—

(a) set aside a judgment given in relation to the right of action on the ground that a limitation period applying to the right of action had expired;

(b) take into account any amounts paid or payable as damages or costs under the judgment.

(4) The Supreme Court may, on application, set aside a judgment under this section even though the Supreme Court is not hearing the action.

(5) However, a court, other than the Supreme Court, may not set aside another court's judgment under this section.

(5A) An action may be brought on a previously settled right of action if a court, by order on application, sets aside the agreement effecting the settlement on the grounds it is just and reasonable to do so.

(5B) If a court makes an order under subsection (5A) for a previously settled right of action—

(a) each associated agreement is void despite any Act, law or rule of law; and

(b) a party to an associated agreement voided under paragraph (a) may not seek to recover money paid by, or for, the party under the agreement.

(5C) However, a court hearing an action on a previously settled right of action may—

(a) when awarding damages in relation to the action—take into account any amounts paid or payable as consideration under an associated agreement voided under subsection (5B)(a); and

(b) when awarding costs in relation to the action—take into account any amounts paid or payable as costs under an associated agreement voided under subsection (5B)(a).

(6) In this section—

associated agreement, for a previously settled right of action, means—

(a) the agreement effecting the settlement; or

(b) any other agreement, other than a contract of insurance, related to the settlement.

previously barred right of action means a right of action for an action to which section 11A applies that was not maintainable immediately before the commencement because a limitation period applying to the right of action had expired.

previously settled right of action means a right of action for an action to which section 11A applies that was settled before the commencement but after a limitation period applying to the right of action had expired."

[86] Here, there is no dispute that the applicant's cause of action falls within s 48(5A) so the only real issue is whether he can establish that it is "just and reasonable" to set aside the settlement agreement.

The submissions of the parties

[87] A significant difference between the parties is as to the width of the discretion bestowed by the words "just and reasonable" in s 48(5A). Therefore a matter in dispute is as to what factors are and are not relevant for consideration in exercise of the discretion.

[88] The applicant's position was expressed by Mr Lynch in his first written submission in these terms:

> "… The applicant has identified the following matters as relevant in the present case:
>
> (a) The applicant qualifies for consideration under the section.
>
> (b) The impact of the expired limitation period on the applicant's decision to settle.
>
> (c) The respondent's reliance on the expired limitation period in negotiating the Settlement.
>
> (d) The circumstances in which the Settlement was agreed, including access to advice and relative bargaining positions.
>
> (e) The value of the Settlement, including whether it was objectively a reasonable amount at the time ignoring the expiry of a limitation period.
>
> (f) The viability of the applicant's present-day action, including:
>
> (i) the anticipated liability of the respondent;
>
> (ii) the minimum quantum of likely damages.
>
> (g) The fact that the law now provides that *no limitation period* applies to victims of child sexual abuse."[109]

[89] Mr Lynch went on to submit (and I am adopting the lettering of the paragraphs in the primary submissions set out above):

(a) The applicant qualifies for consideration under the section. By that Mr Lynch meant that the applicant fulfilled the prerequisites for consideration of the exercise of the discretion in his favour. So much may be accepted.

(b) The applicant decided to settle his claim, for a discounted sum because of fears of a successful limitation defence.

(c) The defendant did, in the 2002 negotiations, rely upon the limitation defence.

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[109] Considered further at paragraph [152] and following of these reasons.

(d) The mediation process was fairly conducted but (and seemingly in substantive contradiction of identification of this as a relevant condition) "… the respondent's otherwise exemplary conduct of 2002 in organising and facilitating a mediation process to settle a large number of sexual abuse claims brought against it is largely irrelevant to the discretion to be exercised by this court".[110]

(e) The settlement figure of $47,000 was not a reasonable settlement disregarding limitation considerations.

(f) The applicant now has a good claim[111] for damages in an amount of about $900,000.

[90] As to primary submission (g), Mr Lynch submitted:

> "62. As noted by Mr Ian Walker in Parliamentary debate related to s 48(5A), '*if we did not take steps to ensure that people who had entered into time barred claim related deeds also had the same rights that we have now given to claimants who did not exercise their rights, we would be creating a level of inequality that is not justified.*'
>
> 63. The applicant should not be disadvantaged as compared with those victims of childhood sexual abuse who took no action in the past. This court should not deny him the rights now granted to other victims, merely because he felt compelled, at a time his rights were weaker than they are now, to accept some nominal compensation for his substantial psychiatric injury suffered when he was a young student at the respondent's school."[112]

[91] While Mr Lynch said in one part of his written submissions that s 48(5A) "provides for a very broad and unfettered discretion",[113] his submissions were in fact quite to the contrary.

[92] Mr Lynch submitted that the primary intention of the legislature was to place claimants in a position as if they had not brought and settled claims. Therefore, he submitted:

(i) the fairness or otherwise of the mediation in 2002 is irrelevant beyond what he called the "procedural fairness threshold". By that he meant that if there is "coercing or bullying" in the settlement process, that conduct would generally be fatal to a respondent's case. But if not (and the so-called threshold is met), any other consideration of the fairness of the mediation process is irrelevant;[114]

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[110] Applicant's written submissions at [40].

[111] In the context of the High Court's decision in *Prince Alfred College Inc v ADC* (2016) 258 CLR 134.

[112] First written submissions, paras 62 and 63.

[113] Reply submissions, para 14.

[114] Paragraph 22 of the reply submissions.

(ii) the reasonableness of a settlement is relevant, but a settlement which was affected by a limitation consideration cannot seemingly otherwise be just and reasonable;[115]

(iii) it is irrelevant that the parties intended to finally settle the claims in 2002;

(iv) procedural and substantive unfairness to the respondent is irrelevant to the present application;

(v) the fact that costs were thrown away in the 2002 action is irrelevant;

(vi) the fact that there had been offers to fund counselling in the future is irrelevant.

[93] Mr Lynch's submission was not that unfairness to the respondent is irrelevant for all purposes, but just irrelevant to the present application. He pointed to s 11A(5) of the *Limitation Act* which preserves the court's inherent powers which, he submits, would empower the court to stay proceedings if the prejudice to the respondent was such that the prosecution of the claim once the settlement agreement was set aside constituted an abuse of process. He then submitted that it was irrelevant to consider prejudice to the respondent when considering whether it was "just and reasonable" under s 48(5A) to set aside the settlement agreement. That unfairness would be legitimately considered, so Mr Lynch submitted, on some later application brought by the respondent to stay the new claim once it had been filed.

[94] The submission, if accepted, would lead to extraordinary, if not perverse, results. A judge hearing an application such as the present may form a view that any future proceedings would constitute an abuse of process because of irremediable unfairness to a proposed defendant, but be obliged, by other factors, to hold that it was just and reasonable to set aside the settlement agreement to enable the new proceedings to be commenced and prosecuted. Then another judge would be asked to find that proceedings which have been commenced upon a finding that it was "just and reasonable" to set aside a settlement agreement should be stayed because prosecution of the proceedings constituted an abuse of process. I reject the submission.

[95] The upshot of Mr Lynch's submission is that the critical issue was whether the settlement agreement was in some way influenced by the limitation defence. Once that point is reached, those settlements "should in most circumstances be set aside".[116]

[96] For reasons later explained,[117] the applicant's submissions are flawed as they fail to appreciate the significance of three critical aspects of s 48(5A), namely:

(i) the starting point is that there is a binding settlement agreement which defines the rights and obligations of the parties;

(ii) the issue then is whether that state of affairs ought to be disturbed;

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[115] Reply submissions, paras 33 and 35.

[116] Applicant's written submissions, para 29.

[117] Paragraphs [131] to [160] of these reasons.

(iii) on a proper construction of s 48(5A), in deciding whether it is "just and reasonable" to do so, both parties' interests are considered. The question is whether it is "just and reasonable" balancing the interest of both parties to set the settlement agreement aside.

[97] The respondent's submissions can be summarised as:

(i) The starting point is the settlement agreement which is a binding contract entered into by the parties to finally determine their rights.

(ii) Given that the legislature, in enacting s 11A of the *Limitation Act*, has determined that limitation periods ought not apply to proceedings brought to recover damages for sexual assault against children, the purpose of the transitional provision (s 48(5A)) is to give some relief, consistently with s 11A, to claimants who entered into unfair settlements before the amendments.

(iii) Section 48 does not evidence a total abandonment by the legislature of the principle that parties are bound by their contracts. The 2016 amendments create an exception whereby the settlement agreement can be set aside, but only when it is "just and reasonable" to do so.

(iv) What is "just and reasonable" is considered from the point of view of both parties' interests.

(v) By enacting s 48 the legislature enacted the test of "just and reasonable" to direct the court to consider the interests of the party who has compromised his claim and the party who, but for the exercise of the discretion, has the benefit of the bargain.

(vi) The mischief being sought to be addressed by s 48 is the continuing burden upon a claimant who is the subject of an unfair settlement.

(vii) In considering the question of what is "just and reasonable", the following factors are relevant:

> "(a) any matter affecting the fairness of the process by which the settlement agreement was entered into, arising from the existence of a limitation period (eg coercion, inequality of bargaining power).
>
> (b) any matter affecting the substantive fairness of the settlement agreement, arising from the existence of a limitation period (eg whether the settlement sum was arbitrary or had no regard to the underlying merits of the claim).
>
> (c) whether the settlement agreement reflected a voluntary decision by the parties to choose finality in preference to a court-determined solution;
>
> (d) any procedural unfairness to the defendant which would follow from the settlement agreement being set aside (eg any evidential disadvantage to the defendant in now being obliged to defend proceedings).

(e) any substantive unfairness to the defendant which would follow from the agreement being set aside (eg any change in the substantive law which would disadvantage the defendant in now being obliged to defend proceedings, any risk of loss of insurance cover).

(f) any other relevant factors (eg wasted time and costs involved in the settlement process)."[118]

[98] The respondent submitted:

(i) the settlement process was fair, with both parties being represented by competent lawyers.

(ii) the settlement sum represented a fair settlement with any discount reflecting factors other than limitation considerations.

(iii) the settlement was the result of voluntarily made decisions by both parties to finally determine their rights.

(iv) in the event that the settlement was set aside, the respondent would be disadvantaged in its defence of the claim by loss of evidence and a decay of recollections.

(v) in the event that the settlement was set aside, substantive unfairness would be suffered by the respondent including:

(a) the inability or unwillingness of the applicant to return the respondent to its original position; repayment of the settlement sum.

(b) a change of the law regarding the respondent's vicarious liability for the actions of Lynch.

(c) changes in such things as quantum decisions which potentially expose the respondent to a higher damages award.

(d) loss of insurance cover.

Legislative history

[99] As already observed, the catalyst for the 2016 amendments to the *Limitation Act* was the report of the Royal Commission.[119] It:

(i) recommended removal of limitation periods for damages for sexual abuse against children in an institutional context but,

(ii) made no recommendation that limitation periods be removed for damages for sexual abuse against children in other than an institutional context.

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[118] Respondent's written submissions, para 166.

[119] Relevantly set out at paragraph [75] of these reasons.

(iii) made no recommendations that courts have jurisdiction to set aside judgments given before any amendments were enacted.

(iv) made no recommendation that courts have jurisdiction to set aside binding settlements made before any amendments were enacted.

[100] The 2016 amendments give wider relief from the operation of the limitations prescribed by the *Limitation Act* than the Royal Commission recommended. How that occurred is evidenced by the legislative history.

[101] The first Queensland Government response to the interim report of the Royal Commission came on 16 August 2016. On that day the Premier issued guidelines for responding to civil litigation involving child sexual abuse. Those guidelines only concerned institutions operated by the Queensland State Government or its agencies and provided that the government should ordinarily "not rely upon a release or discharge from liability pursuant to the redress scheme established by the Forde Inquiry". The Forde Inquiry was the *Commission of Inquiry into Abuse of Children in Queensland Institutions*, conducted in 1998 and 1999.[120] At the same time an Issues Paper was tabled by the Premier in the House and debate ensued.[121]

[102] During the debate the Leader of the Opposition addressed the House as follows:

> "This brings me to my next point, which relates to the deeds of settlement that have already been agreed to between parties. In many instances, settlements may have been entered into because there was a statutory time limitation on civil claims being presented to a court. This is another point of contention that we feel strongly about and believe the government has failed to acknowledge and address. If a right of action relating to a personal injury resulting from child sexual abuse was settled, the settlement agreement should not prevent a person from bringing an action under these revised rules unless a court otherwise orders having regard to the circumstances of the case. I note the comments from the Attorney-General on this matter as published in the Guardian online on 5 August that –
>
> > Any legislative attempt to remove past deeds entered into with private institutions has the potential to have far-reaching and unintended consequences.
>
> Again, I foreshadow amendments to the bill through the proper parliamentary processes that provides for an opportunity for settlement agreements to be voided by the court but subject to any inherent, implied or statutory jurisdiction of the court. The judges with the experience will have the ability to supervise and supervene any such claims.

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[120] The guidelines were announced to the House on 16 August 2016 by the Premier; Hansard 16 August 2016 pages 2725-2727.

[121] Hansard 16 August 2016 pages 2725-2727.

Issues Paper – The Civil Litigation Recommendations of the Royal Commission/Understanding The Queensland Context.

> We will work through the committee process and encourage victims' advocate groups to support sensible changes that improve the scheme for survivors of these heinous crimes. If we are going to learn from past societal abuses, it is only right that as legislators we do what we can to ensure that these changes are fair, non-discriminatory and lawful. That is the aim of the LNP.[122] I again want to thank the Premier for this opportunity to speak on this very important issue. We will be supporting the thrust of the legislation, but we do believe it can be made better. We believe this is the opportunity for all of us to do something that will right the wrongs of the past and ensure a fair day in court for all those who have suffered from past abuses."[123]

[103] Later on 16 August 2016 the Premier introduced the *Limitation of Actions (Institutional Sexual Abuse) and Other Legislation Amendment Bill* 2016 ("the first bill"). The first bill proposed new sections 11A and 48 as follows:

> "**11A No limitation period for actions for child sexual abuse happening in institutional context**
>
> (1) An action for damages relating to the personal injury of a person resulting from the sexual abuse of the person in an institutional context when the person was a child—
>
> (a) may be brought at any time; and
>
> (b) is not subject to a limitation period under an Act or law or rule of law.
>
> (2) For subsection (1), sexual abuse happens in an institutional context if the sexual abuse—
>
> (a) happens—
>
> (i) on the premises of an institution; or
>
> (ii) where activities of an institution take place; or
>
> (iii) in connection with the activities of an institution; or
>
> (b) is engaged in by an official of an institution in circumstances, including circumstances involving settings not directly controlled by the institution, in which the institution has, or the institution's activities have, (whether by act or omission) created, facilitated, increased, or contributed to—
>
> (i) the risk of sexual abuse of children; or

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[122] A reference to the Liberal National Party.

