

VICARIOUS LIABILITY OF PUBLIC SCHOOL BOARDS FOR SEXUAL ASSAULTS: *CHILDREN'S FOUNDATION AND BOYS' AND GIRLS' CLUB*

CASE COMMENT

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Re: Bazley v. Curry (“*Children’s Foundation*”) (1999), Court file no. 26013 (SCC) [now reported at 174 DLR (4th) 45]
Jacobi v. Griffiths (sub nom. *The Boys’ and Girls’ Club of Vernon*) (1999), Court file no. 26041 (SCC) [now reported at 174 D.L.R. (4th) 71]

OVERVIEW

The Children’s Foundation is a non-profit organization operating residential care facilities for emotionally troubled children. A child in its care was sexually abused by an employee expressly hired to act as a surrogate parent to the child. The employee’s duties involved intimate activities, such as bathing and tucking the child in at bedtime.

The Boys’ and Girls’ Club of Vernon is a non-profit organization providing organized recreational activities for children and youths. An employee supervisor was encouraged to form friendships with the children, two of whom he sexually assaulted outside the Club and outside working hours (with the exception of one incident).

In June of this year, the Supreme Court of Canada (“SCC”) unanimously upheld the finding in *Children’s Foundation* that the Children’s Foundation is vicariously liable for its employee’s conduct. However, in *Boys’ and Girls’ Club*, the SCC split 4 to 3, the majority (per Binnie J., for Cory, Iacobucci and Major JJ.) upholding the finding that the Club is not vicariously liable. The minority (per McLachlin J., for L’Heureux-Dube and Bastarache JJ.) would have found the Club vicariously liable.

After reviewing both decisions, we conclude that Courts should continue to rarely impose vicarious liability upon public school boards for sexual assaults by teachers and other employees upon students, with one exception - where intimate “parent-like” relationships exist.

THE “ENTERPRISE RISK” TEST: *CHILDREN’S FOUNDATION*

The traditional “Salmond” test allows vicarious liability to attach to innocent employers when the employee’s act is authorized by the employer. Employers will also be vicariously liable when the employee’s unauthorized act is so connected with authorized acts that it can be regarded as

a mode of the authorized act, or within the “scope of employment”. [see *Children’s Foundation*, paras. 10, 41]

In *Children’s Foundation*, McLachlin J., on behalf of the unanimous Court, expressed dissatisfaction with the semantic discussions caused by attempts to categorize unauthorized intentional torts (the second branch of the Salmond test), such as sexual assaults on students. For example, it would be difficult to maintain the fiction that a teacher committing a sexual assault on a student was “ostensibly” authorized to do so by his or her public school board employer. [paras. 18, 24, 41]

McLachlin J. advised that, in situations where the existing case law does not provide adequate guidance, the Courts are to focus on whether there is a significant connection between the wrongful act and the creation or enhancement of a risk by the employer. The employment must materially enhance the risk of the impugned act before an employer will be held vicariously liable. Where a significant connection exists, the twin policies underlying the attachment of vicarious liability will also be met: (1) fair and efficient compensation for victims; and, (2) deterrence. [paras. 40, 41, 46]

McLachlin J. listed the following as examples of relevant factors:

- (1) the opportunity the enterprise afforded the employee to abuse power;
- (2) the extent to which the wrongful act may have furthered the employer’s aims;
- (3) the extent to which the wrongful act was related to friction, confrontation or intimacy inherent in the employer’s enterprise;
- (4) the extent of power conferred on the employee in relation to the victim; and,
- (5) the vulnerability of potential victims. [para. 41]

McLachlin J. added that requiring or permitting employees to touch a client in intimate body zones may enhance the risk of sexual touching. She also added that in some circumstances the suggestion that the employer created an enhanced risk of harm will be negated when the impugned act takes place away from the job site and outside of working hours. [para. 45]

Applying the foregoing, McLachlin J. concluded that the intimate control and parental power required by the terms of employment in *Children’s Foundation* created the risk leading to the wrongful act. As McLachlin observed, “Indeed, it is difficult to imagine a job with a greater risk for child sexual abuse.” [at para. 58]

BOYS' AND GIRLS' CLUB

Children's Foundation was an “easy” case in which to apply the enterprise risk test. As Binnie J. described it in *Boys' and Girls' Club*, “Power and intimacy, of course, are hallmarks of a parenting relationship. It was the job-created parent-like relationship that attracted vicarious liability.” [para. 58] The greater difficulty of applying the foregoing analysis to the facts in *Boys' and Girls' Club* is reflected in the Court's split decision.

