

The Top Five 2006

Each year Justice Stephen Goudge of the Ontario Court of Appeal identifies five cases that are of significance in the educational setting. This summary, based on his comments and observations, is appropriate for discussion and debate in the classroom setting.



E.B. v. Order of the Oblates of Mary Immaculate in the Province of British Columbia, [2005] 3 S.C.R. 45

<http://scc.lexum.org/en/2005/2005scc60/2005scc60.html>

Employer operating residential school found not to be vicariously liable for sexual assault committed by an employee

From 1957 to 1962, E.B., a student, attended a residential school for First Nations children which was operated by the Oblates of Mary Immaculate (a religious order). The Oblates employed numerous staff at the school, including S. who worked as a baker, boat driver and general repair/odd-jobs person. S. also resided on the school grounds.

At the trial level, it was accepted that the employee S. had sexually assaulted E.B. These frequent and ongoing assaults had lasted from the time E.B. was 7 until 11 or 12 years of age. The assaults took place in S.'s living quarters (an upstairs room in a building on school grounds). E.B. did not inform anyone at the school of these assaults at the time.

With respect to the issue of whether the Oblates as the employer was vicariously liable for these actions of S., the trial judge considered the manner in which the Oblates operated or "operational characteristics" of the residential school (for example, children were separated from their families, employees lived in close proximity to children, and children were required to respect and obey school staff). The trial judge concluded that the manner in which the school operated materially enhanced the risk that sexual assaults would take place at this school. For these reasons, the trial judge found the Oblates vicariously liable for S.'s assault of E.B.

In its consideration of vicarious liability, the Court of Appeal, however, focused on the specific employment duties and responsibilities assigned by the Oblates to employee S., in order to determine whether there was enough of a connection between those job duties and S. committing the assaults. The Court of Appeal overturned the trial judge's decision finding that the trial judge's assessment of vicarious liability overemphasized the opportunity for employee misconduct created by the way the school was operated and minimized the connection between the employee's actual job and the assault. The Court of Appeal found that S. operated on the fringes of school life, and that there was not a strong connection between the jobs he was hired to do and the instances in which the abuse occurred. As such, his misconduct could

not have been anticipated by his employers and did not create a relationship where they could be held to be vicariously liable for the wrongs he committed.

A majority of the Supreme Court of Canada supported the Court of Appeal's reasoning. The Court confirmed that in order to find the employer vicariously liable, there had to be a strong connection between what the employer was asking the employee to do (the employee's role) and the wrongful conduct which took place. This required evidence that the school had created features of S.'s employment relationship which contributed to the ability of S. to carry out the assault. The court explained that applying the trial judge's expansive approach to vicarious liability would open the school up to liability for misconduct of all of its employees, no matter how disconnected their wrongdoings might be from any power or status tied to their jobs, and in situations where employees were not given any position of authority or access to intimacy with students by their employers. The court noted that this is an area which should more properly be addressed in the area of direct liability not vicarious liability.

The Court went on to clarify that if an employer operates in conditions that present a "mere opportunity" for an employee to commit a wrong, this is not enough to attract vicarious liability. In this case, despite the loose structure of the school, S.'s position at the school did not give him the authority nor require him to have regular or meaningful contact with students. Upholding the decision of the Court of Appeal, the Supreme Court concluded that while the employment relationship in this case may have provided S. with the opportunity to commit the wrongful acts, his assigned role in relation to the students fell short of creating an employer/employee relationship which could lead to vicarious liability in this instance.

Justice Abella in her dissenting opinion expressed a different view. On her reasoning, one must look at the enterprise as a whole to determine whether the specific features of the enterprise and of the employment relationship created or materially enhanced the risk that the tort or misconduct would occur. Justice Abella found that the link between the opportunity for misconduct provided by the employment situation and S.'s misconduct was particularly strong. She noted that S. was given living quarters in the middle of the school property, and was permitted to form relationships with vulnerable children who perceived him to be in a position of authority. At trial, the court heard evidence that S. had responsibility for helping the religious staff with all school-related tasks, including supervising children on a daily basis and assigning chores to them. In this case, Justice Abella determined that this relationship was critical to finding that the residential school, as an enterprise, and through the authority it provided to S., materially enhanced the risk of misconduct and should be vicariously liable for S.'s assault of E.B.

Discussion Issues:

- Can you think of any instances when an employer should be responsible for misconduct committed by an employee? Why should the employer be responsible in those instances? When do you think an employer should not be responsible for the acts of their employees?
- How significant was the employee S.'s job description in this case? Why was it important for the court to know about S.'s job duties and responsibilities?
- Would it have made a difference to the liability of the school if the employee S. was required to teach the students baking or maintenance/repairs skills as part of his job? Why or why not?
- Is there anything the employers could have done to prevent the abuse that the student E.B. experienced?
- What does this case tell you about the importance of supervision of employees by employers?
- This is a case where the employees were in a workplace where there were vulnerable children present – First Nations students who had been separated from their families. Do you think that employers like residential schools or children's hospitals have different responsibilities in hiring and supervising employees than other employers? Why or why not?
- Should the same principles of vicarious liability apply to for-profit and non-profit employers?