[123] Hansard 16 August 2016, page 2727.

(ii) the circumstances or conditions giving rise to the risk of sexual abuse of children; or

(c) happens in any other circumstances in which an institution is, or should be treated as being, responsible for persons having contact with children.

(3) This section applies whether the claim for damages is brought in tort, in contract, under statute, or otherwise.

(4) This section applies to an action for damages—

(a) arising under the Civil Proceedings Act 2011, section 64; or

(b) that has survived on the death of a person for the benefit of the person's estate under the Succession Act 1981, section 66.

(5) This section does not limit—

(a) any inherent, implied or statutory jurisdiction of a court; or

(b) any other powers of a court under the common law or any other Act (including a Commonwealth Act), rule of court or practice direction.

Example—

This section does not limit a court's power to summarily dismiss or permanently stay proceedings if the lapse of time has a burdensome effect on the defendant that is so serious that a fair trial is not possible.

(6) In this section—

institution means an entity (whether existing or no longer existing, whether or not incorporated, and however described) that provides or provided activities, facilities, programs or services of any kind that gives or gave an opportunity for a person to have contact with a child.

official of an institution includes—

(a) a representative (however described) of the institution or a related entity; and

(b) a member, officer, employee, associate, contractor or volunteer (however described) of the institution or a related entity; and

(c) a person who provides services to, or for, the institution or a related entity, including, for example, a member,

officer, employee, associate, contractor or volunteer (however described) of an entity; and

(d) any other person who would be considered as, or should be treated as if the person were, an official of the institution.

48 Transitional provision for Limitation of Actions (Institutional Child Sexual Abuse) and Other Legislation Amendment Act 2016

(1) Section 11A applies to an action for damages whether the right of action accrued before or after the commencement of that section (the commencement).

(2) An action on a previously barred right of action may be brought even if—

(a) a limitation period previously applying to the right of action has expired; or

(b) another action has been started in the right of action but not finalised before the commencement; or

(c) another action was started in the right of action and discontinued before the commencement; or

(d) a judgment was given in relation to the right of action on the ground that a limitation period applying to the right of action had expired; or

(e) an action in the right of action was dismissed on the ground that a limitation period applying to the right of action had expired.

(3) If an action on a previously barred right of action is brought after the commencement, the court hearing the action may, if the court decides it is just and reasonable to do so, do either or both of the following—

(a) set aside a judgment given in relation to the right of action on the ground that a limitation period applying to the right of action had expired;

(b) take into account any amounts paid or payable as damages or costs under the judgment.

(4) The Supreme Court may, on application, set aside a judgment under this section even though the Supreme Court is not hearing the action.

(5) However, a court, other than the Supreme Court, may not set aside another court's judgment under this section.

(6) In this section—

> ***previously barred right of action*** means a right of action for an action to which section 11A applies that was not maintainable immediately before the commencement because a limitation period applying to the right of action had expired."

[104] The explanatory memorandum to the first bill referred to various findings and recommendations of the Royal Commission and then noted that the proposed legislation would act retrospectively contrary to the "fundamental legal principle" identified in s 4(3)(g) of the *Legislative Standards Act* 1992. This was justified in the explanatory memorandum as follows:

> "The bill seeks to remove time limits for personal injury claims relating to child sexual abuse in an institutional context under the LA Act[124] and timeframes for compliance with notice of claim requirements under the PIP Act.[125] This would apply to past claims that would previously have been subject to a limitation period. This amendment breaches the fundamental legislative principle (FLP) that 'legislation should not adversely affect rights and liberties, or impose obligation, retrospectively' (section 4(3)(g), *Legislative Standards Act 1992* (LSA)).
>
> The proposed departure from the general principle, that legislation should operate prospectively, is justified on the basis that:
>
> - it is appropriate to relax the limitation period for victims of this abuse who typically do not report their abuse for long periods after the limitation period has expired, with victims sworn to secrecy by their perpetrators or suffering in silence out of misplaced shame;
> - claims for damages that arise from allegations of institutional child sexual abuse should be determined on their merits and
> - unfairness to the defendant can be addressed by preserving the right of the court to stay proceedings.
>
> Further, the departure is mitigated to some extent as the amendment does not provide for the reopening of actions that have received final judgment, except where the judgment was made on the ground that the limitation period had expired."

[105] Two days later Mr Pyne, the Independent Member for Cairns, introduced into the House the *Limitation of Actions and Other Legislation (Child Abuse Civil Proceedings) Amendment Bill* 2016 ("the second bill"). It proposed;

(i) firstly an amendment to s 5 of the *Limitation Act* to create a definition of "child abuse", as follows:

> "***child abuse*** means any of the following perpetrated in relation to an individual while the individual is a child –

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[124] A reference to the *Limitation of Actions Act 1974* (Qld).

[125] A reference to the *Personal Injuries Proceedings Act 2002* (Qld).

(a) sexual abuse;

(b) serious physical abuse;

(c) any other abuse (***connected abuse***) perpetrated in connection with sexual abuse or serious physical abuse of the child, whether or not the connected abuse was perpetrated by the person who perpetrated the sexual abuse or serious physical abuse.

(ii) secondly the addition of subsection (3A) to s 11 as follows:

(3A) Also, a right of action relating to personal injury resulting from child abuse is not subject to a limitation period under an Act, law or rule of law.

(iii) transitional provisions including s 51 as follows:

51 Settlement agreements relating to child abuse

(1) This section applies if—

(a) a right of action relating to personal injury resulting from child abuse was settled; and

(b) the agreement (the settlement agreement) effecting the settlement was executed after the period of limitation for the right of action expired but before the commencement.

(2) The settlement agreement does not prevent a person from bringing an action, on the right of action, after the commencement.

(3) If a person brings an action on the right of action, the settlement agreement is void despite any Act, law or rule of law.

(4) A party to the voided settlement agreement may not seek to recover money paid by, or for, the party under the agreement.

(5) However, a court hearing an action brought under this section may—

(a) when awarding damages in relation to the action—take into account any amounts paid or payable as consideration under the voided settlement agreement; and

(b) when awarding costs in relation to the action—take into account any amounts paid or payable as costs under the voided settlement agreement.

(6) To remove any doubt, a collateral agreement between the parties to the settlement agreement, that is dependent on or is associated with the settlement agreement, forms part of the settlement agreement."

[106] The second bill differed in many respects from the first bill but, notably, it proposed nullifying the effect of deeds of settlement.[126]

[107] In the explanatory note accompanying the second bill this was said:

> "Since past settlements were obtained under the duress of time limits, to fail to remove these deeds and allow the matters to be re-actioned, is to fail to remove the time limits for this group of victims.
>
> It must be remembered that these 'settlements' were never the product of two equal parties negotiating on a level playing field. There was immense asymmetry between claimant (victim) and defendant (institution) and the playing field significantly skewed against the victim (time limits).
>
> These 'settlements' were the product of the unjust time limits – it would be an affront to reason to remove the unjust time limits but not remove the product of those unjust time limits.
>
> To fail to provide a clear and sensible legislative framework that guides the courts on revoking these deeds, would be irresponsible and dangerous – as such an approach would abandon victims, and also it would potentially jeopardise the wider law.
>
> It is against the expectations of the community to place all the burden of risk and cost upon victims to apply to a court, with no legal framework to assist the victim or the court. It is unclear whether the court could even make such a ruling (to revoke these deeds) despite wanting to.
>
> Furthermore it is beholden on Parliament to provide clear legal framework to the courts to ensure that courts are free to revoke these settlements, and are safe to do so with the wider settlement and deed law safe from unintended precedent. This bill provides those protections."

[108] In the explanatory memorandum there is reference to "framework that guides the courts on revoking [the] deeds [of settlement]". This is curious because by the proposed s 51 the deeds are declared void by the statute. They need not be "revoked" by exercise of judicial power. Further, the explanatory memorandum asserts that settlements (presumably all settlements) were reached in circumstances of an inequality of bargaining position. As the present case shows that assumption is incorrect.

[109] Both bills were read for the first time and then referred to the Legal Affairs and Community Safety Committee. Submissions were received and public hearings were held by the Committee.

[110] On 1 November 2016 the Committee reported on the bills.

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[126] It also extended the abolition of time limits to actions arising from any child sexual abuse, not just that committed in institutions.

[111] After recording relevant aspects of the explanatory notes to the second bill the Committee observed:

> "Most submissions received by the committee were in favour of allowing prior deeds and settlements to be reopened.
>
> The practical rationale for this reform was highlighted in the submission from Knowmore:[127]
>
> > We have dealt with many clients who have told us that they felt that they were effectively coerced into settling their claims, on the basis that if they did not accept the amount of monetary compensation offered by the institution (which they perceived as inadequate), their only other option was to take the matter to court, in circumstances where they were in receipt of advice that any such action would in all likelihood be doomed to failure, due to the limitation barrier alone. In those circumstances, the majority of our clients in such positions understandably resolved their claims by accepting the financial settlements offered, where, on any objective assessment, that settlement was manifestly inadequate and arbitrary in nature, bearing no similarity at all to the quantum of damages they would have received had they been able to litigate their matter before a court.
>
> Micah Projects Inc[128] made the following observations in this regard:
>
> > Micah Projects advocates that the matter of Deeds of Release needs to be within legislation preventing any parties from blocking civil actions due to historical settlements through past signed Deeds of Release. However, Micah Projects supports that money already awarded through historical settlements for any party be taken into account in proceedings. While whole-of-Government Guidelines for responding to child sexual abuse claims propose that payments made under the Forde Inquiry Redress Scheme will not prevent claimants pursuing a claim now, the Issues Paper does not identify the need to consider the position of claimants who have potentially, under-settled their claims because of existing statutory limitation periods.
>
> In this context, ALA[129] suggested that any reform in this area be consistent with Victoria and NSW.[130]

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[127] A body set up to assist victims.

[128] A not-for-profit group which aims to assist disadvantaged persons.

[129] A reference to Australian Lawyers Alliance.

[130] Which did not provide a regime for the setting aside of settlements; *Limitation Act 1969* (NSW) s 6A, *Limitation of Actions Act 1938* (Vic) ss 27P, 27Q and 27R.

However, the QLS[131] suggested a more cautious approach and noted some of the disadvantages of this proposed reform:

> The Pyne bill proposes section 51 of the *Limitation of Actions Act* 1974, which voids a prior settlement agreement and collateral agreements upon commencement of a new action.
>
> As previously stated, institutions may find that any such claim is uninsurable, if the insurer were a party to the original settlement arrangement. It may also bring associated problems for unincorporated associations.
>
> However, the amendment is instructive in the case of settlement agreements formed on the basis of the operation of a limitation period having been expired. In this situation the enforcement of such a settlement agreement may prove to be a de facto limitation on actions and may reasonably be an agreement that the victim would not have executed but for the operation of the limitation at the time. In this context, it would be preferable if the court could consider and decide whether to set aside the settlement agreement in the totality of the circumstances rather than the agreement being deemed void per proposed s 51(3)."

[112] The Committee recommended that the first bill be passed and the second bill not be passed. However, the report contained additional comments and recommendations by the non-government members. The two recommendations were as follows:

> "**Non-Government Member Recommendation 1:**
>
> That the government bill be amended to include the right to claim to sexual abuse victims, in circumstances other than an institutional sexual abuse setting.
>
> **Non-Government Recommendation 2:**
>
> That the government bill be amended to provide the courts, at their discretion, the right to re-open Deeds of Settlement which have been entered into, with respect to time barred sexual abuse claims."

[113] The comments in support of Non-Government recommendation 2 were as follows:

> "<u>Deeds of Settlement</u>
>
> Furthermore, the non-government members note the support of witnesses to the concept of re-opening "Deeds of Settlement", in certain circumstances.
>
> The non-government members therefore recommend that the government bill be amended to:
>
> > "Allow courts, at their discretion, to re-open Deeds of Settlement which have been entered into, with respect to time barred sexual abuse claims.""

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[131] A reference to the Queensland Law Society.

[114] On 8 November 2016 the Attorney-General and Minister for Justice and Minister for Training and Skills moved that the first bill be read for a second time.[132] In her speech to the House she dealt with various aspects of the Committee's report and then turned to the question of setting aside settlements:

> "The government bill does not deal with the issue of settlements. This approach is consistent with New South Wales and Victoria. The member's bill,[133] however, inserts a new section 51 into the *Limitation of Actions Act* to allow a person who has previously settled and entered into a settlement agreement after the limitation period had expired, but before commencement of the new provisions, to bring an action on the same matter. If they do, the settlement agreement is void. While a party to the voided agreement may not seek to recover any money paid under the agreement, a court hearing an action may, when awarding damages, take into account any amounts paid under the voided settlement agreement.
>
> While the policy objective of these amendments seems to be providing a further opportunity for victims to renegotiate settlement amounts, the member's bill goes further to create an automatic right. It does not factor in that some defendants may not have relied on the expiry of the limitation period to influence settlement negotiations. The provision as drafted provides no opportunity for this to be raised. Although the court may consider previous amounts paid under a settlement agreement, a defendant will have to expend further costs regardless of whether the limitation period was relied on or not.
>
> Turning again to the commission[134] I note that, despite this issue being raised in hearings and submissions to the commission, the commission did not make any recommendation to provide for settlements to be relitigated. However, the commission did recommend in recommendation 23 –
>
> > Survivors who have received monetary payments in the past whether under other redress schemes, statutory victims of crime schemes, through civil litigation or otherwise should be eligible to be assessed for a monetary payment under redress.
>
> In recommendations 24 and 25 the commission went on to outline how previous payments should be considered against any monetary payments under a redress scheme.
>
> It is interesting to note that in the Redress and Civil litigation report the commission considered the issue of whether a survivor receiving a monetary payment under a redress scheme should be required to enter into a deed of release. The commission at recommendation 63 stated –

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[132] Hansard 8 November 2016, page 4264.

[133] A reference to the second bill; introduced by Mr Pyne, the independent member for Cairns.

[134] A reference to the Royal Commission.

> As a condition of making a monetary payment, a redress scheme should require an applicant to release the scheme (including the contributing government or governments) and the institution from any further liability for institutional child sexual abuse by executing a deed of release.

