Focus PERSONAL INJURY

School's still out on vicarious liability


Elizabeth Grace
Anna Matas

The law has evolved rapidly since the Supreme Court of Canada, in *Bazley v. Curry* [1999] S.C.J. No. 35 and *Jacobi v. Griffiths* [1999] S.C.J. No. 36, clarified when vicarious liability will attach to an employer for its employee's intentional tortious conduct. This has changed how lawyers for plaintiffs and defendants handle certain kinds of sexual abuse claims. For example, there is now established precedent for holding religious bodies vicariously liable for abuse committed by their clergy and for making those who operate residential youth facilities vicariously liable for their staff's sexual misconduct. This greater clarity in the law means most such cases now settle, sometimes without or after only partial discoveries.

Strangely, however, there is still no consistent precedent either for or against holding school boards vicariously liable for sexual misconduct committed by teachers against students, even where this occurs on school premises and during school hours. This is exemplified by the contradictory outcomes in decisions released across the country over the past decade, and in Ontario in the past year alone, with *Langstaff v. Marson* [2013] O.J. No. 1541, and *Hayward v. Cloutier* [2012] O.J. No. 6415.

Vicarious liability is often described as a no-fault or strict form of liability. Irrespective of their lack of knowledge or disapproval for what happened, employers can be held vicariously liable for the harms caused by their employees' torts where these fall within the employee's "scope of employment." The result can sometimes appear harsh.

The principle of "enterprise risk" is critical to the analysis. Where employees' misconduct is sufficiently connected to their employers' "enterprise" to constitute a materialization of the risks created by the enterprise, employers will be vicariously liable, regardless of the fact they neither authorized nor knew about the misconduct. Education of our youth is a service delivered directly to individuals who are vulnerable by virtue of, at minimum, their age. Unquestionably, the "enterprise" of education carries with it a risk of harm. However, whether sexual assault of a student by a teacher constitutes materialization of that risk has proven contentious, and courts have been divided on the issue. The fact that a teacher takes advantage of a teaching position and the opportunities it provides to develop a sexual relationship with a student may not be enough to render a school board vicariously liable.

> "[T]he 'enterprise' of education carries with it a risk of harm. However, whether sexual assault of a student by a teacher constitutes materialization of that risk has proven contentious...
>
> **Elizabeth Grace & Anna Matas**
> Lerners LLP

Where an employee's tort or "unauthorized act" is so closely connected with the acts authorized by the employer that it can be regarded as a "mode" —albeit an improper mode— of doing the authorized act, a finding of vicarious liability is said to further the policy objectives of (1) providing an adequate and just remedy, and (2) deterrence. The two-step test formulated by our Supreme Court first considers whether there is precedent that will "unambiguously determine" if vicarious liability should attach. Where there is none, the next step is to consider whether these policy objectives justify imposing vicarious liability on an "innocent" employer as opposed to leaving the "innocent" victim without a meaningful remedy.

Decisions not to impose vicarious liability on school authorities are reflected both in cases where individual teachers were found liable for sexual assault and where no sexual abuse was proven against them. Examples of the former are *S.G.H. v. Gorsline* [2004] A.J. No. 593 (leave to appeal denied, [2004] S.C.C.A. No. 385), in which a high school physical education teacher/track and field coach abused a female student both on and off school property, and *A.B. v. C.D.* [2011] B.C.J. No. 1087, wherein a high school English teacher abused a female student on school premises during school hours. An example of the latter is *Hayward v. Cloutier* [2012] O.J. No. 6415, where in *obiter* the court found vicarious liability would not attach even if the abuse had been proven. Decisions to impose vicarious liability include *Doe v. Avalon East School Board* [2004] N.J. No. 426, where a high school teacher assaulted a male student after directing him to a separate classroom to write an exam, and most recently, *S.L. v. R.T.M.* [2013] O.J. No. 1541, in which a science teacher entrusted with a key to the elementary school in connection with the operation of a mini-zoo in his classroom misused his job-conferred privileges to sexually abuse male students.

It is difficult to explain the apparent schism in the case law, except to observe that deciding whether or not to impose vicarious liability on a school authority is a highly fact-specific exercise that depends to a great degree on the strength of the causal link between the job and the wrongful conduct in question. Courts are clearly finding the policy-driven imperatives that underlie vicarious liability challenging to apply in the education sphere. As a result, the stakes remain high and there is considerable uncertainty for those advancing and defending claims based on abuse of students by teachers. Until our Supreme Court provides further guidance, this uncertainty will continue.

Elizabeth Grace is a civil litigation partner at Lerners LLP in Toronto, whose practice includes both advancing and defending sexual abuse claims. Anna Matas recently joined Lerners as an associate.