

Protecting Our Students (And Their Teachers Too) A Canadian Perspective

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Introduction

In 1999, the Alberta *School Act* was amended to include the following clause:

45(8) A board shall ensure that each student enrolled in a school operated by the board is provided with a safe and caring environment that fosters and maintains respectful and responsible behaviors.¹

This was the last of a number of clauses introduced to the legislation over the period of a decade, which clearly established that children have rights and that those charged with making educational decisions on their behalf must respect those rights. For example, in 1993, the *Act* was amended to require that each student be provided with a program that ensures that the student can meet the standards of education set by the minister.² It further required that a child be provided with a program that is in keeping with his intellectual, emotional, social and physical needs and limitations.³ Other provinces have similar legislation.

This is not to say that, prior to the introduction of these clauses, school boards and their employees did not adhere to these beliefs. The clauses simply codified the change in societal thinking concerning individual rights. Previously, it was expected that parents and those standing in their place (such as teachers) would make decisions for the child 'in the best interests of the child'. Now society holds that each child has rights that must be respected in the decision making process, including the right to learn in safety and security.

Teachers are inextricably linked to the integrity of the school system. Teachers occupy positions of trust and confidence, and exert considerable influence over their students as a result of their positions. The conduct of a teacher bears directly upon the community's perception of the ability of the teacher to fulfil such a position of trust and influence, and upon the community's confidence in the public system as a whole.⁴

When teachers and/or their employing boards, by acts of commission or omission, fail to provide a student with the appropriate safe and secure learning environment, they may be sanctioned criminally, civilly or professionally. This article addresses the means of redressing harm that can befall students and put them at risk under the following headings:

1. Teacher Misconduct
 - (a) Sexual Misconduct in Canadian Criminal Courts
 - (b) Civil liability for Sexual Misconduct
 - (c) Physical Assault
2. Professional Liability
3. Student Misconduct: Bullying
4. Civil Liability for Educational Risk to Students: Education Malpractice
5. Liability for Breach of Non-Delegable Statutory Duty.

Teacher Misconduct

(a) Sexual Misconduct in Canadian Criminal Courts

Sexual misconduct may be defined as ‘offensive conduct of a sexual nature which may affect the personal integrity or security of any student or the school environment’.⁵ This definition does not look at the notion of intent. The focus is on conduct. Unlike other professions, teachers never lose their characterisation as a teacher, regardless of the circumstances of a situation. In Canadian society today, a teacher is a teacher, 24 hours of the day, seven days of the week. There is no time in which the behavior of a teacher toward a young person can be seen as not tied to his or her position as a teacher. Thus there is no such thing in society today as acceptable sexual conduct between a teacher and a student. As well, in society, in general, there has been a new understanding of the plight of a victim in sexual misconduct. The stigma often attached to the victim of such crimes has diminished significantly.

This was not always the case. Prior to 1983, the character and behavior of the young person was a factor in determining whether sexual misconduct had taken place or a crime had been committed.

Every male person who, being 18 years of age or more, seduces a female person of previously chaste character who is 16 years or more but less than 18 years of age is guilty of an indictable offence.⁶

In 1983, the *Criminal Code* of Canada was extensively amended. A large number of offences were repealed and new offences were created. For example, the referenced law was replaced by a law that placed the responsibility on the adult and removed from consideration, the character and behavior of the young person.

Every person who is in a position of trust or authority towards a person 14 years or older but younger than 18 and who for a sexual purpose touches any part of the body of that young person is guilty of sexual exploitation.⁷

This also opened the door to the possibility that the exploiter might be female and that sexual touching of a young person by a female was equally inappropriate.

Courts then struggled to define when a teacher was in a position of ‘trust’ or ‘authority’. While it was quite clear that a teacher who engaged in sexual touching of a student at school was guilty of a criminal and professional offence, teacher conduct outside of school was not clearly defined.

In 1996, the Supreme Court of Canada considered the issue of when the teacher was in a position of trust and authority in the case of Yves Audet.⁸ Audet was a 22-year-old teacher who met a 14-year-old former student, quite by chance, during the summer. He and other adult friends had gone to a bar where they met the victim, who was there with her older female relatives. Later, the respondent went with his friends to the cottage where they were staying. The women and the victim joined them at the cottage. It was not Audet’s idea. He had a headache and went to sleep on a bed in an adjoining room. Some time later, the victim joined him in the bed without permission, ignoring an empty bed next to his. Ultimately, they engaged in some mutual oral sex.

In the original trial, the judge found that Audet had not been in a position of trust or authority at the time of the alleged offence. No consideration was given to the fact that Audet had been given another contract and would return to the school in the fall, where he would potentially teach the victim again. Consideration was given to Audet’s age, relative inexperience as a teacher and the apparent consent of the victim. As there was consent, there was no consideration given to the possibility that his actions were a sexual assault. The New Brunswick Court of Appeal affirmed the decision of the trial judge. Eventually, the case came to the Supreme Court of Canada, where Audet was found guilty.

The decision of the Supreme Court provided guidance in three important areas concerning sexual interference.

1. A teacher is always in a position of trust and authority toward his/her students. As Justice La Forest wrote:

In the absence of evidence raising a reasonable doubt in the mind of the trier of fact, it cannot be concluded that a teacher is not in a position of trust and authority towards his or her students without going against common sense.⁹

2. It is not necessary for the court to find that the person in the authority position actually used or abused his position of authority to gain the consent for the sexual act.
3. Issues such as the consent of the child even if the child initiated the activity is not relevant. The onus is entirely on the teacher to resist the activity.

The purpose of s. 153 is to make it clear that a person in a position of authority or trust towards a young person is not to engage in sexual activity with that young person, even though there is apparent consent.¹⁰

The *Audet* decision raises the difficult question of double jeopardy. When the incident occurred, the school board suspended Audet for two years without pay. After the Supreme Court found him guilty of criminal charges, the school board terminated his teaching contract. However, an arbitrator reinstated it because he could not be punished twice for the same conduct.¹¹

In the wake of this decision, employers and teacher associations actively put into place policies and provided in-service professional development to employees and members about the responsibilities of teachers.

Despite *Audet*, a jury hearing the case of Jocelyn Jaster apparently came to a different conclusion.¹² Jaster was a 25-year-old married teacher who taught Grade One in a small town school, which served students from kindergarten to Grade 12. In the spring of 1998, at a school track meet, Jaster gave a note to a 17-year-old male student, asking him if he would like to go out. What followed was a three month affair, which culminated with Jaster announcing that she was pregnant with the student's child. When rumors of the affair reached school officials, Jaster left the school and went to another city to stay with relatives. She subsequently miscarried the baby and the affair ended shortly thereafter.

At the trial, the student testified that they were like a 'couple' physically, but not emotionally. He stated that, 'It was always, she was the teacher and I was the student'.¹³ Justice Verville, who presided at the trial, said that the case hinged on whether Jaster was in a position of authority over the young person. The trial was heard by a jury who acquitted Jaster of the charges.¹⁴ Because it was a jury decision, no rationale for the decision is available to us. Suffice it to say that the decision has perplexed teachers and the public alike.

The victim is now suing Jaster, his former principal and the school board in civil court for damages as a result of the affair.¹⁵

(b) Civil Liability for Sexual Misconduct

The change in the way in which society views the rights of children and the new attitude of zero tolerance for sexual misconduct on the part of teachers has greatly increased the number of cases coming to the attention of authorities. While it may represent an increase in the number of sexual misconduct events that occur, it also represents the heightened awareness amongst victims of such abuse from years ago that they are indeed the victim and are entitled to redress for the wrongdoing. Interestingly, these victims, once armed with a conviction in criminal court, are turning to civil court to recover damages from the perpetrator.

Courts have consistently held that the requirement that charges be brought forward in a timely manner (usually within two years of the alleged tort) do not apply to cases of childhood abuse. Limitation periods that have, in Canada, served to protect defendants, are interpreted broadly in cases of alleged sexual abuse or misconduct, and in some cases, statutes have been amended to allow for unlimited time to pursue such claims. This was addressed clearly in the case of *Gorsline*¹⁶, in which the alleged abuse had taken place in 1978 and 1979. At the time, Gorsline was a teacher in Calgary at a junior high school where he coached track, in addition to his teaching duties. The victim, who was a 12-year-old, Grade 7 student at that time, alleged that Gorsline took an interest in her and encouraged her to begin middle and long distance running. She apparently was talented and Gorsline apparently was a good coach. The abuse started as a kiss out of sight of others on the track and then escalated to many other sexual acts short of intercourse.