In reaching this recommendation the commission states –

> A number of submissions argued for including in the deed of release a power to apply to set it aside.

The commission goes on to state –

> We are not satisfied that it is possible to identify clear criteria for setting aside a deed in certain limited circumstances that would not risk undermining the effect of deeds generally.

The commission's report also noted that, in its submission in response to the Redress and civil consultation paper, Catholic Church Insurance submitted –

> Is likely then that insurance protection for determinations made on re-opened old settlements will not be available, leaving many non-government institutions vulnerable to settlements. In case where insurers have indemnified policyholders in the original settlements, those insurers are likely to not provide any additional contribution where the original legal liability has been extinguished by an apparently valid settlement.

The consequences of the amendments proposed in the private member's bill are likely to result in non-government institutions being held solely liable for any damages that are above the original settlements with the insurers unlikely to provide the funds. Noting that the definition of institutions is extremely broad, this could include local sporting clubs such as swim clubs, Little Athletics and Scout groups. Such claims could result in the organisation closing its doors.

It is also probable that insurers could increase their premiums, knowing that these types of institutions are liable for future claims despite past deeds. Alternatively, insurers may put caveats on government institutions to not enter future settlements at the risk of future parliaments legislating to reopen such settlements. The consequence of this is that the victims may be forced into pursing civil claims through the courts, as non-government institutions will be less likely to settle due to the precedent that has been set by parliament willing to interfere with private settlements.

The wording of the amendment also voids the settlement upon a person bringing an action in relation to child abuse. The amendment does not provide for a situation where the person may be unsuccessful in their claim. In such case the settlement remans void. If such settlement provided ongoing payments or support for counselling, such relief under the settlement would immediately cease upon the action being brought and would not recommence upon the decision being released.

Importantly, it should be noted that currently a court may overturn settlements if vitiating factors such as misrepresentation, unconscionable conduct or mistake

> exist. The introduction of such amendments establishes a precedent that the Queensland parliament is willing to intervene or allow the courts to intervene in private settlements beyond the existing principles at law, and doing so could result in fewer settlements into the future, increased insurance premiums and non-government institutions being unable to adequately fund damages awarded. This could lead victims to be significantly disappointed after lengthy proceedings and could result in the non-government institution closing.
>
> The government believes that the approach taken by the commission – to recommend that those survivors who have entered into past settlements be provided for under a redress scheme – is appropriate. For the reasons I have outlined the member's bill should not be supported. Based on the non-government members' statement of reservation to the committee report, the opposition intends to move an amendment to provide a discretion to the court to reopen settlements in certain circumstances. Although the opposition's amendment does not go as far as the private member's bill, the arguments why the parliament should not intervene on private settlements beyond the court's current jurisdiction remain the same. Again I note that the commission did not make any recommendations regarding amendments overriding settlements and neither New South Wales no Victoria have legislated in that area;[135] nor is there any other statute in this jurisdiction or others where the parliament has legislated to allow for intervention on existing settlement deeds. For these reasons the government will not be supporting the opposition's amendment on this point."[136]

[115] Several members spoke on the first bill. It is unnecessary to record here all that was said. A number of the speeches referred to the submission made by Knowmore to the Committee. Knowmore is a body established to assist victims of institutional child sexual abuse in the wake of the Royal Commission. Knowmore's submission is set out at paragraph [111] of these reasons.

[116] Of the Knowmore submissions Mr Pyne, the Independent Member who introduced the second bill said:

> "While defendants who have had the benefit of such deeds of release may complain about 'infringement' of finalised rights and obligations, there will only be an adverse impact on those defendants where it can be demonstrated that a past settlement has been inadequate and unfair to a survivor. Defendants who paid just compensation have little to fear from the reforms that I have proposed."[137]

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[135] In the speech there is reference to the approach in New South Wales and Victoria. This is a reference to the *Limitation Act 1969* (NSW) and the *Limitation of Actions Act 1958* (Vic) respectively.

[136] Hansard 8 November 2016, pages 4268-4269.

[137] Hansard 8 November 2016, pages 4314-4315.

[117] Mr Walker, the shadow Attorney-General proposed amendments to the first bill which included empowering the court to set aside settlement agreements. In support of such a proposition Mr Walker said:

> "We also believe that deeds that have been previously entered into and may have been unfairly settled due to the time limitation period and the relative lack of bargaining power for the survivor should be able to be reopened upon application to the court. I just want to explain that, particularly in light of some of the comments of the member for Cairns, who pointed out that he felt it was unfair that there needed to be an application to the court for the deed to be reopened. We thought long and hard about that and in our view the range of deeds that have been entered into in these circumstances is undoubtedly going to be a very wide range. This was the sort of circumstance: you may have a person in their mid-20s who goes to an institution and alerts the institution to the abuse that has occurred and yet is told by the institution, 'Back luck. Your time limit's expired,' and there is no doubt, I am sure, that in some of those cases the institution said to the victim, 'Here's $1,000. Sign a deed. Go away. You've lost your rights,' and that was the end of the matter.
>
> I am sure that there are other deeds that have been entered into which are more complex than that and which may have been a fair dealing with the relevant person. I think the difficulty with the proposal put by the member for Cairns is that all of those deeds would become void and some of them may well be quite proper and effective deeds. The mechanism that we will propose in our amendment to the legislation is that the court can, upon being satisfied that it is just and reasonable to do so, reopen the deed. That retains as best we can within this difficult area the sanctity of the arrangements of deeds which people enter into voluntarily which basically should be balanced against the fact that obviously that mechanism could be adversely used against a victim given that the victim had little or no bargaining power in the circumstance.
>
> In doing all of these things, we respect the inherent jurisdiction of the court. We note that the government's bill retains, as the royal commission recommended, the inherent jurisdiction of the court to say that, notwithstanding that rights have been re-enlivened, the circumstances of the case and the justice of the case mean that in particular circumstances it cannot proceed and justice still be done. We think that that reserve power is necessary for the court. Survivors should be able to make application to the court in the interests of justice and on the grounds that it is just and reasonable to do so when they have previously entered into a deed. Then it will be a matter for the court and we believe that that is a fair and reasonable solution in the circumstances. We will be moving these amendments to the bill because the issue has been a long time coming and we believe it is important to get this right. These amendments are about fairness and doing what we can in the interests of justice, making the system as fair as possible."[138]

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[138] Hansard 8 November 2016, page 4272

[118] Mr Crandon, the Opposition Member for Coomera said of the amendments proposed by Mr Walker:

> "There have been situations where someone was choofed off[139] after being offered $500 or $1,000, whatever the amount might be. They were asked to sign something and told to go away and not bother them again. It is sad that in those circumstances we are going to lose the opportunity in this bill to reopen these deeds. I make the point, in making the recommendation that the non-government members put forward, that it would be at the discretion of the court. The court would have the opportunity to look at all of the circumstances and if it felt in the circumstances it would be appropriate to reopen the deeds it could reopen the deeds."[140]

[119] Mr McArdle, the Opposition Member for Caloundra in supporting the proposed amendments said:

> "As I earlier stated, the deeds of settlement were a tool used and it is only right that if the emotional state of a victim was used as a weapon then the veracity of the document should be questioned. Thus the court in the LNP's proposal will have the right to set aside a deed if it is just and reasonable to do so. I support the government bill with the LNP amendments."[141]

[120] Ms Howard, the Government Member for Ipswich spoke against the Opposition's amendments in these terms:

> "At present the courts in Queensland have the power to overturn settlement deeds where there are vitiating factors such as mistake, misrepresentation or unconscionable conduct. This gives the court the powers to deal with unjust settlements. Introducing amendments such as these would be setting a precedent in Queensland and would allow the courts to intervene in private settlements – something they currently do not have the power to do. The introduction of these amendments requires appropriate consultation. This has not occurred for these or any of the other provisions that go beyond the recommendations of the report of the royal commission. The committee has therefore recommended that the private member's bill not be passed."[142]

[121] Ms Simpson, the Opposition Member for Maroochydore speaking in support of Mr Walker's proposals said:

> "We are also saying that if a person has entered into a deed of settlement outside of the time limit there should be a power to apply to the court, if it was not a just and fair settlement, to have the case reopened. This is not lightly suggested and I

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[139] "Choofed off", in context seems to mean rebuffed or summarily dismissed.

[140] Hansard 8 November 2016, page 4276.

[141] Hansard 8 November 2016, page 4287.

[142] Hansard 8 November 2016, page 4288.

> note the concerns of the Attorney-General. However, I believe that there are safeguards in that it is not an automatic reopening. It recognises that sometimes these deeds may not have been entered into fairly and that the substance of the issues that are now brought to light would mean that they would be cast in a very different circumstance."[143]

[122] Mr Nichols, then the Leader of the Opposition said that the amendments were necessary in the interest of fairness and he expressed particular concern as to the inequality of bargaining power of victims of institutional child sexual abuse resulting in unfair settlements. Mr Stevens, the Opposition Member for Mermaid Beach expressed similar concerns.

[123] Ms Grace, the Government Member for Brisbane Central speaking against the amendments said:

> "There could be unintended consequences that could be quite devastating for anybody who wants to enter into a private settlement in the years to come. They would know that a government could open them up some time down the track. Why would you do one? It may be exactly what a person needs to get this issue off the agenda and off the table."[144]

[124] The Attorney-General then addressed the House and her comments were along the same lines as that of the Member for Brisbane Central. The Attorney-General said:

> "In relation to the other amendment flagged by the opposition, which has to do with deeds, again, I can understand the merit of the argument. However, the detail of the proposed amendment has only been seen this afternoon. It is still extremely broad, when we talk about giving the courts the power to reopen and, as such, void settlement deeds that parties have entered into, believing that they were full and final settlement, on the basis of what the court considers to be just and reasonable. We do not know what that scope looks like. We do not know what that measurement is until the court starts considering these.
>
> We would be the first jurisdiction in the country to do this. It does set a significant precent, that a parliament is willing to give the courts the very wide discretion to reopen and void deeds. My concern is that institutions may not want to enter into settlements into the future if they believe that those deeds are not going to be full and final settlement, that in fact the courts can at any time in the future reopen those based on a parliament already showing once that they are willing to reopen."[145]

[125] Later in the day Mr Walker, consistently with his speech to the House, moved a series of amendments to the government's bill and tabled an explanatory note to his proposed amendments.

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[143] Hansard 8 November 2016, page 4291.

[144] Hansard 8 November 2016, page 4309.

[145] Hansard 8 November 2016, pages 4315-4316.

[126] Mr Walker spoke to the amendments in these terms:

> "These amendments relate to the ability of a court to set aside deeds that have been entered into in relation to time barred claims. The Attorney and a number of speakers have raised that this is a significant step for this parliament to take, and indeed it is. However, I point out that we have taken a number of significant steps tonight which affect the legal rights and exposure of many people, but we have done so knowing that it is the right thing to do and that it restores justice to the victims of the matters that we are looking at. We have taken significant steps in relation to that already and I believe that, if we did not take steps to ensure that people who had entered into time barred claim related deeds also had the same rights that we have now given to claimants who did not exercise their rights, we would be creating a level of inequality that is not justified.
>
> I have been careful in drafting the amendment with advice to do so and to provide a number of safeguards, and I just want to go through those for the House. The first is that a court will need to find that the relevant deed should be reopened and that it is just and reasonable to do so, the same phrase used by the government in relation to setting aside judgements that have already been delivered in these matters. The court has to find that and the reason for that is that these deeds could have been entered into for a variety of reasons and with a variety of consequences and I do not believe it is fair, as the private member's bill initially proposed, to simply have a broad voiding of those deeds. I think a court needs to make that decision.
>
> Secondly, there will be a provision that relates to not only the relevant deed but any associated documents, and these may be documents that protect an insurer in relation to the settlement made to ensure that if the court does feel it is just to reopen the transaction it can do so setting aside any documents that may release an insurer from liability and at the same time, by virtue of the drafting of the clause, ensure that any insurance policy is not affected by the setting aside of the deed. The court, when it is taking into account the justness and reasonableness of setting it aside, will realise what these consequences are and I am sure will take all of those matters into account in determining whether it is appropriate in a particular circumstance to reopen the deed or not. It is a significant step to take, but my submission is that we have made a number of significant steps tonight and this would be consistent with the other steps we have taken. "[146]

[127] The Attorney-General spoke in opposition to the amendments:

> "We have already indicated that we will be opposing these amendments and I just want to pick up on a couple of those points raised by the member for Mansfield. Yes, we certainly have taken a number of significant steps in this bill tonight but those steps have been well and truly ventilated and have arisen as a consequence of recommendations of the royal commission, so they are a direct consequence of what the royal commission has recommended state and territory parliaments

[146] Hansard 8 November 2016, page 4318.

across the country do in relation to child sexual abuse in institutions. What is proposed here is not something that was before the parliamentary committee. I appreciate the private member's bill had one alternative of doing this, but the idea of having a test of being just and reasonable has not been considered by a parliamentary committee.

The proposal by the opposition does override the presumption when parties enter into a deed that they intend to be bound by the agreement. It does establish a significant precedent which may make defendant parties less willing to enter into a deed in the future. If the applicant is unsuccessful, it may have the effect of removing any continuing benefits that are under the deed agreement. I appreciate that is the choice that the survivor will make in filing that claim. I hope they get very clear advice on the consequences that, once that deed is lodged and the court does make a decision to reopen it, it is void. It may be that under that deed they were to get ongoing payments by instalments, which is not unheard of. In fact, the royal commission actually recommended that the redress scheme make the option of paying in instalments because actual stakeholders and advocates said to pay a very large sum of money to people who are not used to managing that sort of money can be detrimental and so there should be consideration of paying in instalments, so there could be deeds in which instalments are paid or there could be deeds where ongoing counselling is funded by the institution. All of that will cease the moment that that deed is reopened and void, but potentially a very long civil claim may result in that survivor being unsuccessful. That deed does not become valid again. It is void. These are the sorts of things that I believe have not been quite fleshed out.

The member for Mansfield has also not addressed the risk of ongoing insurability where insurance has already been satisfied in settling the amount of the deed. This may lead to an increase in premiums and potentially insurance companies not wanting to cover organisations that may be at risk of these claims. That may cause small organisations, which end up with a significant damages claim, to shut their doors.

I think there is absolutely a need to ensure that we are providing fairness to the survivors, but our job as members of parliament is also to look at all of the implications of the actions that we take in here. I do not believe that all of those issues have been ventilated and we have answers to all of those. For that reason, the government will not be supporting the amendment."[147]

[128] The speeches postulate various circumstances sought to be redressed by the power granted by s 48(5A);

(i) high handed behaviour by the institution.

