



SHIBLEY RIGHTON LLP
Barristers & Solicitors
www.shibleyrighton.com

Toronto Office:
250 University Avenue
Suite 700
Toronto, ON M5H 3E5
Tel.: (416) 214-5200
Toll free: 1-877-214-5200

Windsor Office:
2510 Ouellette Avenue
Suite 301
Windsor, ON N8X 1L4
Tel.: (519) 969-9844
Toll free: 1-866-422-7988

Education and Public Law Group:

John P. Bell
john.bell@shibleyrighton.com

Brian P. Nolan
brian.nolan@shibleyrighton.com

Alan Wolfish, Q.C.
alan.wolfish@shibleyrighton.com

Diane M. Abbey
diane.abbey@shibleyrighton.com

Sheila M. MacKinnon
sheila.mackinnon@shibleyrighton.com

J. Paul Howard
paul.howard@shibleyrighton.com

Thomas McRae
thomas.mcrae@shibleyrighton.com

Byrdena M. MacNeil
byrdena.macneil@shibleyrighton.com

Jennifer E. Trépanier
jennifer.trepanier@shibleyrighton.com

Education Law eBulletin

A newsletter for educators.

April 2004

✿ Spring has sprung! ✿

in the courts

Vicarious liability test applied by Supreme Court of Canada

The recent Supreme Court of Canada decision, *John Doe v. Bennett*, is the first application of the vicarious liability test set out by the Supreme Court in October 2003 in *K.L.B. v. British Columbia*. In *Bennett*, the Supreme Court found a church diocese directly and vicariously liable for the actions of its priest. The decision offers the first indication of how the principles of vicarious liability may be applied in a school setting.

Bennett was a priest in a remote part of Newfoundland. Over two decades he sexually abused at least 36 boys. Two bishops were aware of the abuse but did not prevent further abuse. The liability of the priest, Bennett, was not at issue in the appeal to the Supreme Court. Rather, the appeal concerned the direct and vicarious liability of the diocese, St. George's, and of the Roman Catholic Church. The Court of Appeal had found St. George's directly, but not vicariously, liable.

The Supreme Court first considered the issue of direct liability. This argument was based on the negligence of the overseeing bishops, which was admitted by the diocese. St. George's bishop was incorporated as an episcopal corporation under statute. If the bishop was found to have a corporate character at law, then the negligence of the bishop would result in direct liability for the harm to the boys. St. George's argued that the incorporation of a bishop as an episcopal corporation was for the purposes of holding land only. The Supreme Court rejected this contention finding that such ecclesiastical corporations are created to serve "as a point of legal interface between the Roman Catholic Church and the community at the diocesan level". Reading the statute of incorporation as a whole, the Supreme Court concluded that the episcopal corporation of St. George's could sue and be sued in any court and therefore also had the capacity to be held directly liable.

With respect to the issue of vicarious liability and whether the diocese, as his employer, was liable for Bennett's assaults, the Supreme Court held that the evidence overwhelmingly satisfied the tests affirmed in *Bazley v. Curry*, *Jacobi v. Griffiths*, and *K.L.B. v. British Columbia* which require a consideration of the following factors:

- the role of the enterprise in affording the employee the opportunity to abuse his or her power
- the extent to which the abuse was related to the enterprise's aims
- the extent to which the abuse furthered the enterprise's aims
- the extent of power conferred on the employee, in relation to the victim
- the vulnerability of victims

The Supreme Court held that the main issue is "the question of power and control by the employer: both that exercised over and that granted to the employee. Where this power and control can be identified, the imposition of vicarious liability will compensate fairly and effectively." The Supreme Court found that the relationship between the diocese and Bennett was sufficiently close; and that it was clear that the necessary connection between the employer-created or enhanced risk and the abuse complained of was established - the bishop provided Bennett with the opportunity to abuse his power; Bennett's wrongful acts were strongly related to the psychological intimacy inherent in his role as priest; and the bishop had conferred an enormous degree of power on Bennett relative to his victims.

The Supreme Court held that the majority of the Court of Appeal erred in holding that non-profit employers should not be held vicariously liable for sexual assaults by their employees. While non-profit goals or charitable purposes may negatively impact on the policy rationales underlying the imposition of vicarious liability, they do not confer upon an institution immunity from vicarious liability. Rather, where a *strong* connection is established between the enterprise risk and the sexual assault, a finding of vicarious liability is entirely appropriate.

Accordingly, the Supreme Court found the diocese vicariously, as well as directly, liable for the sexual abuse. The Court refused to deal with the claims against the Roman Catholic Church because insufficient evidence had been led for a determination to be made respecting its liability.