Over time, the abuse stopped, but by then, although clearly talented, the victim lost her interest in track and eventually gave it up all together. After finishing school and making a number

of false starts at careers, the victim became a teachers' aide in a Calgary school. It was then that she came to appreciate the level of trust that young children place in their teachers and fully realised the damage that had been done to her. Knowing that Gorsline was still teaching, she went to the police for the first time.

Gorsline was eventually found guilty of the sexual misconduct¹⁷ and served time in jail. While he was still incarcerated, the victim sued him in civil court for damages. Justice Mahon summarised very succinctly the issue of timeliness in cases of child assault and why victims are often well into adulthood before they come forward.

In these circumstances, it is not enough that the victim knew that the conduct was wrong or even unlawful. Nor is it enough that the victim knew that she had been hurt in some way or was troubled by the assaults. The cause of action does not accrue until the victim understands the true nature of the harm inflicted and that the abuser, not the victim, bears responsibility for it. Ms Holt knew immediately that she had been wrongly abused by Gorsline ... The evidence persuades me that she did not then understand how much the abuse would affect her in later years ...

I conclude from the evidence that at the earliest it was in the fall of 1992 that Ms Holt began to have a substantial awareness of the harm inflicted and who really bore the responsibility for it ... Awareness of harm and responsibility did not occur as a sudden revelation. It was, I conclude, a slowly developing conversion from self-blame and repressed shame to a true understanding and a transfer of responsibility from the victim to abuser.¹⁸

In this case, Gorsline, already in jail for his crime, was ordered to pay damages in the amount of \$173,631.40 to his victim. He also faced the sanction of his profession, an issue that will be addressed later in this article.

(c) Physical Assault

Most school districts today forbid the use of physical discipline on students. It is generally agreed in Canadian society that physical discipline is not an effective means of dealing with children's misbehavior and that its use can and does lead to abuse. Assault is illegal.

265(1) a person commits assault when

(a) without the consent of another person, he applies force intentionally to that other person, directly or indirectly;

(b) he attempts or threatens, by an act or a gesture, to apply force to another person, if he has, or causes the other person to believe on reasonable grounds that he has, present ability to effect his purpose . . .¹⁹

In other words, three elements must be present for the behavior to amount to assault: (a) lack of consent by the victim, (b) intention and (c) an application of force to the victim (or a threat).

Strictly applied, this definition of assault would make the job of parenting and teaching very precarious indeed.

Given the special and unique role of parents and teachers in society, the legislature anticipated times when the parent or teacher would need to use physical force to effectively carry out their duties.²⁰

Examples of this might be where a parent must buckle a reluctant child into his car seat or when a teacher must intervene in a fight between students. Thus Section 43 of the Canadian *Criminal Code* states:

Every schoolteacher, parent or person standing in the place of a parent is justified in using force by way of correction toward a pupil or child, as the case may be, who is under his care, if the force does not exceed what is reasonable under the circumstances.²¹

This section provides parents and teachers with a defence for actions that would otherwise be viewed as criminal assault.

In 2001, the Canadian Foundation for Children, Youth and the Law, a not-for-profit advocacy group, challenged the law in Ontario court on the basis that it violated three sections of the *Canadian Charter of Rights and Freedoms* ('Charter'):

1. Section 7, Everyone has the right to life liberty and security of person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.
2. Section 12, Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.
3. Section 15(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental and physical disability.²²

When the lower court held that Section 43 did not violate the Charter, the Foundation appealed the decision. The respondent, the Attorney General of Canada, was supported by the Canadian Teachers' Federation and the Coalition for Family Autonomy.

From the onset, the court made it clear that the issue before it was not whether using force to correct the behavior of a child was good or bad. The issue was whether or not, by creating the exemption, parliament had violated the Charter.²³ It also reinforced in its decision that the section 'decriminalises only non-abusive physical punishment of children by parents or teachers where the intention is to correct, and correction is possible'.²⁴

The Court of Appeal found that Section 43 did not contravene Section 7, which guarantees the liberty or security of the child, in such a way as to violate fundamental justice. Although Section 43 was found to subject children to differential treatment from adults with respect to physical assault, contrary to the equality rights guaranteed by Section 15 of the Charter, the court found it to be a justifiable limit in a free and democratic society because it allows parents and

teachers to perform the important functions of raising and educating the child:

As I have said, s. 43 implicates the child's security of the person interest. The section permits physical punishment of the child by a limited class of people without the punishment being a criminal assault. The section does not approve or encourage such punishment. It carefully defines the limits that must be observed if those actions are to escape criminal sanction. Those limits are found in the language of the section as informed by the kind of expert evidence presented in this case rather than in the reported facts of particular cases which may be incomplete or worse, wrongly decided. For exemption from the criminal law this section requires that the force be applied to the child by a parent, surrogate parent or a teacher. The force must be reasonable in the circumstances which inevitably include consideration of the age and character of the child, the circumstances of the punishment, its gravity, the misconduct of the child giving rise to it, the likely effect of the punishment on the child and whether the child suffered any injuries. Finally, the person applying the force must intend it for 'correction' and the child being 'corrected' must be capable of learning from the correction. Hence s. 43 infringes the child's security of the person only to the extent of decriminalizing the limited application of force to the child in circumstances where the risk of physical harm is modest.²⁵

Over the years, courts have helped define for parents, school boards and teachers what the parameters are under which this law will provide a defence for their actions. For example, in the case of *R v. Graham*,²⁶ the court found the defendant teacher not guilty of assault citing the defence of Section 43. The teacher had slapped a nine-year-old student on the backside when she had continually disregarded his instructions to her to sit down and attend to her work. Her behavior was disrupting the work of other students.

This Court finds that the Defendant was not only within his rights (both civilly and criminally) in the instant act, but also acted in the best interests of 'A.P.' and her class as a whole, and I so declare.²⁷

Teachers who 'lose it' or use inappropriate means of correction cannot find protection under Section 43. In the case of *R. v. Ocampo*, the teacher faced seven charges of assault.²⁸ At trial, the learned Justice found that, in five charges, the matter was either 'de minimus' and dismissed or justified under Section 43 and dismissed. In one charge it was found that the teacher most likely could have avoided the use of force but was startled by the child's action and the force was 'reflexive'. The charge was dismissed. However, in one instance, the teacher slapped the child, pulled his hair and pushed him into the classroom. Given that her behavior was impulsive, that it went beyond what was necessary to correct the child and that she was clearly reacting out of anger, it was ruled that the Section 43 defence was not available to her. She was found guilty of assault.²⁹

Similarly, when a teacher pleaded the doctrine of *de minimus non curat lex* or alternatively, the defence provided by Section 43, after he kicked a student, he was found guilty of assault.³⁰ In this case, the student stopped to take a drink at the water fountain after being advised not to do so.

The teacher used his foot to strike the student on the buttocks. The court found that,

The use of a kick by a teacher upon a pupil cannot be considered as an acceptable form of discipline.³¹

While Section 43 of the Canadian *Criminal Code* continues to provide teachers with a defence in a very narrow band of circumstances, it does not save the teacher from professional or employment discipline, should the circumstances warrant. Students maintain the protections offered by other sections of the Canadian *Criminal Code*, child welfare legislation and the *Canadian Charter of Rights and Freedoms*.

Professional Liability

The power vested in the teaching profession in Canada for self-regulation means that, for teachers such as Audet, Jaster and Gorsline, who abuse the children in their care and diminish the profession in the eyes of the public, the end of criminal and civil proceedings is not the end of their troubles. The profession will investigate and judge their behavior separately from the other actions that have taken place. In fact, it is not necessary that the individual be guilty in criminal court for the profession to impose a stiff penalty for the behavior in question.