(ii) summary dismissal by the institutions of claims which would have good prospects but for the limitation defence.

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[147] Hansard 8 November 2016, pages 4318-4319.

(iii) unequal bargaining power between the institutions and the victims of the abuse.

(iv) claims being settled for a nominal settlement sum, or perhaps a sum heavily discounted for the limitation contingency.

(v) settlements which were generally unfair.

[129] I have found that none of these features were present here.

[130] The first bill was passed with the amendments proposed by Mr Walker.

Proper construction of the provisions/relevant considerations

Preliminary Observations

[131] Section 48(3) of the *Limitation Act* speaks of "a judgment given in relation to the right of action on the ground that a limitation period applying to the right of action had expired". That must refer to a judgment for a defendant who successfully relied upon a limitation period. Such judgments are maintained unless and until the court decides that it is "just and reasonable" to set aside the judgment.

[132] Similarly, the *Limitation Act* does not strike down settlement agreements. Those agreements remain valid and enforceable unless and until a court decides that it is "just and reasonable" to set them aside.[148]

[133] The onus is therefore upon an applicant for orders under s 48(3) or 48(5A) to establish that it is "just and reasonable" to disturb the status quo and set aside the judgment or settlement agreement as the case may be.

[134] Whether it is "just and reasonable" to set aside a settlement agreement must be assessed now. In other words, taking into account all that has happened up to today, is it "just and reasonable" to set aside the settlement.

[135] Both parties submit that the power to set aside judgments[149] and the power to set aside settlement agreements[150] are discretionary powers. The two sections though are different in structure.

[136] Section 48(3) provides that:

(i) where the court decides that it is just and reasonable to set aside a judgment,

(ii) the court "may" do so.

[137] Section 48(3), at least taken literally, therefore contemplates a residual discretion not to set aside a judgment even where it has been determined that it is "just and reasonable" to do so.

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[148] s 48(5A).

[149] s 48(3).

[150] s 48(5A).

[138] Section 48(5A) does not contain the word "may" but speaks only of setting aside the settlement agreement "on the grounds that it is just and reasonable to do so".

[139] It is doubtful whether there is any practical difference between the two subsections in this respect. In *Norbis v Norbis*[151] the High Court considered the nature of the power vested in the Family Court of Australia to divide matrimonial property according to what was "just and equitable". Of that power this was said:

> "Discretion" signifies a number of different legal concepts: see, e.g., the discussion in Pattenden, *The Judge, Discretion, and the Criminal Trial* (1982), pp. 3-10. Here the order is discretionary because it depends on the application of a very general standard – what is "just and equitable" – which calls for an overall assessment in the light of the factors mentioned in s 79(4), each of which in turn calls for an assessment of circumstances. Because these assessments call for value judgments in respect of which there is room for reasonable differences of opinion, no particular opinion being uniquely right, the making of the order involves the exercise of a judicial discretion. The contrast is with an order the making of which is dictated by the application of a fixed rule to the facts on which its operation depends."[152]

[140] The powers vested by ss 48(3) and 48(5A) are both discretionary powers. The significance or otherwise of the word "may" in s 48(3) need not be considered further.

[141] Section 48(3) empowers "the court hearing the action" to set aside the previous judgment. Section 48(5A) contemplates the setting aside of a settlement agreement "by order on application". The policy behind empowering only a court hearing the trial of the subsequent action to set aside a previous judgment but empowering a court on application to set aside a settlement agreement is not obvious. The respondent raised no procedural objections so this issue need not be considered further.

[142] Neither s 48(3) or s 48(5A) contemplate the imposition of terms upon setting aside of a judgment or settlement. Cases can be easily imagined where the exercise of discretion might be influenced by the offer of undertakings by an applicant to relieve prejudice suffered by a respondent. For example an applicant could undertake to contribute in some way to costs thrown away on the previous proceedings. I raised this issue of undertakings with Mr Lynch during argument. Mr Lynch indicated that no undertakings would be offered. That no undertakings were offered is not a factor I have taken into account in the exercise of discretion. Both parties accepted that no conditions could be imposed.

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[151] (1986) 161 CLR 513.

[152] At 518.

The purpose

[143] The identification of considerations relevant to the exercise of judicial or administrative discretion is a matter of statutory interpretation. In *Minister for Aboriginal Affairs v Peko-Wallsend Ltd*,[153] Mason J (as his Honour then was) said:

> "What factors a decision-maker is bound to consider in making the decision is determined by construction of the statute conferring the discretion ... If the relevant factors — and in this context I use this expression to refer to the factors which the decision-maker is bound to consider — are not expressly stated, they must be determined by implication from the subject matter, scope and purpose of the Act. In the context of judicial review on the ground of taking into account irrelevant considerations, this court has held that, where a statute confers a discretion which in its terms is unconfined, the factors that may be taken into account in the exercise of the discretion are similarly unconfined, except in so far as there may be found in the subject matter, scope and purpose of the statute some implied limitation on the factors to which decision-maker may legitimately have regard."[154]

[144] *Peko-Wallsend* concerned a grant of discretionary power to the executive. The same principles apply to a statutorily conferred judicial discretion.

[145] Both parties rely on the extrinsic materials created during the passage of the 2016 amendments. Mr Lynch in particular relied heavily on a passage from the speech of Mr Walker to which I will return.[155] The modern approach to statutory construction, including the use of extrinsic materials, has been established by the High Court of Australia in a number of decisions. In *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (NT)*,[156] this was said:

> "This Court has stated on many occasions that the task of statutory construction must begin with a consideration of the text itself. Historical considerations and extrinsic materials cannot be relied on to displace the clear meaning of the text. The language which has actually been employed in the text of legislation is the surest guide to legislative intention. The meaning of the text may require consideration of the context, which includes the general purpose and policy of a provision, in particular the mischief it is seeking to remedy."[157]

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[153] (1986) 162 CLR 24.

[154] At 30-40.

[155] Mr Lynch's submission is noted at paragraph [90] of these reasons and the passage from the speech is considered at paras [155]-[158].

[156] (2009) 239 CLR 27 followed in Federal Commissioner of Taxation v Consolidated Media Holdings Ltd (2012) 250 CLR 503, and see Acts Interpretation Act 1954, ss 14A and 14B.

[157] At [47].

[146] Similarly, in *SZTAL v Minister for Immigration and Border Protection*,[158] Kiefel CJ, Nettle and Gordon JJ observed:

> "[14] The starting point for the ascertainment of the meaning of a statutory provision is the text of the statute whilst, at the same time, regard is had to its context and purpose. Context should be regarded at this first stage and not at some later stage and it should be regarded in its widest sense. This is not to deny the importance of the natural and ordinary meaning of a word, namely how it is ordinarily understood in discourse, to the process of construction. Considerations of context and purpose simply recognise that, understood in its statutory, historical or other context, some other meaning of a word may be suggested, and so too, if its ordinary meaning is not consistent with the statutory purpose, that meaning must be rejected."[159]

[147] In the same case but in more expansive terms, Gageler J explained:

> "[35] Mason J said in *K & S Lake City Freighters Pty Ltd v Gordon & Gotch Ltd*:
>
> > 'Problems of legal interpretation are not solved satisfactorily by ritual incantations which emphasise the clarity of meaning which words have when viewed in isolation, divorced from their context. The modern approach to interpretation insists that the context be considered in the first instance, especially in the case of general words, and not merely at some later stage when ambiguity might be thought to arise.'
>
> [36] Drawing on that statement, and its antecedents, Brennan CJ, Dawson, Toohey and Gummow JJ said in *CIC Insurance Ltd v Bankstown Football Club Ltd*:
>
> > '[T]he modern approach to statutory interpretation (a) insists that the context be considered in the first instance, not merely at some later stage when ambiguity might be thought to arise, and (b) uses 'context' in its widest sense to include such things as the existing state of the law and the mischief which, by legitimate means such as those just mentioned, one may discern the statute was intended to remedy.'
>
> [37] Both of those passages have been 'cited too often to be doubted'. Their import has been reinforced, not superseded or contradicted, by more recent statements emphasising that statutory construction involves attribution of meaning to statutory text. The task of construction begins, as it ends, with the statutory text. But the statutory text from beginning to end is construed in context, and an understanding of context has utility 'if, and in so far as, it assists in fixing the meaning of the statutory text'.

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[158] (2017) 91 ALJR 936.

[159] At [14].

> [38] The constructional choice presented by a statutory text read in context is sometimes between one meaning which can be characterised as the ordinary or grammatical meaning and another meaning which cannot be so characterised. More commonly, the choice is from 'a range of potential meanings, some of which may be less immediately obvious or more awkward than others, but none of which is wholly ungrammatical or unnatural', in which case the choice 'turns less on linguistic fit than on evaluation of the relative coherence of the alternatives with identified statutory objects or policies'.
>
> [39] Integral to making such a choice is discernment of statutory purpose. The unqualified statutory instruction that, in interpreting a provision of a Commonwealth Act, 'the interpretation that would best achieve the purpose or object of the Act (whether or not that purpose or object is expressly stated in the Act) is to be preferred to each other interpretation' 'is in that respect a particular statutory reflection of a general systemic principle'.
>
> [40] Exactly the same process of contextual construction is involved when the question is one of what content is to be given to a statutorily invoked concept which is expressed in words the ordinary or grammatical meaning of which is well-enough understood but insufficiently precise to provide definitive guidance as to how the concept is to be understood and applied in the particular statutory setting. An example is the varying senses in which the concept of causation might be invoked in statutory provisions which attribute responsibility for loss caused 'by' or 'because of' or 'as a result of' contravention of different statutory norms. Because 'one cannot give a common sense answer to a question of causation for the purpose of attributing responsibility under some rule without knowing the purpose and scope of the rule', '[t]he application of a causal term in a statutory provision is always to be determined by reference to the statutory text construed and applied in its statutory context in a manner which best effects its statutory purpose'."[160]

[148] As to the proper approach in identifying legislative purpose, Edelman J in *Unions NSW v New South Wales*[161] explained:

> "[168] The statutory purpose, or purposes - since a legislature might have multiple purposes - are the intended aims of the legislature. In some circumstances, such as this case, the identification of legislative purposes may prove elusive and divisive. It is necessary to explain what is involved in the search for legislative purpose.
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> [169] A search for the purposes or intended aims of the legislature involves a construct used to determine the meaning of the words used by that

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[160] At [35]-[40]. See also *SAS Trustee Corporation v Miles* (2018) 92 ALJR 1064 at [20] and [41].

[161] (2019) 93 ALJR 166.

> legislature. It is not a search for subjectively held purposes of any or all of the members of the Parliament that passed the law. Rather, it is a construct that accords with our conventions for understanding language, which are the techniques by which we understand words. The same language techniques require a concurrent consideration of the meaning of words used in their context together with the purpose for which the words are used, in the sense of their intended aim. Hence, purpose must be identified by the same context, and hence the same extrinsic materials, that elucidate the meaning of the words.
>
> [170] Consistently with the concept of intention in law and language generally, an intended purpose of a law is different from its foreseeable consequences or effects. A useful example of the distinction can be seen in a law that places caps on political donations for the purpose of reducing corruption but with the foreseeable effect or consequence of restricting the funds available to political parties and candidates to meet the costs of political communication.
>
> [171] The intended aim of legislation exists at a higher level of generality than the meaning of its words. The meaning of a provision in its context is informed, at a higher level of generality, by the goal or 'mischief' to which the law is directed. Identifying that goal, or intended aim, relies upon the same ordinary processes of interpretation, including considering the meanings of statutory words in the provision, meanings of other provisions in the statute, the historical background to the provision, and any apparent social objective.
>
> [172] In circumstances where a statute expressly sets out its own objects or purposes, that express statement will almost always be relevant to identifying the objects and purposes of a particular provision. But a court should not blindly accept that the high-level, abstract purposes of the whole Act must be the exhaustive statement of the purposes of a single provision. A generally stated objects clause that applies to the entirety of a statute will, usually of necessity, be stated at a high level of generality that might not touch upon, or might barely touch upon, some provisions. Nor should a court recognise any presumption or strong inference that objects expressly stated are the exclusive, constitutionally valid purposes of every provision, characterised at the appropriate level of generality. The characterisation of the purpose of a provision at the appropriate level of generality, and the adjudication of its legitimacy, are matters for the courts."[162]

[149] There are no objects expressly stated in the *Limitation Act*. However, it is well recognised that the discharge of the duty of a court to do justice to a case becomes more difficult as time

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[162] At [168]-[172].

elapses. Similarly, it becomes more difficult for a defendant to defend a claim.[163] The *Limitation Act* deals with this concern and gives protection to potential defendants by placing arbitrary time limits within which parties might commence proceedings but then bestowing on the court jurisdiction to extend that period in limited circumstances.[164]

[150] The law also recognises both the desirability of the finality of litigation and the sanctity of binding contractual bargains. There are many examples of the former; the principles of *res judicata*, *Anshun estoppel*.[165] As to the later the law has developed only limited bases upon which a party can resile from a contract; mistake and fraud are examples.

[151] Section 11A manifests the legislative intention that the interest of a specific class of litigant (those claiming damages resulting from child sexual abuse) should prevail without any restriction as to when the proceedings are commenced. Prejudice to a defendant caused by delay becomes largely irrelevant although delay can still be relied upon by a defendant to seek a stay of the proceedings.[166] No doubt a defendant may rely upon delay in the forensic contest where the plaintiff attempts to prove the claim.[167]

[152] In Mr Lynch's reply submissions he said this:

> "The wording of the relevant s 48(5)[168] focuses on whether it is just and reasonable to set aside the settlement agreement, not whether it is unreasonable or unjust for the respondent to be required to defend fresh proceedings."[169]

[153] The submission draws a distinction which has no meaning but serves to highlight the legislative purpose. The starting point is that there is a binding settlement agreement. Both parties have rights and obligations under the agreement but where an application is brought, the applicant (plaintiff) seeks to set it aside and commence new proceedings. The respondent (defendant) seeks to maintain the settlement. The interest of the applicant is in commencing a new claim where the result may be more favourable than the settlement. A consequence of that is exposing the respondent to the costs and uncertainty of further litigation and the prospect of an adverse judgment. The respondent's interest is to avoid that prospect. Contrary to Mr Lynch's submission, that is the contest.

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[163] *Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 541 at 555.

[164] s 31.

[165] *Port of Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 589.