McLachlin J., writing on behalf of the minority in *Boys' and Girls' Club*, found the prior case law to be of no assistance due to its formalistic reasoning [para. 11]. By contrast, Binnie J., on behalf of the majority, emphasized that the “enterprise risk” theory put forward in *Children's Foundation* was an effort to explain the existing case law, not reject it. [para. 65]

Binnie J. reviewed the case law, concluding that the mere presence of an adult-child relationship does not automatically equate to the presence of risk sufficient to support the imposition of vicarious liability: “While the vulnerability of children provides the appropriate context in which the respondent's enterprise is to be evaluated, vulnerability does not itself provide the ‘strong link’ between the enterprise and the sexual assault that imposition of no-fault liability would require.” [para. 86; see also paras. 39, 41]

Binnie J. also distinguished the Club from the Children's Foundation in that the Club, like public schools in many circumstances, offers its services in a public setting, in group activities with other persons, including other children and adults. There was no “job-created authority for the perpetrator to insinuate himself into the intimate lives of these children.” [para. 43]

In Binnie J.'s view, the Club could not be said to be vicariously liable, because the sexual abuse became possible only when the employee managed to subvert the public nature of the Club's activities, by isolating the victims from the group in a manner that was entirely antithetical to the group's purpose. In particular, the employee enticed the children to his home to cultivate a one-on-one relationship which was entirely outside Club activities. [para. 80] Binnie J. concluded that:

Where, as here, the chain of events constitutes independent initiatives on the part of the employee for his personal gratification, the ultimate misconduct is too remote from the employer's enterprise to justify “no fault” liability. [para. 80]

APPLICATION OF THE ENTERPRISE RISK TEST TO PUBLIC SCHOOL BOARDS

Binnie J.'s analysis in *Boys' and Girls' Club* canvassed several decisions involving sexual assaults in the public school context. He also commented directly on policy concerns arising out of the application of vicarious liability to public school boards. Accordingly, the majority's analysis provides significant insight into how the enterprise risk test should apply to public school boards.

(i) Situations involving No Vicarious Liability in the Public School Board Context

As an example of the “creation of opportunity without job-created power”, Binnie J. cited *E.D.G. v. Hammer*, [1998] B.C.J. No. 992 (B.C. S.C.), where the B.C. Supreme Court found a school board had no vicarious liability for a sexual assault committed by a janitor. Similarly, in *Goodwin c. Commission scolaire Laurenlal* (1991), 8 C.C.L.T. (2d) 267 (Que. S.C.), the Quebec Supreme Court held the school board had no vicarious liability for a sexual assault committed by a janitor, even where the janitor had some child-care responsibilities supervising children in the school after hours. [paras. 45, 47]

A greater risk is entailed when there is a “job-created excuse for intimate access to the individual who becomes the victim”; that is, there is privileged access to the victim, as would often be the case with teachers. [para. 48] However, Binnie J. noted the U.S. decision in *Boykin v. District of Columbia*, 484 A.2d 560 (D.C. 1984), where the Court of Appeals found the District of Columbia public schools could not be held vicariously liable for a sexual assault on a blind, deaf and mute student, even where the employee was authorized to take the student by the hand in guiding her. Binnie J. placed in the same category the authority to touch a child as part of a dismount from gym equipment or as part of a game. [para. 52]

Binnie J. went on to observe that vicarious liability has been most often applied in a parent-like relationship. Though he took pains to state that a parent-like relationship is not a precondition to a finding of vicarious liability in child abuse cases, he concluded that this shows “how high the courts have set the bar before imposing no-fault liability.” [para. 64]