In all Canadian provinces, there is provincial legislation and codes of professional conduct emanating from the legislation that require teachers to act in such a way as to ensure the physical and emotional safety of their students. For example in Ontario under *Regulation 437/97* dealing with professional misconduct, a teacher can be found guilty of misconduct for the following, amongst others:

7. Abusing a student physically, sexually, verbally, psychologically or emotionally.

17. Contravening a law if the contravention has caused or may cause a student who is under the member's professional supervision to be put at or to remain at risk.

18. An act or omission that, having regard to all of the circumstances, would reasonably be regarded by members as disgraceful, dishonorable or unprofessional.³²

Similarly, in Alberta, the *Teaching Profession Act* states that:

22(1) any conduct of a member that, in the opinion of a hearing committee,

(a) is detrimental to the best interests of

(i) students as defined by the *School Act*,

(ii) the public, or

(iii) the teaching profession

whether or not that conduct is disgraceful or dishonorable ...

(2) If a member has been convicted of an indictable offence,

(a) The conduct of the member on which the conviction is based is deemed to constitute unprofessional conduct.³³

This is further refined in the Code of Professional Conduct under this *Act*, which states:

4. The teacher treats pupils with dignity and respect and is considerate of their circumstances.

18. The teacher acts in a manner which maintains the honor and dignity of the profession.³⁴

In the case of Jocelyn Jaster, as previously noted, she was acquitted of criminal charges concerning an affair with a student. Nevertheless, a hearing committee of the Professional Conduct Committee looked at the evidence in the case and concluded that Jaster's behavior was contrary to what was expected of a member of the profession.³⁵ It was determined that, by initiating and engaging in an inappropriate sexual relationship with a student at her school, she had failed to treat him with dignity and respect. She also violated her position of trust as a teacher. Further, it was found that, by engaging in this sort of relationship and, by the fact that it became widespread knowledge in the community (to say nothing of the entire country), Jaster had compromised the honor and dignity of the profession. Her membership in the profession was revoked and the Ministry was asked to cancel her teaching certificate, which they did. Additionally, she was fined \$1,000.00.

The committee also sanctioned Jaster for her refusal to cooperate or communicate with the investigating officer or with the committee. This is, in itself, unprofessional conduct and Jaster was sentenced to revocation of her membership and certificate in this matter as well. She was also fined a further \$2,000.00.

Losing one's teaching certificate in one jurisdiction in Canada means that the teacher cannot obtain certification in any other jurisdiction. Effectively, her career is at an end in spite of the fact that a jury found her not guilty of any crime.

Two recent cases also serve to emphasise the important role that professional discipline bodies play in regulating the behavior of their members toward students and in serving the broader public interest. In the case of *J.G. v. Ontario College of Teachers*³⁶, a teacher was dismissed from her employment in 1996 for an inappropriate relationship with a student. The matter was not reported to the College until 1999 for a number of reasons, not the least of which was the turmoil surrounding the forced amalgamation of school boards during that time. The College gave notice of a hearing in July of 2001. The complainant filed for a stay of proceedings because the delay in bringing this matter to hearing amounted to an abuse of process. The College ruled against this application, but did not provide reasons for its decision. The complainant then alleged that this violated the College's duty of procedural fairness.

While the court found both the delay and the lack of reasons provided to be troubling, it did not find either to be a significant impairment.³⁷ In dismissing the appeal, the Ontario Supreme Court noted that:

The allegations (against the complainant) are serious. The broader public interest in assessing the continuing status of a professional in an extremely responsible position of trust involving children is a strong factor.³⁸

*Sclater v. Ontario College of Teachers*³⁹ affirms the central role the College plays in protecting the public interest. *Sclater*'s appeal was denied by the Court who noted that, 'the Committee's disposition balanced the right of the appellant and the public interest'. Of equal importance was the Courts reaffirmation of the ability of discipline bodies to make correct decisions about professional conduct, which higher courts are reluctant to interfere with unless there is a clear error. The Court said:

Two of the three members of the panel were educators. Those members would know first hand what takes place in a classroom, in the corridors of a school, about 'boundaries' and the violation of 'boundaries'.⁴⁰

The decision references another case on the expertise of professions to self discipline:

The power of self-discipline perpetuated in the enabling legislation must be based on the principle that members of the profession are uniquely and best qualified to establish the standards of professional conduct. Members of the profession can best determine whether the conduct of a fellow member has fallen below the requisite standards and determine the consequences. The peers of a professional person are deemed to have and, indeed, they must have special knowledge, training and skill that particularly adapts them to formulate their own professional standards and to judge the conduct of members of their profession. No other body could appreciate as well the problems and the frustrations that beset a fellow member.⁴¹

Another judge has summarised effectively the respect the courts have for the ability of the teaching professional to discipline members who have gone beyond acceptable social boundaries and put students at risk:

The penalty was imposed by a professional disciplinary tribunal whose main concern was protection of the public, specifically school children.⁴²

This profession has set a high standard for itself and imposed sometimes severe penalties for failure to meet those standards. I cannot substitute a different standard and I should be, and am, reluctant to question the propriety of a penalty which has been approved by nine members of Mr. D's peer group.⁴³

Student Misconduct: Bullying

Although bullying is an old problem well known to educators, students, the legal community, and parents everywhere, it is relatively new as the subject matter for liability claims involving school children and school boards.

Bullying is behavior that exhibits a power dysfunction in relationships between persons at any age. Canadian Courts have defined it variously as:

- (a) Conduct which relies on either physical aggression or intimidation;⁴⁴
- (b) Threats of violence against a person as distinguished from verbal taunts meant to embarrass.⁴⁵

Although there are still isolated cases in which the Court denigrates the problem by distinguishing a serious assault from a mere ‘schoolyard fight,’⁴⁶ judges generally recognise that bullying behavior merits sentences that will serve as general deterrence, especially when it affects students entitled, as they are, to be protected from intimidation and violence.⁴⁷ Judges confronted with such cases often comment on the mounting amount of violence in Canadian schools.⁴⁸ However, ‘bullying’ is not a distinct offence under the Canadian *Criminal Code* or the *Young Offenders’ Act*, and there can only be a conviction for behavior that contravenes existing statutory provisions, obviously.

Bullying can describe the actions of an individual or the actions of a group. In its latter manifestation, when several persons together assert dominion over an obviously weaker victim, it takes on its most frightening character. The Alberta Court of Appeal increased the sentence of the main perpetrator of a two-week series of gang assaults, ultimately fatal, on a mentally challenged man living in the community, which the Court described as:

...the bullying one often finds when members of a group, safe and secure in the knowledge they collectively have the ability to overpower their intended victim, decide to assert power and control over another human being with complete disdain for the victims’ feelings.⁴⁹

The horrific British Columbia case of the murder of Reena Virk involved a classic bullying situation: a group of teens, mostly girls, came upon another schoolgirl, Reena, who was not one of the ‘in’ group, and decided to push her around to show their disdain for her or for other even more sinister purposes. In an unprovoked and prolonged attack, they kicked, jumped, and beat her, burned her with a lit cigarette, then two of her attackers finally held her down to drown in the nearby bay. Despite transparent efforts to stick up for each other in court, one of the attackers has already been convicted of second degree murder,⁵⁰ and trials of others are still underway.⁵¹ In another case, even passive participation in a vicious, unprovoked gang attack on students at an after-grad party the judge described as bullying has caused the Court to impose a substantial sentence of imprisonment,⁵² and standing around with a group anticipating a fight is not just a neutral activity, but will certainly justify suspension from school.⁵³

Conversely, being on the receiving end of bullying frequently shows up in judicial descriptions of the backgrounds of young offenders as a contributing factor to explain the young offender’s deviant behavior and to ameliorate sentencing decisions⁵⁴ or to resist being transferred from youth court to adult court.⁵⁵ If being bullied amounts to provocation, it can change the outcome of a criminal trial in favor of the accused who had been victimised by the provocation.⁵⁶ Conversely, if the Court is aware that a young person has a profile of a bully, with scant regard for

the rights of others, sentencing can be more stringent.⁵⁷ On the other hand, a child can become a bully as a reaction to sexual abuse,⁵⁸ and the connection between bullying and sexual assault is recognised.⁵⁹ As a result of society's sensitivity to the negative role bullying can play in a child's life, during custody battles, parents also refer to the bullying their children are subjected to in school that they attend when living with the other spouse, as reason for the Court not to permit the custody arrangement the other spouse is proposing.⁶⁰