[166] s 11A(4).

[167] *Longman v The Queen* (1989) 168 CLR 79 explains the impact of delay on the quality of evidence.

[168] Which should be a reference to s 48(5A).

[169] Applicant's reply submissions, para 7.

[154] The legislative purpose of s 48(5A) is to strike a balance between those two competing interests.[170] The statements in the Legislative Assembly by those who spoke to Mr Walker's amendments strongly support this identification of the legislative purpose.

[155] Mr Lynch relied heavily on Mr Walker's statement "if we did not take steps to ensure that people who had entered into time barred claim related deeds also had the same rights that we have now given to claimants who did not exercise their rights, we would be creating a level of inequality that is not justified,"[171] and submitted;

> "As a general proposition, it is submitted, one should assume that settlements entered into in actions commenced after the expiry of a limitation period are prima facie subject to being set aside. Such purpose is reflected in the extrinsic material available to this court."[172]

[156] I reject that submission. There is nothing in s 48 which supports such a presumption. Even where a claim has been defeated at trial by operation of a limitation period, the judgement in favour of a defendant is not automatically set aside, or presumed to be liable to be set aside.[173] In both ss 48(3) and 48(5A) the discretion is to set aside the judgment or settlement where it is "just and reasonable" to do so. That term is of wide import. It recognises that in determining which interest should prevail many factors may be relevant. One of those factors is that there is now no limitation period applicable to claims arising from child sexual abuse. Another is that settlements may have been entered into which are unfair.[174] What is intended is that a balance be struck between the two competing interests. That is struck as what is "just and reasonable".

[157] Mr Lynch's submission that Mr Walker's speech in the Legislative Assembly supports the presumption for which he submits should also be rejected. The court's function is to construe the words of the statute in the context of facts including the legislative history, not to construe and apply the statements made in the House Assembly. In any event Mr Walker in his speech explains that the discretion is intended to be a wide one.[175]

[158] There were other statements in the parliament to similar effect.[176]

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[170] See the discussion in a slightly different context in *Walla v State Transport Authority* [1985] VR 327 at 330 examined and approved in part in *Bell v SPC Ltd* [1989] VR 170 at 174.

[171] Mr Walker's statement is set out in context at paragraph [126] of these reasons.

[172] Applicant's outline of submission paragraph 18.

[173] s 48(3).

[174] The mischief.

[175] The relevant parts of Mr Walker's speech appears at paragraph [126] of these reasons and the passage relevant here starts "I have been careful in drafting" and ends "I think a court needs to make that decision".

[176] Mr Walker's speech to the House on 8 November 2016, set out at paragraph [117] of these reasons, the paragraph of text commencing "I am sure that there are other deeds …"; the various speeches which refer

[159] In the written submissions I was referred to various cases which consider terms like "just and reasonable".[177] None are of any real assistance as the context differs from the present. The term "just and reasonable" is simple enough and its meaning and application is discerned from the context and purpose of the *Limitation Act* as I have explained.

[160] I now turn to consider the factors which the parties here identified as relevant to the exercise of the discretion.

Prospects of success in any claim

[161] Both parties submitted that the prospects of success of the applicant in any fresh proceedings is a relevant consideration. I accept that it is relevant in determining whether it is just and reasonable to permit the applicant to commence proceedings, to consider the prospects of success of those proceedings.

[162] Putting aside the compromise of the cause of action and any limitation issues, the applicant's success in any future proceedings depends on him proving:

(i) He was assaulted by Lynch;

(ii) He suffered damage;

(iii) The assault occurred in circumstances where the respondent is liable for the damage inflicted by Lynch.

[163] In the statement of claim in the 2001 proceedings the applicant pleaded:

> "3 Lynch ordinarily conducted counselling sessions with students:-
>
> 3.1 alone;
>
> 3.2 in a locked room;
>
> 3.3 for periods of up to approximately an hour;
>
> 3.4 using techniques of hypnotism and relaxation of the student."

[164] and later:

> "5 Lynch, during a number of counselling sessions with the Plaintiff, in the course of his employment, assaulted, and or alternatively trespassed upon, deprived the liberty of, sexually abused, and or alternatively indecently behaved, and or alternatively indecently touched, and or alternative indecently gestured to the Plaintiff ("the incidents").
>
> 6 On the occasion of each of the sessions Lynch:-

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to fair dealings. Subjective intention of members is not, of course equivalent to "purpose"; *Unions NSW v New South Wales* (2019) ALJR 166 at [169].

[177] *McNamara Business & Property Law v Kameridis* (2007) 97 SASR 129, *In Re Stuart* [1893] 2 QB 201, *Jones v Hamersley Resources Ltd* [2005] NSWCA 371.

6.1 consulted with the plaintiff alone in a locked room for periods of up to approximately one hour;

6.2 performed hypnosis or hypnotic techniques on the Plaintiff without the consent of the Plaintiff or the Plaintiff's parents, the effects of which were the Plaintiff would effectively 'lose time' and not be able to recall the entirety of what happened to him whilst in the counselling session;

6.3 rubbed the Plaintiff's arms, legs, neck, shoulders, chest and stomach;

6.4 took steps to undress the Plaintiff;

6.5 touched and fondled the Plaintiff's genitals; …"

[165] In these reasons I have referred to Lynch's assaults upon the applicant as if the fact of them having occurred is proven. I have not though been asked, naturally enough, to make final findings and I do not.

[166] However, the applicant would, no doubt, in any future trial, give evidence consistently with the allegations in the statement of claim in the 2001 proceedings. There is evidence, no doubt still available, of other former students who were sexually assaulted by Lynch. Several of these former students gave evidence at the Royal Commission.[178] There are a number of former students:

(i) who consulted Lynch in his capacity as a counsellor at the School; and

(ii) hypnotism or some similar type of relaxation technique was performed by Lynch;

(iii) Lynch and each of the students were alone;

(iv) the door to the room was locked;

(v) Lynch touched or fondled the former students' genitals.

[167] It was recognised, even before the landmark judgment of Lord Herschell L.C. in *Makin v Attorney-General for New South Wales*[179] that the admission of evidence of criminal conduct, other than that charged on an indictment, but in order to prove the charge, was prohibited when the evidence did no more than prove a propensity for criminal activity.[180] Difficulties have arisen in determining when evidence rises above that of proving mere propensity. In Australia the test for admission of such evidence is that laid down in *Pfennig v The Queen*[181]

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[178] Applicant's affidavit (Ex 4, pp 16-32).

[179] [1894] AC 57.

[180] *R v Geering* (1849) 18 L.J. (N.S.) (M.C.) 215, *R v Dossett* (1846) 2 C & K 306 and *R v Gray* (1866) 4 F & F 1102.

[181] (1995) 182 CLR 461.

following *Hoch v The Queen*.[182] The evidence, to be admissible in a criminal case must be of such probative force that guilt is the only reasonable inference.[183]

[168] The *Pfennig* test results from application of the standard of proof in criminal cases.[184] The principles which lead to the exclusion of such evidence in criminal cases do not apply in civil cases where the issue is solely relevance; whether the evidence goes to prove that the fact alleged was more likely than not to have happened.[185]

[169] In the 2001 proceedings the respondent did not deny Lynch's criminal activity. The respondent simply did not admit it. At no stage has there been advanced any contrary case. In a press release made on 9 July 2000 by Dr Lennox and Mr Stack this was said:

> "… the School accepts there is now evidence which indicates Lynch engaged in behaviour which was seriously inappropriate in respect of a number of boys."[186]

[170] There have been other public acknowledgements of the fact of Lynch's offending.[187]

[171] Quantum of loss is very much a live issue on this application and a matter I consider later.[188] However, both Dr Larder, who examined the applicant in 2002, and Dr David Storor, a psychiatrist who examined the applicant in February 2018,[189] opined that there is a causal connection between the assaults perpetrated by Lynch and the psychiatric and psychological injuries suffered by the applicant. I should consider the present application on the basis that the applicant has strong prospects of establishing that he suffered injury and loss as a result of sexual assaults committed upon him by Lynch.

[172] Attribution of legal liability to the respondent for the actions of Lynch was problematic in 2002[190] but not so much now.

[173] Liability for Lynch's actions could be visited upon the respondent at least theoretically in two ways:[191]

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[182] (1988) 165 CLR 292.

[183] *Pfennig* at 482-483 per Mason CJ, Deane and Dawson JJ.

[184] *Hoch v R* (1988) 165 CLR 292 per Mason CJ, Wilson and Gaudron JJ at 296.

[185] *Purnell v Medical Board of Queensland* [1999] 1 Qd R 362 at 368-9 at 380 and see also *Crime and Corruption Commission v Swindells* [2009] QSC 409 at [16] per Applegarth J.

[186] Second Arends affidavit (Ex AWA-2).

[187] See paragraphs [14] and [15] of these reasons and see in a very general way Ex AWA-1 to the second Arends affidavit.

[188] Paragraphs [188]-[195] of these reasons.

[189] First Arends affidavit (Ex AWA-7).

[190] The year of the settlement.

[191] Putting aside the more exotic claims that were the subject of the strike-out application.

(i) The School being primarily responsible for the loss in the sense that the loss flowed from a breach of duty owed by the School.

(ii) The School being vicariously liable for the criminal actions of Lynch, its employee.

[174] The statement of claim in the 2001 proceedings particularised vicarious liability[192] and also breaches of duty owed by the respondent. In *Rich v State of Queensland & Ors*,[193] a civil case arising from sexual assaults committed by the former minister of the Crown, William D'Arcy, when he was a school teacher, the Court of Appeal said:

> "[6] Despite the use of the words negligence and assault, it is clear that no allegation is made that the State is vicariously liable for D'Arcy's acts in its role as his employer at the times in question. So much was confirmed on appeal by Mr North SC for the plaintiffs. The assaults alleged to have been committed by D'Arcy were deliberate, and they were, under what were originally s 348 (rape) and s 350 (indecent assault), and are now ss 349 and 352 of the Criminal Code, criminal offences. Despite the very recent decision of the House of Lords in *Lister v Hesley Hall Ltd* [2001] 2 WLR 1311, it remains the law in Australia that an employer is generally not vicariously liable for an assault by an employee that is an independent personal act not connected with or incidental in any way to work the employee is expressly or impliedly authorised to perform. See *Deatons Proprietary Limited v Flew* (1949) 79 CLR 370, and the authorities referred to by Mahoney JA in *Petrou v Hatzigeorgiou* (1991) Aust Torts Reports 81-071, at 68, 563. Nothing can be clearer than that the assaults alleged to have been committed here were independent and personal acts of misconduct by D'Arcy. They were in no sense capable of being regarded as methods of conducting his teaching function, but were done in utter defiance and contradiction of it and of his duties as an employee of the State."

[175] I have referred to the Court of Appeal's decision in *Rich* as that was the law as it was available to the parties at the mediation. In early 2003 the High Court of Australia dismissed *Rich's* appeal.[194]

[176] The law concerning vicarious liability of an employer for the criminal acts of its employee committed in the setting of a school was considered again by the High Court in *Prince Alfred College Inc v ADC*:[195]

> "[80] In cases of the kind here in question, the fact that a wrongful act is a criminal offence does not preclude the possibility of vicarious liability. As

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[192] Paragraph 28.1.

[193] [2001] QCA 295.

[194] *State of New South Wales v Lepore; Samin v State of Queensland; Rich v State of Queensland* (2003) 212 CLR 511.

[195] (2016) 258 CLR 134.

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

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

[177] The prospect of proving liability against the School as the law was understood in 2002 and as the law is now understood should be considered.

[178] In the 2001 proceedings, because of the law as understood from the judgment in *Rich*, it was thought critical that the applicant prove knowledge by the respondent (before the applicant was sexually abused) of allegations made against Lynch; hence the importance of the allegations made by BQP and BQH. Prospects of proving that knowledge were always going to be difficult to assess.

[179] While BQP allegedly reported Lynch's conduct to Dr Howell in 1980, there is no suggestion that he mentioned it to anyone else until 2000; some 20 years later. Experience suggests that there are many and varied reasons why complaints of sexual misconduct against children are either never made, or are made very late or are not persisted with. BQH's evidence was potentially dangerous for the school. BQH was a parent, so an adult at the relevant time.

[180] By 2001 any documentary records which may have corroborated the evidence of BQP and BQH to the extent of recording meetings with Dr Howell were lost. Dr Howell's secretary who may have remembered such meetings was, by 2001, deceased. BQH's wife attended the School

with BQH when he met with Dr Howell so she could presumably confirm the fact of the meeting, even if not being able to give any evidence as to what was discussed, as she remained outside Dr Howell's office. No statement or affidavit of Mrs BQH was before me.

[181] Curiously, it seems that while BQH obtained no satisfaction from Dr Howell other than he promised to look into the matter of the complaint, BQH did not withdraw his sons from the School[196] and took no further action; notwithstanding that on BQJ's report to Mrs BQH one conclusion open was that a sexual predator was active in the School. BQH did say in his statement that BQJ had no further contact with Lynch[197] and that may explain his attitude.

[182] As already observed, Dr Howell denied any knowledge of inappropriate conduct by Lynch until the allegations of misconduct at St Paul's School surfaced in 1997. The School was not embroiled in the controversy until 2000. The allegations revealed against Dr Howell were extremely serious and if true amounted to very significant misconduct by him; knowingly allowing the continued access to students of a man who had sexually interfered with at least two students (to Howell's alleged knowledge) and who would have access to students in a private setting in the course of his work as the School counsellor. Any court may require compelling evidence to support such a serious finding against Dr Howell.[198]

[183] Another obstacle in making findings against Dr Howell is the evidence that he faced a similar problem in the late 1960s.[199] In that instance the teacher resigned but in circumstances where his dismissal was imminent as Dr Howell was preparing to dismiss him. Dr Howell on that occasion obviously not only understood the seriousness of the allegations made against the teacher but understood his (Dr Howell's) responsibilities and acted accordingly.

[184] The problems faced by the 2001 claim were well understood by counsel who were at that point advising the applicant.[200] Quite apart from any limitation issues, the applicant's case in 2001 faced a significant hurdle, namely proving the liability of the School for the actions of Lynch, on the law as it was then understood.

[185] If the settlement agreement is set aside, then any proceedings commenced now would not face a limitation problem. It also seems (without finally deciding the issue) that if the applicant was accepted in his evidence that he was sexually assaulted by Lynch, there would be little difficulty in proving the respondent's vicarious liability for the loss thereby caused. This is because the uncontested evidence is that:

(i) Lynch was an employee of the respondent;

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196 Abernathy affidavit (Ex DJA-69, p 394, para 24 of BQH's statement).

