

Altering the Structure of the School System: Broadening the Lines of Liability?

By J. Paul R. Howard

The current climate in education, with its fiscal realities and demands for increased accountability, invites self-examination. As reflected in the other articles in this issue, educators are pausing to reconsider their concept of the education leader and the structure of educational leadership.

Of course, other changes to the structure of the school system are being imposed on educators. Under these legislated changes, the role of some stakeholders is enhanced, new entities are created, relationships altered. But changes to responsibilities and relationships often give rise to new legal liabilities.

In keeping with the nation-wide professed desire to devolve increased powers and influence to parents and the local community, each provincial and territorial jurisdiction in Canada now provides for the establishment of school councils, parent councils or school-parent committees, whether legislatively required *de jure* or *de facto*. In most jurisdictions where school councils are mandated, their role would seem to be advisory only. In many jurisdictions, however, the extent of the parent council's role and responsibilities has not been clearly defined.

One of the problems from the legal perspective flows from the practical reality that lines of legal liability tend to mirror lines of responsibility. Thus, in the absence of precise delineation of the powers, duties, and even the status of school councils, considerable uncertainty surrounds such questions as whether school boards will be held liable for all actions and decisions taken by parent councils, whether the councils will share liability for loss resulting from the implementation of those policies they recommend, and whether the councils possess sufficient legal personality such that they may attract liability in their own right or whether that liability will be imposed personally upon each individual council member. There is less difficulty where the council functions in an advisory capacity only such that the ultimate decision-making power, and therefore liability, would presumably rest with the school board. But to the extent that the councils may exercise real decision-making authority in such areas as personnel, curriculum and administrative management, the problem remains a live one.

This issue concerns not only the extent to which parent councils or their respective boards may be legally liable for policies and decisions made or administered by the councils, but also to what extent the school board may be responsible for the misconduct, crimes or other legal wrongs committed by individual council members. Historically, the relationships between the various actors in the education system have been governed by conventional legal principles, such as the familiar doctrine of vicarious liability. School boards are vicariously liable for those wrongful acts of their superintendents, principals, teachers and other employees committed within the scope of employment. The law deems the "scope of employment" to include otherwise legal acts which are authorized by the employer but which are performed in a "wrongful and unauthorized mode" by the employee. Thus, to paraphrase one of the traditional texts, a school board is responsible not merely for what it authorizes its employee to do but also the way in which she does it: if the employee does

negligently that which he was authorized to do carefully, if she does fraudulently that which she was authorized to do honestly, or if he does mistakenly that which he was authorized to do correctly, the school board will answer for that negligence, fraud or mistake.¹

However, the application of traditional principles of vicarious liability is not so straightforward in the context of wrongful acts committed by members of parent councils. Generally, one would not consider the council members to be employed by their corresponding school board. Whether the former may be said to be agents of the boards for some purposes will depend upon the circumstances of the given case. Again, the root of the problem is the absence of clear legislation expressly describing the status of school councils and their relationships to the boards.

If the legislation requiring the establishment of school councils was truly intended to augment parental participation in education governance, then statutory reform of this unsettled area is all the more required, for one is hard pressed to think of a more effective or quicker way to dissuade parents from becoming involved in their local councils than to ignore lingering uncertainties concerning potential legal liabilities.

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1. R.F.V. Houston & R.A. Buckley, *Salmond and Heuston on the Law of Torts*, 20th ed. (London: Sweet & Maxwell, 1992) at 456-57.