As society's tolerance for the physical and sexual abuse of young people becomes ever lower, it is no wonder that bullying is receiving greater attention from educators and parents alike. Most Canadian schools have zero tolerance policies for bullying, but detecting it and dealing with it is not a simple proposition. Even judges can recognise that the criminal justice system can also fall short of offering adequate remedy for bullying and fighting in schools. One judge commented extensively on his concerns about the differential medical and procedural treatment meted out to the participants in a school fight (only one of whom was before him, charged with assault on the other), once they were labeled 'victim' and 'perpetrator':

I immediately acknowledge that violence in schools is perceived as a growing problem. It is also becoming a concern for our courts...there are recent studies which indicate a growing fear among students attending our schools ... It has become widespread that schools are adopting policies concerning the tolerance of violence on school property. The principles involved in those policies are laudable, but the decision-makers at ground level must be aware that criminal prosecution is only one possible form of intervention ... I concede that when the violence is as serious as it was in this case, the police are an obvious option. This fight, resulting in one student blacking out and another having face surgery, cried out for an intervention. Whether or not charges should have been laid by the police, against either or both boys, or whether this case should have resulted in mutual peace bonds, are other worthy questions. Nevertheless, when the criminal justice process is chosen to deal with school incidents (as it was here), the decision-makers must acknowledge that the policy against violence in our schools may affect sentence or disposition, but that policy in no way drives the result on the question of guilt or innocence. The importance of ridding our schools of violence does not direct the court on questions of credibility of witnesses or admission of evidence. Time-honored 'burdens of proof' and rules of evidence inform the task of the court. In short, criminal prosecution may end up being the least effective intervention, because there can be no consequence until there is a finding of guilt.⁶¹

Consistent with the recognition that society as a whole has an interest in maintaining a proper educational environment,⁶² parents are increasingly turning their focus on establishing, in civil court, that the school is responsible when their child is bullied.⁶³

Can such a claim succeed?⁶⁴ In 1996, a Saskatchewan Court struck out a claim that a teacher bullied a student by speaking loudly to the students, as well as for permitting other students to bully her, as disclosing no cause of action.⁶⁵ The Court found the case bordered on a claim for

education malpractice and declined to interfere. In Ontario, in 1995, a school board was held not vicariously liable for the actions of a coach and several teachers in a school in which a student had been injured in a later, escalating attack after a fist fight that had occurred between two boys during a floor hockey game.⁶⁶ However, more recently in Ontario, a Court found that, while there was no cause of action against the school board for suspending an 11-year-old student who had put nails in his teacher's coffee cup because it was essentially a claim for breach of statutory duty⁶⁷, the action in tort could proceed against the child's teacher for yelling at him, intimidating him and denying him an opportunity to be heard before being disciplined.⁶⁸

Schools will be held to high standards in dealing with bullying as well as in dealing with the bullies. Just excluding them from attending school is not the answer. In one surprising Ontario case, a private school for learning disabled children was found liable for a year's tuition for having decided to expel an 8-year-old girl who had, in the hearing of several other children, firmly threatened to bring a knife to school on the next day to stab a girl she disliked. The Court held that, although she did interview the child, who confirmed she made the threat, the principal's failure to consult the parents before expelling the child was arbitrary and constituted a breach of the implied term for procedural fairness in the contract of instruction.⁶⁹

On the other hand, schools that do not discipline strongly enough for bullying on prohibited grounds may be considered to have silently condoned and supported the conduct, since the Supreme Court of Canada in the *Ross* case held that a school board has a duty to maintain a positive school environment, including an environment free of discrimination for all persons served by it.⁷⁰ Students who are subjected to bullying which is based on a prohibited ground in human rights legislation, have still another avenue for redress: the human rights tribunal. It is generally accepted in Canada that schools are places customarily available to the public and thus subject to human rights legislation.⁷¹ Azmi Jubran was taunted and harassed all during his high school years in North Vancouver, B.C. with language and conduct which targeted him as gay, despite the fact that the perpetrators did not believe that he was gay. The school administration and teachers were aware of it and put great effort into addressing the incidents as they occurred, including meeting with the aggressor students and their parents and suspending some of the students for various periods of time. Nevertheless, the B.C. Human Rights Tribunal held the school board liable for the discriminatory behavior of the harassing students because its disciplinary response to the bullying was not up to the standard, 'similar to that of a kind, firm and judicious parent, but must not include corporal punishment', as set out in B.C.'s *School Act*.⁷² The evidence bore out the staff's view that they had done so:

Mr. Jubran's evidence is that virtually every incident of harassment in grades 10, 11 and 12 were reported to the administrators ... Each student was sought out as soon as possible, taken out of class if necessary, and spoken to ... If the incident was found to be substantiated or the student admitted the harassing behavior, he was warned and advised what would happen if he re-offended. If the incident occurred in a classroom, Mr. Rockwell also spoke to the teacher. Each incident was dealt with on its own merits. Mr. Rockwell indicated that, so far as possible, her reported back the results of the investigation and conclusions to Mr. Jubran, offered him support, and told him what disciplinary steps had been taken ... The

administration was proactive in seeking Mr. Jubran out, encouraging him to report, and asking him how he was doing . . .⁷³

The Tribunal recognized that the school's efforts were sufficient, but ordered the school board to pay Mr. Jubran \$4,000 (far less than he had claimed) for injury to his dignity, feelings, and self-respect because it had implemented policies and programs which were too little and too late in Mr. Jubran's case in responding to the pervasive problems an Auditor General's study had found to exist in every B.C. school with ensuring a learning environment safe from 'physical threats, bullying, harassment, intimidation and intolerance'.⁷⁴

It must be remembered that the *Jubran* case involved homophobic bullying, not bullying in other forms. It remains to be seen whether a student can successfully sue a school board for failing to protect him or her from a group of bullies and to provide a safe learning environment. An action of that nature has recently been launched in Ontario by a teenage brother and sister who allege that they were threatened and taunted at school for a period of years, along with being physically assaulted and having their car and property vandalised.⁷⁵ In another recent case, a 15-year-old Halifax, Nova Scotia girl faces criminal charges of extortion, assault and uttering threats three months after a 14-year-old boy she allegedly bullied, Emmet Fralick, committed suicide, leaving a note saying he could not take any more bullying.⁷⁶ It would be surprising if the situation did not also result in civil action by the boy's family against the girl.

Finally, there was the case of two teenaged boys who were suspended from their schools, the one for pulling out a knife he carried in order to protect himself from further bullying, and the other, who had also been repeatedly bullied and intimidated, because he wrote a story for class about a boy who was bullied and who brought a bomb to school. Because of the authorities' assumption that the boy was not just writing a story, but was actually planning to set off a bomb at school, he was arrested and placed for 34 days in pre-trial custody, after which the charges were withdrawn on terms. The father successfully sought injunctive relief against the school board, claiming on the boys' behalf, that the school board should arrange placement for them elsewhere than in one of its schools, in order that they could receive adequate instruction and safe accommodation. The Ontario Court ordered the school board to see that they were able to return to school, reserving, pending further evidence, on whether that should be by way of agreement with a neighboring school jurisdiction or by paying their tuition at a private school.⁷⁷

It is clear that bullying is a pandemic risk for students and one to which neither the legal nor the educational system has found sufficient solutions.