197 Abernathy affidavit (Ex DJA-69, p 394, para 26 of BQH's statement).

198 *Briginshaw v Briginshaw* (1938) 60 CLR 336.

199 Similar at least in that it involved sexual misconduct, although the incident in the 1960's did not involve misconduct at the School; see paragraph [45] of these reasons.

200 Advice of RJ Douglas SC and RM Treston of Counsel (as they both then were), 25 September 2002 (Ex 1 to the applicant's second affidavit).

(ii) the respondent had assigned to Lynch the role of the School counsellor;

(iii) that role necessarily brought him into close contact with students where he and individual students would be alone together;

(iv) the students would no doubt be encouraged to speak about personal and intimate matters.

[186] A court may easily conclude that the respondent placed Lynch in a position vis-à-vis the applicant and other students which provided the opportunity and the occasion for Lynch to commit the criminal acts that he apparently did.[201]

[187] The applicant in any new proceedings, would have strong prospects of attributing to the respondent vicarious liability for the sexual assaults and damage inflicted upon him by Lynch.

The quantum of any claim brought now

[188] Mr Lynch submitted that the applicant's claim in any new proceedings would be in the vicinity of about $900,000.00. That is well in excess of the sum calculated in 2002 by Mr Douglas QC and Ms Treston before discount. There are various reasons for the discrepancy.

[189] Mr Douglas QC and Ms Treston thought the range of general damages would be in the vicinity of $25,000.00 to $30,000.00. New cases which could be relied upon as setting a guide for comparative awards[202] were submitted to justify an award of general damages in the vicinity of $100,000.00.

[190] Since leaving the School the applicant has not maintained steady employment. He has battled with drug and alcohol addiction and also with depression. It is submitted that a conservative estimate of his past economic loss would be in the vicinity of $400,000.00 and Mr Lynch submits that future economic loss is quantified at about $300,000.00.

[191] Dr Storor opined that the applicant will require ongoing psychiatric care and medication. This is valued, in the applicant's submissions, at $66,700.00.

[192] Before the mediation in 2002 the applicant delivered a statement of loss and damage claiming in excess of one million dollars but it seems that was not seriously pressed. As already observed the first offer was $150,399.00.[203] The present calculation makes a significant claim for past and future economic loss but is not, unlike the calculation in the 2002 statement of loss and damage, dependent upon acceptance of the assertion that the applicant has lost a career in medicine.

[193] These new calculations are not accepted by the respondent but it is unnecessary to make any precise findings as to quantum.

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[201] *Prince Alfred College Inc v ADC* (2016) 258 CLR 134 at [81]-[82].

[202] *Hegarty v Queensland Ambulance Service* [2007] QSC 90, *Sapwell v Lusk and Another* [2010] QSC 344 and *Walters v The University of the Sunshine Coast* [2012] QSC 298.

[203] Paragraphs [37] and [41] of these reasons.

[194] It is obvious that any new proceedings are likely to yield significantly more than the $47,000.00 being the settlement sum. Even adopting the figures based on the material available to Mr Douglas QC and Ms Treston in 2002, the claim was of an amount up to $167,110.00. As is later explained,[204] that figure was heavily discounted because of the possibility that the applicant would not prove that Dr Howell had knowledge of Lynch's activities.[205] Because of a change in the understanding of the law of vicarious liability, that discount would not in any new proceedings be warranted.

[195] I accept that the likely award of damages to the applicant will well exceed the figure calculated in 2002 by Mr Douglas QC and Ms Treston before discount, given the evidence which can be given as to economic loss and given the latest comparable cases relevant to general damages.

What was the effect of the *Limitation Act* on the quantum of the 2002 settlement?

[196] Both parties accept that the effect of the limitation defence upon the quantum of the settlement in 2002 is a relevant consideration. That is correct.

[197] There is no doubt that the respondent sought to rely on any available limitation defence in the 2001 proceedings. There is a significant body of evidence to this effect.

[198] On 9 June 2000, shortly after allegations against Lynch had emerged, the respondent issued a newsletter which included this:

> "It is the school's opinion that its investigations to date do not establish any legal liability on the school's part and it will avail itself of all defences available."[206]

[199] On 22 January 2001 AIG Insurance, one of the respondent's insurers, wrote to Corrs and the letter included this:

> "… I note your advices that you are waiting to see the insurer's reactions prior to progressing the matter. As we are unable to confirm indemnity at this stage, I ask that the Insured act as a prudent uninsured. I would assume that the third party (based on the common state of knowledge) would have problems in extending the limitation period, and indeed, in proving liability. Accordingly, I would not have any objection to the insured inviting the third party's comments on these issues, and perhaps inviting their expectations of settlement."[207]

[200] On 27 March 2001 Corrs wrote to Dr Lennox regarding a conversation which occurred at a meeting which Mr Abernathy, Mr Stack and Ms Cameron had attended with representatives of Shine. The letter included this:

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[204] Paragraphs [195] to [232] of these reasons.

[205] Which as later explained was crucial to both the limitations issue and the vicarious liability issue; see paras [196] to [232] of these reasons.

[206] Second Arends affidavit (Ex AWA-3).

[207] Second Arends affidavit (Ex AWA-4).

"Howard Stack, Julie Cameron and I attended a without prejudice meeting this afternoon with the solicitors for the various claimants, Shine Roche McGowan.

The meeting went much as anticipated although they conceded they had difficulties on liability and on the limitation period issue. They inquired whether we were interested in resolving the claims without them having to issue proceedings. We said that we were, but that we can only consider the matters if sufficient information is provided to us to enable us to form a view of liability, the quantum of each claim and the likelihood of each claimant obtaining an extension of the limitation period."[208]

[201] On 31 March 2001 Corrs wrote to Shine, referred to the meeting of 27 March 2001 and asked for submissions about various things including the limitation issue.[209]

[202] On 18 April 2001 Shine wrote to Corrs enclosing a submission. As to the issue concerning limitation periods, the submission stated this:

"**LIMITATION PERIODS**

We do not believe that the school will be successful in mounting a valid argument in pleading any limitation of actions. The cause of action in these claims arose in May 2000. This is when the students became aware of the damage.

In the event the Courts find that the cause of action arose at the time of the abuse, we believe that the claimants will be able to secure an extension of the limitation period on the following grounds:-

Hypnosis

There are a number of claimants who are highly hypnotisable and did not remember the abuse of the school counsellor, as he used Post Hypnotic Suggestion Techniques so that they would not remember the incidents, which occurred. The incidents were subsequently recalled in or around May 2000 following various media releases. We have retained a psychologist, who is an expert in hypnosis, who supports this contention.

Realisation

Other students have been aware of the incidents and behaviour of the school counsellor for a number of years. However, to their mind it was part of the therapy, which the school counsellor administered and the school sanctioned. Thus, to the claimant's minds, it was not sexual abuse, but part of the therapy that was prescribed for them. It was only when the claimants read in the Courier

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[208] Second Arends affidavit (Ex AWA-5).

[209] Abernathy affidavit (Ex DJA-22, p 72).

> Mail of May 2000, that what happened to them also happened to other students and it was sexual abuse, that they realised that they had been abused."[210]

[203] Shine's letter of 18 April 2001 elicited a response on 1 May 2001 from Corrs. That letter stated:

> "Further, your general submission with respect to the limitation period issue is insufficient to allow any reasonable assessment to be made as to whether or not your clients are likely to be successful in obtaining an extension of the limitation period. This is an issue which is critical to assessing the prospects of each claim. We do not think that this issue can be dealt with in a global sense or in three separate categories because we expect each claimant's circumstances will be different. As identified in your submission the various claimants' reactions to the alleged abuse vary widely, as will their conduct since the alleged abuse.
>
> If you are in a position to provide the further information to us in relation to identity of claimants, periods of claims and the types of allegations in each case together with information in respect of each case on the limitation period issue we will consider the matter further."[211]

[204] On 11 May 2001 Shine wrote to Corrs again. Various details concerning the claims of many claimants were given and in relation to the limitation period issue this was said:

> "We believe we have given sufficient insight into the limitation period issue. We note your desire for separate submissions on each claimant in respect of the limitation issue. You say that this is an issue critical to assessing the prospects of each claim.
>
> Nevertheless, we are surprised that the school would take the view that one victim's claim would be less meritorious than another, because it thinks it can avoid legal responsibility by invoking the statute of limitation technicality.
>
> The victims find such an attitude offensive. All former students have been horrifically affected irrespective of the timing of the making of the claims. That the school would hide behind the limitation period for any student clearly indicates to us that the school's purpose is to avoid its moral, social and legal responsibility."[212]

[205] It is unfortunate that Shine apparently took it upon themselves to express their own view that the respondent's purpose was "to avoid its moral, social and legal responsibility". It was obvious by this stage that insurers were involved and that if the insurers were to indemnify the respondent, decisions as to how the defence might be conducted were ultimately to be made by the insurers.

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[210] Abernathy affidavit (Ex DJA-23 p 86-87).

[211] Abernathy affidavit (Ex DJA-25 P 102-103).

[212] Abernathy affidavit (Ex DJA-26, p 137).

[206] On 22 May 2001 Corrs wrote to Shine, perhaps pointing out the obvious:

> "In addition to any moral, social and/or legal responsibilities which the School may owe to former students, it has moral, social and legal obligations to all current stakeholders in the school which includes current and future students.
>
> Commensurate with those obligations, it is incumbent upon the School to consider the legal merit of any claim against it when considering what action should be taken in response to that claim. For the Board to approach these claims in any other fashion would amount to an improper use of the Board's powers."[213]

[207] As already observed, in the defences filed in November 2001 to the proceedings commenced by each of AB and CD, a limitations defence was pleaded.[214]

[208] The applications filed by AB and CD for an extension of the limitation period under s 31 of the *Limitation Act* were, as already observed, adjourned.[215] There are obvious reasons why both sides would have preferred not to have the applications of AB and CD determined prior to a mediation. From the respondent's point of view, it was in its interests to keep the limitation defence alive so it could be used as a negotiating tool. If the applications were brought, heard and determined against the respondent, then the only real doubt as to liability (assuming that AB and CD's cases were truly genuine "test cases", and assuming that the applicant was believed in relation to his allegations against Lynch), was whether Dr Howell did in fact know of the allegations against Lynch. On the other hand, if AB and CD lost their applications, then all the actions that had been commenced were in severe jeopardy. Better then, from both parties' points of view, to proceed straight to mediation.

[209] At the mediation the limitation period was relied upon by the respondent. At the joint session of the mediation the respective parties put their positions in respect of all cases. In other words there was no statement of position solely in relation to the applicant's case. Mr Douglas QC made an opening statement on behalf of all claimants. Each of Mr Abernathy, Ms Cameron and Dr Lennox took notes of what Mr Douglas QC said.[216]

[210] In relation to the liability of the respondent for the actions of Lynch, Mr Douglas QC;

(i) acknowledged that the claimants must prove that the respondent knew or ought to have known of the risk which Lynch posed;[217]

(ii) submitted that knowledge would be attributed to Dr Howell through the evidence of BQP and BQH;

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[213] Abernathy affidavit (Ex DJA-27, p 138).

[214] See paragraph [25] of these reasons.

[215] See paragraph [28] of these reasons.

[216] Cameron affidavit (Ex JPC-7), Abernathy affidavit (Ex DJA-71, p 400), Lennox affidavit (Ex PGL-2).

[217] That is the point emerging from *Rich v State of Queensland & Ors* (2001) Aust Torts Rep 81/626 [2001] QCA 295.

(iii) said that the "material fact of a decisive character"[218] relied upon by the claimants to found the applications for an extension of the limitation period was the communication by BQP and BQH to Dr Howell, and the fact of those communications occurring not coming to the attention of the claimants until after expiry of the limitation period.

[211] Mr Williams QC provided a written position paper. This asserted that, on the state of the law as explained in *Rich*, the position was:

> "The allegations of breach cannot succeed unless it is shown that in the circumstances the defendant ought to have foreseen the relevant risk (molestation or kindred inappropriate behaviour) and guarded against that by taking reasonable steps to prevent that risk causing injury."[219]

[212] What then followed in the position paper was a detailed argument pointing to the difficulties which the claimants would encounter in proving relevant knowledge in Dr Howell. It was submitted that even if the fact of the conversations was proved, it would not be established that the terms of the conversations were such as to properly alert Dr Howell to the risk which Lynch posed. Reliance was placed on how Dr Howell dealt with the teacher about whom questions arose in the 1960s. Dr Howell, it was submitted, had a track record of taking action when such risks were identified to him. The inference, it was submitted, was that had the issues concerning Lynch been properly communicated to Dr Howell, he would have acted. He didn't, and then by inference one concludes that the conduct of Lynch was not clearly communicated to him.

[213] The *Limitation Act* was dealt with quite briefly in the position paper of Mr Williams QC. This was said:

> "34. In relation to section 31 of the *Limitation of Actions Act* 1974:
>
> (a) there are a number of cases where the Plaintiffs will not be able to demonstrate:
>
> (i) the decisiveness of the material facts alleged (it is unclear what material facts are alleged in each case); and
>
> (ii) that the material facts contended for, as being of a decisive character, were not within the means of knowledge of the Plaintiff."[220]

[214] It can be seen that paragraph 34(a) is very broad. The material facts of a decisive nature are not identified. The material facts capable of founding an application under s 31, no doubt, are the communications by BQP and BQH. On the authority of *Rich*, the fact of those communications may easily be regarded as both material and decisive given that it was

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[218] *Limitation of Actions Act* 1974 (s 31(2)).

[219] Cameron affidavit (Ex JPC-8, para 1 of the position statement).

[220] Cameron affidavit (Ex JPC-8, p 34).

necessary to demonstrate the respondent's knowledge of the risk.[221] Without the evidence of those two witnesses, it is difficult to see how that knowledge could be proved.

[215] Paragraph 34(b) of Mr Williams QC's position paper asserted "insurmountable prejudice" as a defence to an application under s 31, and cited *Muir v Franklins Limited*[222] where Mullins J[223] identified the question as "… whether … the proposed defendant can obtain a fair trial, if the extension of the limitation period was granted. If there is the possibility of a significant prejudice of the proposed defendant then a fair trial is not obtainable and the extension should not be granted." The prejudice which was identified in the position paper can be summarised as:

(i) the death of Lynch;

(ii) missing documentation;

(iii) diminishing recollection of key witnesses;

(iv) the difficulty in disentangling the pre-abuse and post-abuse symptoms and stressors, from the conduct of which the complaint is made.[224]

[216] I infer that in the face of potentially dozens of former students giving evidence that they were sexually assaulted by Lynch in the setting of his counselling sessions, the respondent would not have called Lynch to give evidence if he had survived.

