“Mere opportunity” is not sufficient to ground a finding of vicarious liability

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In *H.N. v. School District No. 61 (Greater Victoria),* the British Columbia Court of Appeal upheld the trial judge’s decision that the defendant school district was not vicariously liable for the sexual abuse perpetrated on a student during private tutoring sessions.

Facts and trial decision

At trial, the plaintiff, H.N. alleged that the School District No. 61 (Greater Victoria) was vicariously liable for the sexual abuse perpetrated by Mr. Redgate, who was identified as an appropriate tutor by H.N.’s then English teacher. Mr. Redgate was initially hired to provide H.N. tutoring at the school during classes and did so until June 2000 (the end of the school year). Mr. Redgate also saw H.N at Mr. Redgate’s home twice before the end of that school year. After the school year ended, visits between Mr. Redgate and H.N. occurred approximately 10-15 times per year at Mr. Redgate’s or H.N.’s home, and were arranged by Mr. Redgate, H.N. and H.N.’s parents. The school was not involved in arranging the subsequent visits. Although there were allegations that H.N. may have been ‘groomed’ by Mr. Redgate during the in-school tutorials, no sexual abuse occurred at the school. However, the English teacher, who recommended Mr. Redgate, was aware that Mr. Redgate was seeing H.N. at his home, an arrangement which was contrary to the school’s policy.

Decision on appeal

On appeal, the Court considered whether the trial judge erred in his application of the facts to the three leading decisions on vicarious liability: *Bazley, Jacobi,* and *Oblates.*

The court reviewed the case law surrounding vicarious liability, which focuses on the notion of an “enterprise risk”. The court explained that the focus of the inquiry in determining whether to impose vicarious liability is to consider the nature of the risk of abuse occurring which was introduced into the community by an institution as a result of the obligations and responsibilities of an employee. In applying the test, however, the court clarified that the traditional test of “but for” to determine causation does not suffice

to impose vicarious liability. Put another way, “mere opportunity” to commit a wrong does not ground vicarious liability. Instead, there must be a **strong connection** between what the employer was asking the employee to do (the risk created by the employer’s enterprise) and the wrongful act.

In addition, the court clarified that the vulnerability of potential victims also does not, standing alone, ground vicarious liability. While the vulnerability of children provides context in which an enterprise is to be evaluated, that vulnerability does not itself provide the “strong link” between the enterprise and the sexual assault that imposition of no-fault liability requires. Accordingly, providing a potential abuser with the mere opportunity to commit abuse of a vulnerable child is insufficient to make out vicarious liability.

The Court ultimately dismissed the appeal and accepted the analysis undertaken by the trial judge. The trial judge’s analysis focused on Mr. Redgate’s role as a tutor, the extent of any power and intimacy created by the arrangements put in place, and the nature of the arrangements themselves. The tutoring in this case provided only an *opportunity* to begin to groom H.N. in the sense that it established the “but for” causation. However, since the abuse occurred away from the school, it created the question of whether the abuser’s misconduct was sufficiently connected to the risks created by his duties and responsibilities. In this case, the trial judge determined that Mr. Redgate had subverted the slight opportunity created by the School’s tutorial arrangements for his own ends.

While Mr. Redgate’s role as a tutor created the opportunity to commit his abuse, or to cultivate an improper relationship, this was not sufficient to establish the strong connection required for vicarious liability. Mr. Redgate’s role did not carry with it any parental-like duties, he was not expected to develop an intimate relationship with H.N., nor was he endowed with a position of trust, care, protection, or expected to fulfill a nurturing role. It was not part of the School’s expectations of Mr. Redgate that he would have any physical contact with H.N. or be alone with him outside the school.

The Court of Appeal also considered the use of expert evidence on grooming and found that while an expert can provide helpful evidence on the typical steps in grooming behaviour, it is the judge’s role, not the experts, to determine whether there is a strong connection between what the employee/abuser is tasked to do and the abuse for the purposes of vicarious liability.

This case is important for our institutional clients as it reinforces that there must be a “strong” connection between the alleged abuse committed and the alleged perpetrator’s employment in order to reach a finding of vicarious liability on behalf of the institution. The court also emphasized that while precedents may be used in such an analysis, proper weight has to be given to the specific circumstances between the claimant, the wrong doing employee and the contribution of the enterprise to enabling the wrongdoer in each specific case.

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