Civil Liability for Educational Risk to Students: Education Malpractice

There is no doubt that there is a right conferred on children to have an education⁷⁸, which consists of the right (and obligation, under compulsory school attendance laws) to be in school and not to be excluded from it. This bare right the Courts will enforce.⁷⁹ The situation is, however, quite different when it comes to the *quality* of that education or the choice of placement, which choice belongs to the school board,⁸⁰ even in the case of a child with special needs.⁸¹

Education malpractice is a tort, which has to date, generated in Canada more smoke than fire. Such a claim is premised on the assumption that a school board or teacher is under a legal duty to exercise reasonable care for a pupil's intellectual and academic interests and that the breach of this duty can give rise to a claim for damages. Like other forms of negligence, professional or otherwise, there are certain basic elements that a plaintiff making such a claim would have to prove:

- (a) a legally recognised duty owed by the defendant to the plaintiff;
- (b) a required standard of conduct and care;
- (c) a failure to conform to that standard;
- (d) harm suffered by the plaintiff capable of legal redress; and
- (e) a causal relationship between the harm suffered and the failure to meet the standard.⁸²

Difficult as these elements would be to prove in a school context, given the multiplicity and elusiveness of factors that explain why children fail to learn at their best,⁸³ plaintiffs face the additional hurdle that, from the earliest attempts to establish the tort of 'education malpractice', e.g. the U.S. case of *Peter W. v. San Francisco Unified School District* (1976),⁸⁴ to the present, the Courts have rejected such claims, citing a 'floodgates' rationale, or policy reasons, or a reluctance (rare for the Courts!) to involve the legal system in educational decisions. As Justice LaForest said for the Supreme Court of Canada in *Jones v. Regina*:

... the Courtroom is simply not the best arena for the debate of issues of educational policy and the measurement of education quality.⁸⁵

The few exceptions occur when the Courts are able to find an alternate basis to education malpractice on which to allow the Plaintiff's claim to succeed. The odd results cannot be better illustrated than by a pair of remarkable U.S. cases issued on the same day in 1984 by the New York Court of Appeals. In *Snow v. The State of New York*,⁸⁶ the deaf plaintiff had been improperly diagnosed as 'retarded' and placed in state schools for the mentally handicapped. The Court upheld his claim for \$1,500,000.00 in damages, characterising the claim as one for 'medical malpractice'. However, in *Torres v. Little Flower Children's Services*,⁸⁷ it rejected altogether the claim of 'education malpractice' advanced by a young ward of the state who had been misdiagnosed as 'retarded' and treated in a similar manner because no one had recognised that his poor test results were due to the fact that he spoke only Spanish.

The reluctance of the Canadian Courts to recognise a claim for education malpractice is complicated by the fact that, in Canada at least, the standard of conduct and care for educators is that of the 'careful and prudent parent' taken from 19th century British law.⁸⁸ Like Section 43 of the Canadian *Criminal Code*, this standard aims at protecting teachers from liability for 'correcting' their pupils:

This concept in its education context apparently originated as a means whereby a teacher or tutor might exercise the powers of restraint and correction over a minor which a parent could exercise without fear of criminal proceedings or civil action being brought against him by the parent.⁸⁹

One U.S. judge spoke to the datedness of this view, preferring to impose a ‘professional’ standard on educators:

In my view, public educators are professionals. They have special training and state certification is a prerequisite to their employment. They hold themselves out as possessing certain skills and knowledge not shared by non-educators. As a result, people who utilize their services have a right to expect them to use that skill and knowledge with some minimum degree of competence ... Moreover, from the fact that public educators purport to teach it follows that some causal relationship may exist between the conduct of a teacher and the failure of a child to learn. Thus, it should be possible to maintain a viable tort action against such professionals for educational malpractice.⁹⁰

A survey of the Canadian cases in the last two to three years in this area, however, shows a continuing reluctance to transfer any of the risk for education shortfalls from students to their teachers or school boards, except, for example, as discussed below, in the exceptional circumstances of the sexual, physical and emotional abuse of aboriginal children in Canada who were confined to residential schools and are now suing the Government of Canada and the various churches who operated the schools.⁹¹

There is a good chance that, no matter how well framed or worthy, claims in educational malpractice will be struck out,⁹² since the Courts take the view that inadequate implementation of an educational program, in whole or in part, does not, on public policy grounds, constitute a basis for tortious liability against a teacher,⁹³ and the same is true even for a claim based on wrong evaluation or misplacement.⁹⁴ At the post-secondary level, Courts are equally reluctant to pass judgment on the nature and quality of the education offered.⁹⁵

Where Courts fail to strike the claim, it is usually because ‘novel legal arguments, even though unlikely to succeed, should not be dismissed out of hand at a preliminary stage’.⁹⁶ In recent years, some applications in Canada to strike have not succeeded; one Court, faced with a motion to strike a claim that a career development school misrepresented a computer network program it offered and had breached its contract with, and fiduciary duty to, the student, dismissed the motion, being of the opinion that

... although educational malpractice has not been accepted as a cause of action in Canada, there might arise a situation in which the court might consider such a cause of action. Matheson J. in *Gould v. Regina (East) School Division No. 77* (1996) 7 CPC (4th) 372 (Sask. Q.B.) stated at p. 384:

It is surely not the function of the courts to establish standards of conduct for teachers in their classrooms, and to supervise the maintenance of such standards. Only if the conduct is sufficiently egregious and offensive to community standards of acceptable fair play should the courts even consider entertaining any type of claim in the nature of educational malpractice.

At this stage, it is not for me to decide the merits of Mr. McKay's case. Although I accept the defendants' submissions that there are constraints upon an action for educational malpractice, I am not convinced that the defendants have established that Mr. McKay's entire claim rests solely upon education malpractice.⁹⁷

Thus, in Canada, the door to education malpractice claims is ajar but still held by a chain lock. It remains for a plaintiff to bring a claim in which the facts show egregious conduct well below the standard of teacher professionalism, which has resulted in measurable, quantifiable damage to a child, in order to test whether the Court will open the door to a worthy claim in education malpractice.⁹⁸

The law has developed in a dramatically different way in the U.K. Most recently, in *Phelps v. Hillingdon London Borough Council et al.*,⁹⁹ the House of Lords considered four cases in which there had been failures, either by the local education authority or by its employees for which it was vicariously liable, in the provision of appropriate educational services for children at school. At trial decision in the *Phelps* case, it was held that the educational psychologist was individually liable for the failure over years to diagnose the child's dyslexia and to provide schooling appropriate to her needs, with the result that she ultimately left school with a reading age of 7.9 years. However, the teachers and the local education authority were not liable. The Court of Appeal dismissed the claim altogether, holding that it was wrong to circumvent the non-liability of the education authority by suing the individual psychologist, who was cleared by the finding that there was no proof that earlier diagnosis would have made a difference.

On the further appeal, the House of Lords held that the psychologist had assumed responsibility for the child and that the local education authority was also vicariously liable for her professional negligence. On similar principles, the claims for direct and vicarious liability on behalf of other children were restored where they had been stuck out in the courts below. In several penetrating analyses of the law of professional negligence in the educational context¹⁰⁰, the Law Lords were clearly agreed that:

- it is well established that persons who are exercising a particular skill or profession, such as an educational psychologist, owe a duty of care to persons to whom it is foreseeable that they will be injured if due skill and care are not exercised – and this applies equally to teachers (para. 45-46, 114), in respect of whom it has long been recognized that they have a duty of care for the physical safety of a child attending school under the charge of that teacher (para. 124)
- the standard of care for teachers is not merely that of a careful parent, as the Court of Appeal had held, but also, like other professionals, 'to exercise the reasonable skills of their calling in teaching and otherwise responding to the educational needs of their pupils' (para. 76)
- this may include a duty of care in common law to take reasonable steps to investigate the reasons for, and to provide for, a child's under-performance (para. 92, 102), in contrast to the Court of Appeal's finding that failure to ameliorate an innate impairment cannot establish proximate cause between the teacher's actions and the injury suffered by the child, since failure to diagnose does not exacerbate the consequences of the child's impaired condition (para. 93-94)