[217] Missing documentation was unlikely to be a real issue. It is hardly going to be an issue that the numerous claimants were counselled by Lynch and therefore there was an opportunity for him to sexually assault them. The absence of appointment books, etc was also unlikely to be of great importance. While the loss of Dr Howell's diaries may potentially be significant in that they may have failed to show that appointments were made to see BQP and BQH, it is clear that it is not so much the fact of the conversations but the content of the conversations which was the real issue.

[218] General dwindling of the memories of witnesses was unlikely to lead to the dismissal of an application under s 31 in these circumstances. The criminal courts routinely deal with historical cases of sexual offending where similar issues arise. Criminal trials, ultimately held to be fair ones, regularly occur, notwithstanding that the events have occurred decades previously. Loss of memory, etc is always a factor in such cases.

[219] The disentangling of the medical evidence may well be an issue for exploration at the trial with the psychiatrists but unlikely to form the basis of the dismissal of an application under s 31.

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[221] As to the operation of s 31 and the meaning of the concepts "material fact" and "decisive nature", see *Moriarty v Sunbeam Corp Ltd* [1988] 2 Qd R 325 and *Dick v University of Queensland* [2000] 2 Qd R 476.

[222] [2001] QCA 173.

[223] At para [56].

[224] This summary comes from para 484 of the respondent's submissions.

[220] What can be seen is that the limitation period was inextricably bound up with the issue of proving the respondent's liability for Lynch's actions. If there was communication to Dr Howell by BQP and, or, BQH sufficient to place Dr Howell on notice of the risk posed by Lynch, then that was capable of visiting liability upon the respondent according to the principles in *Rich*, and was also capable of forming "the material fact of a decisive nature" required by s 31 of the *Limitation Act*. The real issue facing the applicant in the 2001 proceedings was to prove Dr Howell's relevant knowledge. If that were proved his prospects of both achieving an extension of time, and succeeding in the claim against the respondent were good.

[221] In their joint advice to Shine, Douglas QC and Ms Treston said this:

> "11 A significant issue is that, in respect of causes of action in contract and in tort, the plaintiff's proceeding is (or probably is) statute barred.
>
> 12 Should the matter not settle at mediation, for the plaintiff to put himself in a position of being able to take the matter to trial, at which trial liability (that is causative fault on the part of the school) and quantum of damages will be contested, it would be necessary for him to:-
>
> 12.1 first, successfully seek an extension of the three year period of limitation which is prescribed under Section 11 of the *Limitation of Actions Act* 1974 (Qld), pursuant to Section 31 of the *Limitation of Actions Act*;
>
> 12.2 otherwise prove the proceeding is not statute barred.
>
> Summary of Advice:
>
> 13 The plaintiff has adverse prospects of proving his proceeding is not statute barred but has reasonable prospects of obtaining a limitation extension.
>
> 14 The plaintiff has fair to reasonable prospects of proving liability against the school.
>
> …
>
> 17 Ultimately, in our opinion, the litigation risks, consisting principally of proving at trial liability in the school for the actions of Lynch, to a lesser extent obtaining prior to trial a limitation extension, and to a lesser extent again consisting in quantum assessment vicissitudes, dictate that the plaintiff ought seriously entertain any offer which is 50% to 60% of a proper assessment of his damages."[225]

[222] A little later this was said:

> "41 [BQP], a student at the school until 1980, says that on two occasions, at a time which is unclear other than that it was in either late 1979 or late 1980, he told Mr Max Howell, the principal of the school, that Lynch had sexually abused him during a counselling session.

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[225] Applicant's second affidavit Ex 1.

42 In an affidavit filed on behalf of the school, Mr Howell denies vehemently that [BQP] so informed him.

43 BQH, the father of former boarding students, says that in 1981 he received a complaint from his Grade 8 son that he had his penis handled by Lynch and he travelled to Brisbane from Bundaberg to complaint to Mr Howell."

[223] There was then a discussion in the joint opinion of the evidence and issues concerning the matters raised by *Rich*. Counsel said this:

> "As to the suspicion argument[226] in the case of the plaintiff here, if the evidence of [BQP] and [BQH] was to be accepted then, in our opinion, the plaintiff would certainly succeed on the issue of liability.
>
> [BQP] allegedly complained to Mr Howell in 1979-1980. [BQH] complaint complained in 1981. The abuse of the plaintiff commenced in 1986.
>
> Predicting the outcome at trial of the contest as to [BQP's] complain in 1979/1980 and [BQH's] complaint in 1981 is difficult. Mr Howell denies the allegation. The case for the school, not surprisingly, will be that as a head master of a school and a well credentialed on at that, had there been any suggestion of such conduct then Mr Howell would have investigated it. On this scenario, no negligence will be sheeted home to the school.
>
> The alternative characterisation of Mr Howell's conduct is that he chose, for any number of reasons, each unacceptable, not to believe the truth of [BQP's] and [BQH's] complaints, treating them, in effect, as a frivolous school boy whim, and took it no further. On this scenario, negligence will be found in the school.
>
> Each of these arguments, in the abstract, may be attractive to the court. There are questions of credit (of Mr Howell, [BQP] and [BQH]) involved and the court would need to resolve these. The choice is rather start and, we repeat, difficult.
>
> We think however the likely result is that the evidence of [BQP] and [BQH] will be preferred.
>
> On balance it is our opinion that the plaintiff's prospects of establishing liability against the school based on the suspicion argument are fair to reasonable."

[224] Counsel turned to what they called the "limitation extension prospects". After concluding that the claim was statute-barred,[227] counsel considered the prospects of an extension under s 31 of the *Limitation Act*. They said:

> "93 The critical matter here is whether there is a material fact, and that fact was of a decisive character.

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[226] Based on knowledge by responsible persons in the School rather that counsels' alternative basis of liability; a breakdown of systems which should have been in place to prevent abuse.

[227] Advice, para 90.

94 We think that the plaintiff has reasonable prospects of satisfying the other matter.[228]

95 We consider the following to be the candidates as the 'material facts':-

95.l knowledge of the evidence of [BQP] or [BQH] ('the [BQP/[BQH] evidence ground');

95.2 knowledge that the school had in place no auditing or monitoring mechanisms in respect of counselling ('the system evidence ground');

95.3 knowledge that he was suffering a psychiatric condition ('the psychiatric condition ground');

95.4 knowledge that a psychiatric condition the plaintiff knew he was suffering was materially caused by Lynch's conduct ('the causation ground');

95.5 knowledge that other students had been the subject of similar conduct by Lynch ('the other student ground');

95.6 knowledge that Lynch's conduct was not legitimate counselling conduct or treatment ('the wrongful conduct ground',).

96 As to the [BQP/[BQH] evidence ground, in our opinion it constitutes a basis with reasonable prospects to obtain an extension. The evidence could not have otherwise been procured by the plaintiff. We assume the plaintiff knew nothing of it until told of it by our instructing solicitors.

97 For the purpose of gaining an extension such evidence does not have to be proved as true only as prima facie existing and available to be called. Proof of such evidence as true is a matter for trial on the issue of liability.

98 A notional solicitor, upon advising the plaintiff, is likely to consider the [BQP/[BQH] evidence critical to proof of negligence.

99 If this basis for extension is accepted then none other needs to be made out. We deal with the remainder, however, by way of completeness."

[225] Counsel then went on to deal with the other bases for extension, opining that prospects of success on some other grounds were "marginal" or "marginal to fair", or "unlikely to succeed". Summarising their opinions on the limitation issue, counsel said this:

"111 In summary, then, it is the fact that [BQP] and [BQH] will give their evidence (putting to one side whether it will be accepted at trial) that puts the plaintiff in a position to have fair to reasonable prospects of succeeding in obtaining a limitation extension."

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[228] A reference to showing a prima facie cause of action, discussed earlier in the advice as being dependent on attributing to Dr Howell knowledge of Lynch's criminal sexual behaviour.

[226] No mention of the limitation issue was made at the session of the mediation where the applicant was present. There is no mention of the limitation issue in any of the records of the post-mediation negotiations.

[227] The applicant can recall very little about the process but does recall the limitation issue being mentioned to him. He swore this in his first affidavit:

> "31. I cannot recall the extent of the advice I was given about the legal process. However, I can remember being told that there could be an issue because the statutory time limit had passed. I remember I was told by someone at Shine that because I was out of time we would have to go for an 'out of court settlement'. It left me with a feeling of not being entitled, and even a feeling that I was engaging in something of a scam - a grab for money in circumstances where I had no entitlement. This was largely because of my sense of shame and general sense of low self-worth. The fact that I was out of time to bring a claim just added to my general sense of hopelessness."

[228] As to the calculation of the $47,000 settlement sum, the applicant in his first affidavit swore:

> "38. I have no recollection of how that figure ($47,000.00) was arrived at. I do not recall any negotiation. I have no recollection of knowing at that time what my claim was worth if it were assessed by a court. I considered this was the day (the day of the mediation) that a figure for my claim would be determined. I have no recollection of on the day of the mediation anyone sitting down with me and advising me of the psychiatric evidence that had been obtained and the assessment of damages, nor the alternatives to accepting the offer and the steps to trial. The only other thing I can recall from the Mediation was the offer of access to counselling through the school. I recall feeling sick at the thought of going anywhere near BGS."

[229] The settlement figure of $47,000 is just below the figures nominated by Mr Douglas QC and Ms Treston as the bottom of the range for an appropriate settlement.[229] I am not prepared to conclude that the figure was settled upon as a result of downward pressure from the threat of a limitation defence being successful.

[230] There is no direct evidence that the limitation issue was taken into account in the calculation of the final settlement figure. There is no evidence from any of the solicitors involved that the limitation period was even mentioned after the initial session at the mediation. What emerged at the initial mediation session as critical was Dr Howell's knowledge of Lynch's activities.

[231] What is clear is that the real risk to the applicant's case was a failure of a court to accept that BQP and or BQH had placed Dr Howell on notice of the risk posed by Lynch. If the applicant did not succeed on that issue, then the case was lost. Given though the absence of any knowledge by the applicant (during the limitation period) of the experiences of BQP and BQH,

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[229] 50% of the lower quantum figure gives $47,782.50.

their evidence, if accepted, would likely resolve the *Limitation Act* issue in favour of the applicant.

[232] In practical terms, the limitation issue was not the applicant's real problem. His problem was to convince a court that an experienced school principal was made aware that Lynch was sexually preying upon students but then did nothing about it. The applicant may have won on that issue, but there was a very significant risk that he wouldn't and I draw the inference that it was that factor which drove the settlement down. In the end the settlement figure seemed to have been reached by exchanges of offers (without explanation of how the figures were calculated) until common ground was reached. In making those various offers, both parties no doubt had in mind the risk that relevant knowledge in Dr Howell may have been proved (the respondent's risk) or not proved (the applicant's risk).

[233] I find that the limitation issue did not materially affect the quantum of the settlement reached and was not a material factor in the applicant's decision to settle the 2001 proceedings.

Reasonableness of the mediation process

[234] The applicant's memory is that he was not satisfied with the process. In his first affidavit he said this:

> "36. The mediation process seemed rushed. I remember at one point I went into a boardroom where there were about 8 other people sitting around a table. I did not know any of these people. I have a very patchy recollection of what was said in that room. I recall people I did not know talking about me and my case. I remember finding some of the comments irrelevant and offensive. I recall people made references to the psychiatric report of Dr Larder, though I had never seen the report. I felt the whole mediation process minimised the experience which I had been through."[230]

[235] The applicant honestly accepts that his recollection of the mediation is limited.[231] Various details to which he swore are objectively incorrect. For instance, his recollection of signing the settlement agreement at the mediation[232] is wrong. This though is all understandable given that at the time of the mediation he was in a state of depression, was suicidal[233] and was being asked to confront issues concerning his abuse at the hands of Lynch.

[236] The applicant, through Mr Lynch, generally accepted that the mediation process was fair[234] but submitted that the fact that the mediation process was conducted fairly "is largely irrelevant".[235]

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[230] Applicant's first affidavit, para [36].

[231] Paragraph 3 of the applicant's first affidavit.

[232] Applicant's first affidavit, para [37].

[233] Applicant's first affidavit, para [35].

[234] Applicant's written submissions, paras [39] and [40] and reply submissions, para 22.

[237] Mr Lynch specifically conceded that the mediation process was "fair and reasonable at the time"[236] and that the respondent's conduct in organising and facilitating the mediation was "exemplary".[237] I deal with the relevance or otherwise of the mediation process later,[238] but Mr Lynch's concessions that the mediation was fair and that the respondent acted in a "exemplary" fashion are properly made, in particular because:

(i) an experienced mediator was engaged;

(ii) the mediator was engaged in setting up the structure of the mediation process;

(iii) the respondent paid for the mediation;

(iv) the applicant was represented by experienced solicitors and very able counsel;

(v) the sessions were organised so the claimants were not involved in legal argument but could concentrate on giving input into their individual claims;

(vi) although the applicant may now consider that the mediations were rushed, they were not. The individual sessions were each between one and two hours and it appears clear that the applicant was given ample opportunity to put his point of view;

(vii) during the mediation there was no challenge to the applicant's allegations of being abused by Lynch; and

(viii) The respondent's acceptance of the truth of the allegations was reinforced in the apology session.

[238] The claimants as a group were not, it seems, happy with the way in which the respondent conducted itself, particularly in relying upon the limitations defence.[239] In circumstances such as those of the applicant, it is completely understandable that he would feel resentment against the respondent; he had been sexually assaulted in an environment where he was entitled to feel safe by an employee of the respondent who clearly took advantage of the applicant's vulnerability.

[239] However, as already observed,[240] the respondent had a legitimate interest which it was obliged to defend. I have not seen anything in the material before me which could form the basis of any legitimate criticism of the respondent, its representatives,[241] or its legal advisors, in their conduct in handling the issues raised by Lynch's criminal actions once those matters emerged in the year 2000.

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[235] Applicant's written submissions, para [40] and reply submissions, para 22.

[236] Applicant's written submissions, para [39].

[237] Applicant's written submissions, para [40].

[238] See paragraph [277] of these reasons.

[239] See paragraph [202] of these reasons.

[240] See paragraph [206] of these reasons.