For example, in the U.S. case of *John R. v. Oakland Unified School District*, 769 P. 2d 948 (Cal. 1989), the Supreme Court of California denied vicarious liability against a school district where a teacher invited a child to his home as part of a school-authorized program and then sexually assaulted him. Binnie J. observed that this situation created a higher “enterprise risk” than in *Boys’ and Girls’ Club*, but the Court felt the failure of the school to provide prudent safeguards went to the board’s negligence rather than the policy objectives behind the imposition of vicarious liability. [para. 74]

More generally with respect to sexual assaults, Binnie J. observed that Canadian courts have demonstrated “a strong reluctance to impose no-fault liability for such deeply personal and abhorrent behaviour on the part of an employee.” [para. 44]

(ii) Situations involving Vicarious Liability in the Public School Board Context

Both McLachlin J. and Binnie J. criticized the reasoning employed in the English Court of Appeal decision in *S.T. v. North Yorkshire County Council*, [1999] I.R.L.R. 98. In that case, on a school trip to another country, a disabled student requiring nocturnal supervision was sexually

assaulted by the deputy headmaster sharing her room. The Court of Appeal found that the employee's conduct was a negation of the employee's duties, and vicarious liability would therefore not attach to the employer. [para. 57] Though it is somewhat unclear whether Binnie J. is critical of the outcome, as well as the reasoning, presumably these circumstances would constitute a job-created, "parent-like" relationship, thus creating a risk similar to that in *Children's Foundation*.

Binnie J.'s endorsement of Newbury J.A.'s comments at the B.C. Court of Appeal in *Children's Foundation* is more illustrative for the purposes of assessing the authority accorded to teachers in a typical school setting:

Where, for example, a teacher uses his or her authority to develop a relationship with a pupil in his or her class and then abuses that relationship by approaching the child at a park during the summer holidays, it may be said that by employing the teacher and giving him or her some authority (albeit not parental authority) over the child, the teacher's employer "made the wrong more probable". But it is likely vicarious liability would not be imposed on the employer given the absence of a close connection between the teachers' duties and his or her wrongful acts. To put the matter another way, *the fact that the teacher took advantage of his opportunity at the school to develop a relationship with the child is not enough: something more is required – a close connection between the teacher's duties and his or her wrongful acts – to render the school board liable without proof of negligence or other fault on its part.* [Newbury J.A. cited at para. 83; Binnie J.'s emphasis]

While it appears public school boards will not be held liable for "the teacher in the park", school boards will be liable for intentional torts where there exists "a close connection between the teacher's duties and his or her wrongful acts."

A possible example in the public school board context is found in *Goodwin*, the janitor case discussed above. The Quebec Supreme Court observed that vicarious liability might have been imposed had the janitor struck the children as part of his supervisory duties, for example, because they refused to leave the school on his orders. However, vicarious liability was not imposed where the janitor's actions were unrelated to his supervisory duties. [para. 47]

(iii) Policy Concerns in the Public School Board Context

In *John R.*, *supra*, the Supreme Court of California expressed the concern that, if vicarious liability were to be imposed for intentional torts, "school districts would be dissuaded from permitting teachers to interact with their students on any but the most formal and supervised basis." Binnie J. went on to observe that:

A public authority such as a school board will typically have a greater capacity for loss-spreading and deterrence management than a

volunteer, non-profit organization such as the Club. Nevertheless, I think the California court is correct to point out that in an understandable desire to help victims of child abuse, courts ought not to be oblivious to the societal ramifications of the proposed solution. [para 77]

More generally, Binnie J. specifically cautioned against failing to balance the policy of efficient compensation with adherence to the standards of the enterprise risk test, noting that an employer will almost always be in a better position to provide effective compensation to a sexual assault victim than the assailant. [paras. 67, 71] Furthermore, “Much as the Court may wish to take advantage of the deeper pockets of the respondent to see the appellants compensated, we have no jurisdiction ... to practise distributive justice.” [para. 29]

In addition, Binnie J. is cognizant that “There may be little an employer can do in reality to deter such conduct in its employees if the possibility of ten years in jail is not sufficient... [especially as] ‘Conventional incentives and disincentives used by enterprises simply do not work to deter compulsive sexual misconduct.’” [citing Jahnke J., para. 73]

Nevertheless, Binnie J. does accept that the imposition of vicarious liability on non-profit organizations can be fairly done so long as there is a *strong* connection between the enterprise risk and the sexual assault. The connection must be shown to be a strong one as the policy reasons behind the imposition of vicarious liability are weak in this context. [para. 78] In light of Binnie J.’s comments with respect to public school boards, it would seem that the higher standard articulated for non-profit organizations (the “strong” connection) should also apply to public school boards.