- the duty that a person employed as a psychologist or teacher owes to his employer to perform in accordance with contractual or statutory responsibilities does not mean that no duty of care is owed to the child as well (para. 46, 110, 132, 136)
- just because it will be very difficult to show causation and quantum of damages in such cases, there is no principled reason to rule out such claims (para. 49)
- there is no reason for the Court not to hold the local education authority vicariously liable for the breach of duty of its employees (para. 50)
- the Education Act 1981 requires a local authority to identify and, by seeking advice by a person appointed by the authority, assess any child who it considers has or probably has special education needs, and must then provide for those needs and consult with the parents, who may appeal decisions made (para. 31, 111-113)
- a statutory duty may be breached *per se*, or by the failure to carry out the statutory duty without due care, or by a breach of a common law duty of care which is not inconsistent with the due performance of the duty created by the statute (para. 27)
- there was no need to consider breach of statutory duty in these cases, since the local education authority was vicariously liable for the negligence of its employees (para. 65, 69, 119-121, 138)
- however, an action for breach of statutory duty may lie if it can be shown that Parliament intended to confer on members of a discrete group a private right of action for breach of the duty the statute creates (para. 35)
- in this case, while the duty was to benefit a particular group (special needs children), the 1981 Education Act was providing a general structure for all local education authorities, not a statutory remedy by way of damages (para. 40)
- the fact that a statute permits the use of discretion does not conclude the matter, since if a duty of care would exist where advice was given apart from the exercise of statutory powers, such duty of care is not excluded simply because the advice is given as the result of the exercise of statutory powers (para. 42, 132)

In a remarkable passage on the duty of teachers leading inexorably to the forbidden territory of education malpractice, Lord Nicholls of Birkenhead wrote:

Does a teacher owe a common law duty of care to a pupil who is obviously having difficulty and not making the progress he should? ... They too are professionals. It would make no sense to say that educational psychologists owe a duty of care to under-performing pupils they are asked to assess, but teachers owe no duty of care to under-performing pupils in their charge or about whom they give educational advice under the statutory scheme ... It cannot be that a teacher owes a duty of care only to children with special educational needs. The law would be in an extraordinary state if, in carrying out their teaching responsibilities, teachers owed duties to some of their pupils but not others. So the question which arises, and

cannot be shirked, is whether teachers owe duties of care to all their pupils in respect of the way they discharge their teaching responsibilities. This question has far-reaching implications ... I can see no escape from the conclusion that teachers do, indeed, owe such duties. The principal objection raised to this conclusion is the spectre of a rash of 'gold digging' actions brought on behalf of under-achieving children by discontented parents, perhaps years after the events complained of ... I am not persuaded by these fears. I do not think they provide sufficient reason for treating work in the classroom as territory which the courts must never enter. 'Never' is an unattractive absolute in this context. This would bar a claim, however obvious it was that something had gone badly wrong, and however serious the consequences would be for the particular child...Denial of the existence of a cause of action is seldom, if ever, the appropriate response to fear of its abuse. (para. 114-117)

The learned Law Lord then differentiated and limited claims for education malpractice:

This is not to open the door to claims based on poor quality of teaching. It is one thing for the law to provide a remedy in damages when there is manifest incompetence or negligence comprising specific, identifiable mistakes. It would be altogether different matter to countenance claims of a more general nature, to the effect that the child did not receive an adequate education at the school or that a particular teacher failed to teach properly. Proof of under-performance by a child is not by itself evidence of negligent teaching. There are many, many reasons for under-performance. A child's ability to learn from what he is taught is much affected by a host of factors which are personal to him and over which a school has no control ... Suffice it to say, the existence of a duty of care owed by teachers to their pupils should not be regarded as furnishing a basis on which generalized 'educational malpractice' claims can be mounted. (para. 118, c.f. para. 105, 129-131).

If this approach to the teacher's duty of care were to prevail and overcome the policy hurdles that have precluded claims for education malpractice in Canada and the U.S. thus far, it is still highly unlikely that many claims would ultimately succeed. The battleground in actions for professional negligence against teachers and, vicariously, against their employing school authorities would simply shift from the duty and standard of care to issues of causation and damage¹⁰¹, where, for obvious reasons, the hurdles of proving a claim will remain enormous.¹⁰²

Liability for Breach of Non-Delegable Statutory Duty

The term 'non-delegable duty' is somewhat misleading. As explained in *M.B. v. BC*,

To call a duty non-delegable does not mean that the duty cannot be delegated, but, rather, that ultimate responsibility for the performance of the duty cannot be delegated. Responsibility for the performance of the duty remains with the

delegator who will be held liable in the event that the duty is not performed, or if it is performed negligently or tortiously.¹⁰³

As holds true in the U.K.,¹⁰⁴ but unlike Australia,¹⁰⁵ Canadian law has been slow to recognise claims for breach of statute or for negligent performance of statutory duty, preferring instead to regard such breaches as *evidence* of negligence a claim for which must otherwise be based on principles of common law.¹⁰⁶

However, recent developments, which have stretched the law of vicarious liability to its limits, such as the thousands of aboriginal claims of mistreatment in Indian residential schools, have refocused attention on the need to provide more extensive remedies through different means.¹⁰⁷ For example, in *W.R.B. v. Plint*, the British Columbia Supreme Court held that the Government of Canada had breached its non-delegable statutory duty to the plaintiffs who had been sexually abused in a residential school operated by the United Church of Canada by agreement with the Government of Canada because the *Indian Act* vested in the Government of Canada ‘pervasive control over Indians’ which is not consistent with a delegable statutory duty that could simply be vacated by entering into an agreement with the Church.¹⁰⁸

When parents and students seek to allege negligence or other tortious conduct relating to events at school, it is common to sue the school jurisdiction along with the employees as being vicariously liable for their actions. Vicarious liability is a principle of agency law that says that the employer who does something by the agency of his employee does it himself. It gives a plaintiff access to the deeper pockets of the employer on the basis that, of the two innocent parties to the delict, the employer and the victim, it is generally the employer who should pay. In Canada, as in British law, the employer’s vicarious liability has generally been limited to liability for acts done within the scope of employment or in the form of an unauthorised act, which is nevertheless an improper mode of doing something authorised by the employer. Now the Supreme Court of Canada has expanded the principle to include acts sufficiently related to conduct authorised by the employer, which arise from an opportunity to do or an enhanced risk of doing the wrong which happened, even if unrelated to the employer’s actual intentions. This permitted the Court to find the employer, in this case, a non-profit organisation, vicariously liable for sexual assaults perpetrated upon a young person by one of its employees in a residential care facility it operated in Vancouver for troubled children. This was conduct which, naturally, no employer would authorise or bring within the scope of its employment terms and thus would otherwise not be actionable.¹⁰⁹ It is fairer, in the Court’s view, to place the loss on the employer, which introduced the risk and had the better opportunity to control it, than on the wholly innocent victim. The end, according to the Court, was not only fair and efficient compensation for the wrong, but also deterrence.

The outcome was different in the companion decision of *T.(G.) v. Griffiths*,¹¹⁰ in which the sexual abuse had occurred at an activity centre of the Vernon, B.C. Boys’ and Girls’ Club and associated field trips for the children attending the Club. The Court distinguished *Curry* on the basis that, in that case, the opportunity for the sexual abuse was significantly higher because the employer was a residential facility with round-the-clock responsibility for the young people.

Since teachers have responsibility for their students, which is somewhat intermediate between the circumstances in *Curry* and those in *Griffiths*, these cases leave the law of vicarious

liability no more certain than it was before for teachers and their employing school jurisdictions – and for those who wish to press claims against them.

Another avenue of redress for negligent or intentional delicts is an action against the employer directly, for failure to put adequate protections in place at the time of hiring, failure to supervise or ignoring complaints about an employee's behavior. The evidence for such direct liability may be difficult for a plaintiff to access and, thus far, there are mixed results.¹¹¹ It is easier (but not by much) to establish a nexus between an education employer and the plaintiff student on the basis of fiduciary duty of care.¹¹²

In the last two years, approximately, interest has focused on whether Canadian courts will accept the principle – for which there is already precedent in other common law jurisdictions, such as Australia – of a non-delegable duty of care owed by an employer, such as a school board, whether based on fiduciary principles or on a statute. The answer seems to be: not completely.