[241] Dr Lennox or Mr Stack.

The reasonableness or otherwise of the settlement figure

[240] As already observed, the filed claim was in an amount of $389,360.[242] Even though the statement of loss and damage subsequently delivered calculated the claim at over a million dollars, that position was never seriously pressed. The opening offer from Shine was $150,399.00[243] and that was based on the quantum opinion of Mr Douglas QC and Ms Treston which valued the claim at its highest, before discounts at $167,110.

[241] On the application before me the respondent did not accept the range of damages suggested by Mr Douglas QC and Ms Treston in 2002. Detailed written submissions were made by the respondent on this point supplemented by oral submissions by Mr Holyoak of counsel who was led on the application by Mr McKenna QC. Those submissions were to the effect that the true range was between $61,000 to $96,050 which after a 50% discount for litigation risks gave a settlement range of between $30,500 to $48,525. Mr Lynch submitted that the assessment done in 2002 by Mr Douglas QC and Ms Treston was inherently superior to any analysis done now because of its closeness in time to the actual settlement. I reject that submission. There is no logical reason why I ought not have regard to submissions on quantum made now based on material available in 2002 in order to assess the reasonableness or otherwise of the figure settled upon then.

[242] My task though is not to assess quantum and make an award, but rather to generally assess the reasonable or otherwise of the figure settled upon as the parties rightly contend that to be a relevant consideration on the question of whether it is just and reasonable to set aside the settlement agreement. I do not propose to make findings on the correctness or otherwise of the respective opinions on quantum. What Mr Holyoak did demonstrate though is that the assessment of damages, in a case such as this, where psychiatric injury is alleged and the task is to assess the value of the lost chance of earning income, is made difficult by the number of variables necessarily present when attempting to value the loss.[244] The lawyers for both sides would have had those considerations in mind when negotiating the settlement in 2002.[245]

[243] There has been somewhat of a concentration upon difficulties faced by the applicant in the claim. However, there were also pressures upon the respondent to reach a settlement with the claimants without having a trial (or trials) where serious allegations against it would be aired, in some respects, no doubt in public.

[244] Shine knew that the respondent would find settlement out of court attractive and no doubt knew that the respondent would be likely willing to pay compensation to their clients notwithstanding difficulties with the claims, if publicity (and therefore reputational damage) could be avoided. This was an issue which was raised during the process:

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[242] See paragraph [35] of these reasons.

[243] See paragraph [41] of these reasons.

[244] For example, *WAQ v DiPino* [2012] QCA 283; even taking into account the onus of establishing contributing causes of the loss might fall upon the respondent; *Watts v Rake* (1960) 108 CLR 158.

[245] See the joint advice of Mr Douglas QC and Ms Treston, paragraph 120, exhibit 1 to the applicant's second affidavit.

(i) In their letter of 13 March 2001, Shine said to Corrs:

> "Prior to issuing these proceedings, we invite you to consider early settlement of this matter. We feel that it would be in the best interests of all parties concerned to attempt a resolution through settlement, rather than through more time consuming, costly and public litigation."[246]

(ii) On 18 April, in their "without prejudice" submissions to Corrs, Shine said:

> "As flagged at the meeting of 27 March 2001, we are ready to issue proceedings.
>
> We again point out that this solution, and any settlement negotiations entered into on behalf of the claimants, would negate the necessity for long, costly and public litigation."[247]

(iii) Against that background, Shine issued proceedings and conducted a press conference before the proceedings were served on the respondent.[248]

(iv) The mediation agreement banned the parties from making media statements and prohibited disclosure of the terms of any settlement reached.[249]

(v) The settlement agreement also contained a general confidentiality provision.[250]

[245] There is nothing to suggest that the settlement figure of $47,000 was not a fair and reasonable reflection of the applicant's case as it appeared in 2002. It was the product of an arm's length bargain facilitated through a fair mediation process where the applicant was very ably represented.

[246] The applicant's claim was a relatively modest one (on his own barristers' advice) which faced difficulties and where there were pressures on both sides. A fair negotiation process settled on a figure of $47,000 and I find that was a reasonable settlement. For the reasons explained earlier the limitation issued had no material impact upon the quantum of the settlement.

The impact of delay

[247] As previously described it is well recognised that the court's ability to do justice in any case is adversely affected by delay.[251] We are now over 16 years from the date the 2001 proceedings settled and 30 years after Lynch's sexual assaults upon the applicant.

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[246] Abernathy affidavit (Ex DJA-16, p 66), emphasis added.

[247] Abernathy affidavit (Ex DJA-23, p 73 at 86), emphasis added.

[248] Abernathy affidavit (Ex DJA-24, p 100).

[249] Abernathy affidavit (Ex DJA-44, p 238 at cll 12 and 13 on p 241).

[250] Abernathy affidavit (Ex DJA-76, p 454 at 456, cl 6).

[251] *Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 541 at 551; the often quoted observations of McHugh J.

[248] It wasn't argued by Mr Lynch that there wasn't prejudice caused to the respondent by delay, but he submitted that the prejudice was not relevant in the application before me. It is necessary to consider the impact of the delay.

[249] By the time of the 2002 settlement, evidence had already been lost; in particular:

(i) Dr Howell's secretary had died;

(ii) various school records had been destroyed; in particular diaries recording appointments, etc of Dr Howell;

(iii) Lynch had died.

[250] Since 2002:

(i) Dr Howell has died;

(ii) the Shine files have, it seems, been destroyed.

[251] For reasons already expressed, I have concluded that the respondent was never going to call Lynch as a witness in its defence of the claim.

[252] Evidence which may have been given by Dr Howell and his secretary would likely concern the issue of Dr Howell's knowledge of Lynch's activities through BQP and BQH. That has rather become a non-issue given the High Court's decision in *Prince Alfred College Inc v ADC*.[252] Since the decision in that case, the respondent will be liable for the impact of the criminal actions of Lynch if it had assigned a special role to him and provided him with the occasion to commit the sexual assaults. The critical facts here are the ones I identified earlier[253] and neither Dr Howell nor his secretary were likely to be able to give evidence contradicting those facts.

[253] The lost school records would largely also relate to the issue which was critical before the decision of *Prince Alfred College*, namely whether Dr Howell met with BQP and BQH on the occasions when they allegedly informed him of Lynch's activities. Shine's files, if they were available, may either corroborate or contradict the applicant on matters relevant to this application. They may perhaps also have contained statements and instructions of the applicant which might be relevant to questions of quantum,[254] but issues of legal professional privilege would arise in relation to those communications. There is a possibility that the files may have contained documents relevant to any new case which might be launched now, but it is difficult to think of anything significant which may have been lost.

[254] Mr McKenna QC, no doubt appreciating the difficulty in pointing to specific sources or categories of relevant evidence that may have been lost, concentrated his submissions on the general decay of evidence relevant to quantum. That was described in these terms: "The

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[252] (2016) 258 CLR 134.

[253] See paragraph [185] of these reasons.

[254] Since *Prince Alfred College*, the respondent's liability seems hardly to be a serious issue.

ability of witnesses to recall the detail of individual students' aptitude, disposition and changes had diminished".[255] That was said to be relevant to quantum.[256]

[255] There is little doubt that the applicant was experiencing troubles at home. His parents separated while he was in primary school. The impact of that, as opposed to compensatable loss arising from Lynch's actions was, by 2002 difficult to distil. The applicant's school grades did not fall, at least at the onset of his parent's difficulties and Dr Larder opined that there was a connection between the applicant's falling academic performance and Lynch's assaults upon him.

[256] Legitimate lines of injury by the respondent on these issues would be with friends, associates and teachers who knew the applicant and observed him at the School. By 2001 the investigations would be difficult. Now they are likely impossible. To that extent the respondent is prejudiced in the defence of any new proceedings.

Costs thrown away

[257] There is no direct evidence as to the costs incurred by the respondent in relation to the 2001 proceedings and the settlement.

[258] The applicant was paid $12,000.00 as party party costs in terms of the settlement. In total then the applicant was paid $59,000.00 by the respondent and received $24,000.00 from his solicitors after the payment of costs. Therefore his solicitor and client costs were $35,000.00. That may give some indication as to the respondent's costs as they relate to the applicant's 2001 proceedings.

[259] In addition the respondent paid for Dr Larder's report and paid all costs associated with the mediation.

[260] No finding can be made beyond that the costs which were incurred by the respondent of and incidental to the applicant's claim in 2001 were substantial.

Loss of insurance

[261] There is no direct evidence as to whether indemnity is now available to the School against any insurer.[257] There is evidence that when the claims were initially made in 2000 insurers were reluctant to indemnify the School but ultimately partially did.

[262] The only finding that can be made on the evidence in its present state is that there must be some unquantifiable risk that the respondent will be without effective insurance cover in relation to any new proceedings.

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[255] Written submissions, para 53(c).

[256] Transcript 1-34.

[257] But see Abernathy affidavit, paras [61]-[64].

Change of the law

[263] Since 2002 the law has changed (or in one respect reinterpreted) in two significant ways. Firstly there are the 2016 amendments to the *Limitation Act.* Secondly, there is the restatement by the High Court of the law concerning vicarious liability of employers for the criminal acts of their employees.

[264] The respondent's point is that it is prejudiced by the settlement being set aside because it would then be forced to face proceedings where the law as presently understood concerning its vicarious liability for Lynch's criminal actions, is less favourable to it than it was in 2002.

[265] It can be accepted that the understanding of the law of vicarious liability has changed and has changed unfavourably to the respondent. The relevance of the change of the law is not in my view that the respondent may now be forced to litigate in a legal climate less favourable to it. The significance of the change of law is more as to the reasonableness or otherwise of the settlement at the time it was reached. It is not the policy of s 48(5A) of the *Limitation Act* that settlements should be set aside to facilitate new claims based on more favourable views as to the vicarious liability of employers for the criminal actions of their employees. This can be tested by supposing that the respondent had, in the 2001 proceedings not taken the limitation defence. For the reasons already explained, in my view the claim would still have been heavily discounted because of the difficulties which the applicant faced in attributing liability to the respondent by proving Dr Howell's knowledge of Lynch's actions. In those circumstances the 2016 amendments would not have afforded the applicant any right to apply to set aside the settlement agreement.

The offer of ongoing counselling

[266] As previously observed, solicitors for the applicant asked the School as to the availability of ongoing counselling.[258]

[267] The respondent submits that the offer is a relevant consideration in its favour.

[268] Mr Lynch in his reply submission says;

> "52". The respondent's vague "offers" of ongoing counselling and possibly treatment, were not the subject of the binding settlement agreement. The applicant did not receive the benefit of such offers and the respondent did not suffer any detriment as the applicant, justifiably, declined ongoing involvement with the School where his sexual abuse occurred."

[269] That submission is at once both unfair and somewhat illogical. The applicant inquired as to the availability of counselling and the school immediately responded by inquiring as to what assistance was required so it could consider its position. It was the terms of the approach by the applicant to the respondent which was "vague", not the response of the respondent.

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[258] See paragraph [78] of these reasons.

[270] The reason offered by Mr Lynch for the applicant not taking up the offer for counselling seems to be that he does not want any further involvement with the School. However, it was the applicant who instructed his solicitors to make inquiry of the School as to the availability of assistance.

[271] In the end though, Mr Lynch is correct to the extent that he says that there is no ongoing legal obligation upon the respondent to provide counselling, and, for whatever reason, the counselling was not provided and so the respondent is not out of pocket.

Exercise of discretion/conclusions

[272] I have taken into account the fact that if the settlement is set aside the applicant has good prospects of recovery of significantly more than the settlement sum paid in 2002. The issue of further proceedings would be well justified.

[273] The fact that the respondent paid its own costs of the 2001 proceedings (as those costs relate to the applicant) and paid the applicant's party party costs of $12,000.00 is a relevant consideration. Mr Lynch's submission that there will always be costs associated with a settlement which is subject to be set aside under s 48(5A) can be accepted. His submission that it therefore follows that the fact that costs have been incurred is irrelevant is rejected. The fact that costs were incurred and paid by a defendant in the earlier proceedings is a relevant consideration which as a matter of degree, may or may not influence the exercise of discretion. I take it into account here in a limited way as later explained.

[274] Mr Lynch points to the legislative intention expressed by s 11A of the *Limitation Act* namely that limitation periods do not now apply to claims for damages arising from sexual abuse of children. His submission that prejudice caused by delay is irrelevant (as a matter of law, it seems) should be rejected. There may be cases where, despite the policy behind s 11A, prejudice to a defendant caused by the effluxion of time may be a weighty consideration. However, that is not the case here. For the reasons explained earlier,[259] the only potential prejudice to the respondent is the general decay of memories of potential witnesses who had dealings with the applicant at the time he was at the School. That is the type of prejudice which the policy behind s 11A would regard as irrelevant to claims of child sexual abuse. I therefore ignore it.

[275] While, for the reasons previously explained,[260] I have found that there is a possibility that the respondent may not have a right of indemnity against any insurance policy, the evidence on that topic is so vague that I have not given it any weight.

[276] The offer of further counselling is relevant, as, if supplied, the counselling is a benefit to the applicant. However, dealings about further counselling never went beyond initial inquiry so I have ignored it.

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[259] Paragraphs [254]-[256] of these reasons.

[260] Paragraphs [261]-[262] of these reasons.

[277] As previously observed, Mr Lynch submitted that the good conduct of the respondent in the 2001 proceedings and the settlement was only relevant to the extent that it proved there was no misconduct or duress etc. That was his "threshold" submission which I rejected. I have taken into account the conduct of the respondent (and the incurring of costs by the respondent) in the original claim in these limited ways:

(i) There was no intimidation, bullying or high handed action by the respondent.

(ii) The respondent paid for and otherwise facilitated an elaborate process for settlement of all claims including that of the applicant.

(iii) By those actions, and because the applicant was represented by Shine and competent counsel, there was no inequality of bargaining position.

[278] The settlement was the product of fair, arms-length negotiations between two parties on equal footing, both appropriately represented.

[279] The settlement figure of $47,000.00[261] was a fair settlement reflecting the factual and legal strengths and weaknesses of the parties' respective cases properly assessed at that time by them. The discount of the applicant's claim was not materially contributed to by any consideration of limitation defences.

[280] In the circumstances as I have found them, and having directed myself to the purposes for which the discretion is to be exercised as I have identified, I find that it is not just and reasonable to set aside the settlement.

Orders

[281] The application is dismissed.

[282] The parties are to be heard on the issue of costs.

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[261] Plus costs.