CONCLUSIONS FOR PUBLIC SCHOOL BOARDS

Courts have traditionally been reluctant to impose vicarious liability on innocent employers when the impugned acts constitute sexual assault. It seems clear, however, that even on the most conservative reading of the SCC decisions, some circumstances will now give rise to vicarious liability on the part of public school boards.

Public school boards will be particularly vulnerable when their employees are engaged in “parent-like” relationships with their students. Vicarious liability will be much more likely in potentially intimate situations involving young children, students with disabilities requiring personal assistance and special activities, such as overnight schools. Albeit incompatible with modern financial constraints, minimizing risks may involve arranging for the presence of more than one adult at all times or during situations of high potential risk. Public school boards may also wish to re-consider involvement in special activities, weighing whether the benefits continue to justify the potential liability.

In addition, despite Binnie J.’s admonitions, some trial judges will no doubt attach findings of vicarious liability directly to the so-called “deep pockets” of public school boards and their insurers, without much analysis to support such a finding.

Nevertheless, in our view, the SCC has clearly stated that there must be a strong and close connection between a teacher's duties and his or her wrongful acts to impose vicarious liability on a public school board. While "parent-like" relationships will usually attract vicarious liability (e.g. the teacher sharing a room with a disabled student requiring supervision), it will be much more difficult to establish vicarious liability in non-intimate situations.

For examples, it seems vicarious liability should not attach where a teacher meets a student in a park, is required to assist a disabled student or is required to assist students as part of gym activities. Binnie J. also appears to approve of the result in *John R.*, *supra*, where a public school board was found not to be vicariously liable for a sexual assault committed by a teacher authorized to have a child to his home. While leaving open the possibility of vicarious liability where there is no "parent-like" relationship, Binnie J. emphasized how high the case law, from which we are still to take guidance, has set the bar to attach vicarious liability.

Furthermore, though not specifically addressed by the Court, it is apparent that a teacher's common law duty to act as "a reasonable and prudent parent" is not sufficient, in and of itself, to cause vicarious liability to attach to a public school board.

In the context of the very specific comments in *Boys' and Girls' Club* relating to public school boards, we conclude that, with the exception of parent-like or intimate relationships with students, vicarious liability should not normally attach to public school boards for sexual assaults by employees on students. While it is not an easy task to predict how a Court will assess whether a particular duty is strongly connected to a sexual assault, the general tenor of Binnie J.'s analysis does not support a dramatic change in the majority of situations which arise in the employee-student context.

For further elucidation, we must await the interpretation of the lower Courts. To date, there has been very little substantive consideration of the SCC decisions. In *FSM v. Clarke*, [1999] BCJ No. 1973 (BCSC), a decision of the British Columbia Supreme Court, vicarious liability was imposed on the federal government and various Church organizations on facts described as "closely analogous" to those in *Children's Foundation*.¹ This simply serves to confirm that vicarious liability will be imposed for sexual assaults when employees are engaged in parental-like roles.

Despite the encouraging aspects of the foregoing analysis for public school boards, our readers should keep in mind that public school boards escaping vicarious liability for an employee's intentional misconduct are still liable for the negligence of their other employees. Where such negligence exists, public school boards will be responsible for damages in any event. The only consequence of a finding of vicarious liability for employees' negligence, as opposed to a finding of vicarious liability for employees' intentional misconduct, may be an increased exposure to aggravated and punitive damages awards.

¹Readers may be interested in the analysis of the SCC decisions employed in *Matsusiak v. British Columbia and Yukon Territory Building and Construction Trades Council*, [1999] BCJ No. 2416 (BCSC), where a union was found vicariously liable for the violent and threatening behaviour of its members.