One example is *S.G.H. v. Gorsline*,¹¹³ a decision of the Alberta Court of Queen's Bench, in which a former physical education teacher, convicted of criminal sexual assaults on a grade 7 student he was coaching (and for other sexual assaults),¹¹⁴ was found civilly liable to one of the students, but his school board, which had employed him from 1974 until his conduct came to light in 1992, was not liable. The Court found that no one knew or reported his conduct or suspected it of taking the form it did, and students who had heard rumors or observed physical contacts with students, did not tell anyone in authority. The Court held that, while the school board owed the student a duty of care, there was no reason on the evidence to impose strict liability or vicarious liability, since there was insufficient connection between Gorsline's duties and the harm experienced. In addition, the Court said, the harm was not foreseeable back in the 1970s when 'child sexual assault at school was not a live issue'. The Court rejected an argument based on non-delegable duty 'for the policy reasons discussed in determining that the School Board should not be vicariously liable for the intentional torts of its teacher'.¹¹⁵

In the leading decision in this area, *E.D.G. v. Hammer*,¹¹⁶ the British Columbia Court of Appeal split 2-1 over whether a school board had a non-delegable fiduciary duty to a student whom a janitor employed in one of its schools had sexually assaulted on school property while she was in grades 3 and 4 between 1978 and 1980. The lower court had already determined that the school board owed the girl a fiduciary duty, but in the circumstances had not breached it. The majority then rejected an extension of liability based on breach of non-delegable duty:

If a claim for vicarious liability must fail because, in the traditional language, the employee's tort was outside the course and scope of his employment, then any claim for breach of a non-delegable duty of the employer equally must fail. The rationale for breach of non-delegable duty is to extend liability for torts of independent contractors in appropriate cases where there would be vicarious liability if the independent contractor were an employee. I do not think that vicarious liability and non-delegable duty should overlap to permit inconsistent results for the same tort by an employee. The duplication of vicarious liability and non-delegable duty would create doctrinal confusion for no valid policy purpose . . . I am not aware of any case where liability for breach of a non-delegable duty has

been entertained for the tort of an employee where vicarious liability for the employee's tort has been rejected.¹¹⁷

In a vigorous dissent, which may ultimately decide the matter at the Supreme Court of Canada level, Justice Prowse held that the school board had indeed failed in its non-delegable duty of care to protect the girl from harm while she was attending school. After noting that the trial judge had simply found that if the school board's vicarious liability was unsupported by the evidence, so was the claim for non-delegable duty, Justice Prowse drew out the distinction between non-delegable duty of care and vicarious liability:

Breach of a non-delegable duty focuses on the breach by an employer of its personal duty to the victim, whereas vicarious liability focuses on the indirect responsibility of an employer for the acts of its employee ... this is an important distinction.¹¹⁸

She relied upon Australian authorities, which 'most clearly delineate this distinction': *Commonwealth of Australia v. Introvigne*¹¹⁹ and *Kondis v. State Transport Authority*,¹²⁰ and quoted extensively from *Introvigne*:

The liability of a school authority in negligence for injury suffered by a pupil attending the school is not a purely vicarious liability. A school authority owes to its pupils a duty to ensure that reasonable care is taken of them whilst they are on the school premises during hours when the school is open for attendance ... It has been said that the concept of personal duty departs from the basic principles of liability and negligence by substituting for the duty to take reasonable care a more stringent duty, a duty to ensure that reasonable care is taken....the law has, for various reasons, imposed a special duty on persons in certain situations to take particular precautions for the safety of others ... There are strong reasons for saying that it is appropriate that a school authority comes under a duty to ensure that reasonable care is taken of pupils attending the school ... The immaturity and inexperience of the pupils and their propensity for mischief suggest that there should be a special responsibility on a school authority to care for their safety, and that goes beyond a mere vicarious liability for the acts and omissions of its servants ... The fact that the Commonwealth delegated the teaching function to the State [of New South Wales], including the selection and control of teachers, does not affect its liability for breach of duty. Neither the duty, nor its performance, is capable of delegation.¹²¹

In *E.D.G. v. Hammer*, the school board had taken the position that the question of non-delegable duty did not arise between it because it had never delegated any supervision over the girl to the janitor, but the dissenting judge rejected that proposition as suggesting that a school board's liability could only be found to exist where there was a specific fiduciary or parent-child relationship between the tortfeasor and the complainant.¹²² The obvious implication of that would be severely to curtail liability of a school board for the harm caused to students by any of its non-

teaching staff and is not tenable as a matter of public policy, nor consistent with the statutory duties imposed on school boards. To refute the proposition, Justice Prowse referred to *Lewis (Guardian ad litem of) v. B.C.*,¹²³ in which the Supreme Court of Canada had established that the B.C. Ministry of Highways had a non-delegable statutory duty of care, arising from sections of the *Ministry of Transportation and Highways Act*, RSBC 1979, c. 280, towards motorists using the highway and was therefore liable for the death of a motorist killed by a rock that fell onto the highway as a result of an independent contractor's negligence. The Court recognised the principle of such statutory duty as having been established in Australia by *Kondis*.¹²⁴

Next, Justice Prowse completed the move from non-delegable fiduciary duty to non-delegable statutory duty by pointing to the extensive statutory provisions governing the responsibilities of school boards in British Columbia (and in the other provinces and territories) and, in addition, the compulsory school attendance provisions of the *School Act*, which leave parents and children with no choice but to attend school (with limited exceptions for home schooling). She concluded:

In my view, it is reasonable to conclude that where the legislature gives a Board de facto supervisory powers over the schools in its district, including the power to hire and fire support staff, and where children within the district are statutorily compelled to attend these schools and abide by the directions of their teachers while there, the Board has a non-delegable duty to ensure that reasonable care is taken for the safety of those children while on school premises. Absent statutory language indicating a contrary intent, this duty would exist whether the claim against the Board arose in negligence or as a result of an intentional tort on the part of one of its employees ... In this case, although Mr. Hammer was not hired to perform child-care responsibilities, he was hired to do a job which placed him in daily proximity with young and vulnerable children ... She was repeatedly victimized by a person hired by the Board, the very entity charged with the responsibility to provide a safe learning environment ... In my view, it would be surprising, if not repugnant, to find that the Crown is responsible for taking reasonable care to ensure the safety of motorists who travel on its highways, but that School Boards, statutorily mandated to supervise children who are statutorily compelled to be under their care, are not similarly responsible for their safety. The duty is a direct duty which cannot be avoided by delegating the responsibility for certain necessary administrative acts to its employees ... the conclusion, which rests thus far on the construction of the relevant legislation, is also supported by policy considerations....Although the Australian cases dealt with situations involving negligence, rather than intentional torts, the policy considerations remain persuasive.¹²⁵

Strangely enough, in two companion cases released on the same day as *E.D.G. v. Hammer* by the British Columbia Court of Appeal, *K.L.B. v. BC*¹²⁶ and *M.B. v. BC*.¹²⁷ the Court, in the first case, found the Crown not vicariously liable, but liable under non-delegable duty, because the foster parents were related to the Crown, not by way of an employer-employee relationship, but by

way of a relationship more akin to that of independent contractor.¹²⁸ In the second case, Justice Prowse, this time writing the majority decision for herself and Justice MacKenzie, found the Crown to be both vicariously liable and liable under its non-delegable duty of care to the foster child.¹²⁹

Thus the law on non-delegable statutory duty remains unclear until the Supreme Court of Canada decides the issue. At present, non-delegable statutory duty appears to be limited, except in Justice Prowse's dissent, to cases in which an independent contractor relationship characterises the defendants' legal position. This is, of course, seldom the case in the school context, at least with respect to the major players of school board, teachers or administrators, where the relationships are employer-employee. But there is more. As the amendments to the Alberta *School Act*, referred to at the outset of this article show, Canadian legislatures are alive to the need to ensure that the responsibilities of the education community to students are properly defined in accordance with society's expectations. That being the case, it is not satisfactory that the courts should ignore the statutory provisions in defining the duty or standard of care in civil claims against education authorities and their employees. The authors agree with the dissenting judge in *E.D.G. v. Hammer* that the Canadian Courts should look to the statutory regime in order to determine the scope of school board duty of care to the students in its charge, not just to the actions of school board employees. Principles of non-delegable statutory duty can usefully be applied to refocus the attention of the legal system and school authorities to their profound duty to reduce risks to students and to keep them safe from harm.