While there are significant differences between the parish setting and the school setting and, particularly, significant differences in the level of control over employees, and expected relationships with students, the decision nonetheless provides some guidance in respect of the application of the *K.L.B.* test, and some indication of the types of situations in which institutions will be held liable for sexual abuse by employees.



“in the courts” continued ...

Parents seeking self-contained gifted program

The Halton District School Board successfully convinced the Ontario Divisional Court to stay a proceeding brought by parents of a gifted student before the Ontario Special Education Tribunal until a preliminary argument was heard by the Court.

The parents of the gifted student wanted their child placed in a self-contained gifted class. When the student was placed in a regular class with resource support the parents appealed to the school board's Special Education Appeal Board (SEAB). When the SEAB also upheld the placement, the parents appealed to the Ontario Special Education Tribunal, requesting, among other things, an order that the Board establish a self-contained gifted program.

The Board took the position that the Tribunal did not have jurisdiction to make this order, since the program did not exist within the school board's Special Education Plan, which had been approved by the Minister of Education. The Board also argued that the parent was in a conflict of interest since she was a trustee of the school board. After the Tribunal rejected the Board's preliminary arguments, the Board sought review of this decision through the courts. The Board also asked that the Tribunal's hearing be postponed until the Divisional Court made its determination on the preliminary issues.

The Court determined that there were serious issues to be decided and that the “balance of convenience” favoured granting the Board's request.

health and safety

Anaphylactic students - Bill 3

School boards should be aware of Bill 3, An Act to Protect Anaphylactic Students. This private member's bill received First Reading on November 24, 2003 and Second Reading on December 4, 2003. As of the date of this writing, it has been ordered referred to the Standing Committee on General Government. This bill is unprecedented in that it requires every school principal to establish and maintain a school anaphylactic plan. Should an anaphylactic student require the administration of medicine on an emergency basis during school hours, this measure may be taken by school staff with or without consent. The bill provides that no action for damages arises from the administration of medication unless the damages result from the school staff's gross negligence.

It is expected that this bill will have third and final reading in the current legislative session. The bill sets out the components of a school's anaphylactic plan. In our opinion, the government expects that a school's plan will include comprehensive and practical provisions relating to its preventative measures, emergency responses and communications campaign.

Our firm has specialized expertise in this important area and is pleased to assist school boards in the development of these mandatory plans. It is important that school boards have specialized consent forms and be very well-informed about legal issues relating to liability. Essentially, this bill is about safe schools and the health and well-being of students with life-threatening allergies. For further assistance regarding best practices and obligations arising from this bill, please contact: John P. Bell 416-214-5212 or Byrdena MacNeil 416-214-5221.

human rights

Claim against university dismissed

The Ontario Divisional Court recently dismissed a former York University student's appeal of the Ontario Human Rights Commission's decision not to pursue his human rights complaint. The Court also denied the student's claim for \$55,000,000.00 against the University. The student alleged that he had been discriminated against because he had not been given grants, was harassed, and had been stigmatized and confined to certain areas of the University. The Commission investigated the complaint and decided that the evidence did not merit referring the matter to a Board of Inquiry. The Commission found that there was insufficient evidence of unequal treatment, that the complainant failed to complete his thesis as required, and that he had failed to pay the University certain fees and therefore was not allowed to register in classes. The Court found that there was evidence before the Commission to support its conclusion that the decision was not “patently unreasonable”. The Court also denied the student's claim for \$55,000,000.00 in damages for loss of income, loss of reputation, loss of academic process, public humiliation, and mental anguish because the Court did not have the power to give this relief.

We welcome your comments and questions. Send them, and any updated contact information, to byrdena.macneil@shibleyrighton.com. If you wish to unsubscribe to this eBulletin, please send a blank e-mail to unsubscribe@shibleyrighton.com

Legal Disclaimer: The information contained in this publication is not intended to be legal advice. It is general information only. You should take appropriate professional advice on your particular circumstances. Shibley Righton LLP disclaims all responsibility for all consequences of any person acting on, or refraining from acting in reliance on, information contained herein.

case law

Kyriacou v. St. Jude's School Inc.

Ontario Superior Court of Justice

The Court dismissed an action for breach of contract as the school's discretion to change the application of its behaviour policy was not a term of the school's contract with parents.

Purssell v. Coast Mountains School District No. 82

British Columbia Supreme Court

The Court refused to grant an order requiring the school district to revert to a five-day school week as the result would cause more disruption than continuing with the four-day school week until the end of the year.

Summaries of these cases and others can be found in the Shibley Righton Education Law NetLetter published by Quicklaw. Visit www.quicklaw.com.