Endnotes

1. *School Act*, Revised Statutes of Alberta, 2000, Chapter S-3, with amendments in force as of February 1, 2002.
2. *Alberta School Act*, 2002, Section 45(7).
3. *Ibid*, Section 46(1).
4. *Ross v. New Brunswick School District* [1996], (SCJ), No 40 at para. 43, [1996] 1 SCR 825.
5. *Protecting Our Students: A Review to Identify and Prevent Sexual Misconduct in Ontario Schools*, The Honorable Sydney L. Robins, Queen's Printers, Toronto, 2000, p. 373.
6. *Criminal Code* of Canada, 1982, 1970, c. C-34, s. 151.
7. *Criminal Code* of Canada, 1983, Section 153 (1)(a).
8. *R. v. Audet* [1996], SCJ No 61; [1996] 2 SCR 171. (After two acquittals in lower courts, the Supreme Court found Audet guilty of sexual exhibition. The court determined that he was in a position of trust and authority.)
9. *Ibid*, para. 43.
10. *Ibid*, para. 25.
11. *Audet* [1997] (DATNB) No 25 (NB: Durette).
12. 'Notes passed in school ended in pregnancy', *Edmonton Journal*, December 12, 2000.
13. *Ibid*.
14. 'Teacher acquitted in sex case', *Edmonton Journal*, December 14, 2000.
15. *Ibid*.

16. *SJH [Holt] v. Gorsline* [2001], AJ No 263 (Alta. Q.B.).
17. *R. v. Gorsline* [1993] AJ No 961 (Alta. Prov. C.T. – Crim. div.).
18. *SJH [Holt] v. Gorsline*, op cit, para. 43 and 44.
19. *Criminal Code* of Canada, Section 265(1).
20. *Teachers' Rights, Responsibilities and Legal Liabilities*, Edmonton, Alberta Teachers' Association, 1999.
21. *Criminal Code* of Canada, Section 43.
22. *Canadian Foundation for Children, Youth and the Law v. The Attorney General in Right of Canada* [2002], OJ No 61, (Ont. C.A.).
23. Ibid para. 3.
24. Ibid, para. 29.
25. Ibid para. 49.
26. *R. v. Graham* [1994], NBJ No 335 (NB Prov. Ct.).
27. Ibid para. 47.
28. *R. v. Occampo* [1997] OJ No 4936 (Ont. CJ).
29. Ibid para. 103 and 104.
30. *R v. White* [1997] OJ No 146 (Ont. C.J.).
31. Ibid para. 29.
32. Ontario Regulation 437/97, *Ontario College of Teachers Act*, 1996, 'Professional Misconduct'.
33. *Teaching Profession Act*, Government of Alberta, 1996.
34. *Code of Professional Conduct*, Alberta Teachers' Association.
35. *Jaster v. Professional Conduct Committee*, praxis.
36. *J.G. v. Ontario College of Teachers* [2002], OJ No 2329, (Ont. SCJ).
37. Ibid para. 33.
38. Ibid para. 34.
39. *Sclater v. Ontario College of Teachers* [2000] OJ No 1428, (Ont. SCJ).
40. Ibid para. 33.
41. Ibid para. 35.
42. *Dunlop v. The Alberta Teachers' Association* [2001], from transcript, (Alta. QB).
43. Ibid.
44. *R. v. S.W.* [1993] AJ No. 226 (Prov. Ct.) (son acquitted of threatening his mother with bodily harm because she had taunted him); *R. v. M.J.* [2000] OJ No. 493 (Ont. CJ) (Grade 9 girl used her friends to intimidate a younger girl at school and was convicted of uttering threats to cause bodily harm)
45. *Arishenkoff v. B.C.* [2002] BCJ No. 659, para. 58 (BCSC) (apprehension in 1953-59 of Doukhobor children)
46. *R. v. Ricker* [1992] OJ No. 2819 (Ont. CJ-Gen.Div.); the distinction is discussed in *R. v. T.E.* [1997] OJ No. 3146 (Ont. CJ-Prov. Div.); *R. v. J.M.* [2001] OJ No. 3752 (Ont. CA). See also Maurice Green, 'Consent as a Defence in a Fistfight between Minors', 6 *Education & Law Journal* 115, a case comment on *R. v. W.(G.)* [1994] 18 OR (3d) 321 (CA), which foreclosed the defence of consent of the

complainant where the accused intends to do bodily harm and bodily harm results. When no such intention is present, however, consent to a 'schoolyard scuffle' may still operate as a complete defence for an accused under the age of 18.

47. The authors recognise the distinction between aggressive acts, such as fighting and bullying, which are usually a more insidious form of repetitive behaviors, including isolation, labeling, intimidation, verbal threats, denigration, teasing and physical assaults resulting from a perceived imbalance of power between a group and an isolated student, as explained in several of a valuable series of articles on bullying in Australian schools, published in ANZELA Reporter, vol. 5, no. 1 (October, 1998). However, when bullying manifests itself in overt acts, which attract the attention of law enforcement authorities, it is then one or more of 'assaults' or 'threats' and the law treats it as such, rather than as a different species of invasive and punishable behavior. Intervention by the school or law enforcement authorities stops the aggressive acts, but can drive bullying underground: K. Healy, 'Addressing Bullying at the School Level through Multiple Systems', ANZELA Reporter, vol. 5, no. 1, p. 18 at p. 19.
48. *R. v. L.B.* [1993] OJ No. 271 (Ont. CA); *R. v. L.B.* [1992] OJ No. 3807 (Ont. CJ-Prov. Div.) *R. v. D.C.* [1996] OJ No. 1590 (Ont. CJ-Prov. Div), esp. para. 19 ff.
49. *R. v. MacIntyre* [1992] AJ No. 1088, at page 3 (Alta. CA) (acting in concert to subject a mentally handicapped man to a series of assaults leading to his death is a serious aggravating factor and reason to increase the sentence imposed at trial to 20 months imprisonment).
50. *R. v. Glowatski* [2001] BCJ No. 2499 (BCCA), dismissing the appeal of conviction in [1999] BCJ No. 1278 (BCSC).
51. *R. v. Ellard* [2002] BCJ No. 184 (BCCA); [2000] BCJ No. 683 (BCSC).
52. *R. v. Keizer* [1983] AJ No. 207 (Alta. CA) (four years for standing by with a club on his shoulder while the accused's brother and a friend beat and maimed a student).
53. *Hopkins (Guardian ad litem of) v. Mission School District No. 75* [1998] BCJ No. 568 (BCSC) (student's five-day suspension for watching a gang assault at school was not mere watching but provided encouragement and added to the intimidation, thus justifying the trustees' action).
54. *R. v. Mo* [2002] AJ No. 296 (Alta. CA) (sentence reduced for an accused student who attacked a pregnant woman with a pipe during a robbery because he was carrying it due to his fear of attacks after racist comments were directed at him at school); *R. v. D.C.* [1996] OJ NO. 1590 (Ont. CJ-Prov. Div.) (accused acquitted of assault in school fight because his 'victim' had escalated the confrontation by hitting him hard with textbooks).
55. *R. v. P.P.* [1994] BCJ No. 150 (BCSC); *R. v. K. (N.A.)* [1991] BCJ No. 2606 (BCSC).
56. *R. v. S.J.C.* [1992] AJ No. 976 (Alta. CA) (murder conviction reduced to manslaughter because the victim had repeatedly made bullying remarks to his younger brother, the accused, which left a reasonable doubt as to whether the accused was out of control at the time he delivered the fatal blow, rather than intending to deliver it).
57. *R. v. T.S.D.* [1965] OJ No. 406 (Ont. CA).
58. *K.G. v. J.T.* [1992] BCJ No. 1365 (BCSC) (incest between age 5-12 by great uncle in civil case in which the young person was awarded \$45,000 in non-pecuniary damages, \$26,000 for past loss of income, \$24,000 for future care, \$15,000 for reduced income during treatment, and \$5,000 in punitive damages).
59. *R. v. D.M.* [1998] BCJ No. 1330 (BCCA) (young offender's sentence for sexual assault adjusted from 18 to 12 months for counseling in light of his background); *R. v. Ittinuar* [1993] NWTJ No. 48 (NWTSC) (women are entitled to protection from bullying and sexual assault as visited by the accused)

on his victim); *R. v. Paul* [1999] OJ No. 5148 (Ont. CJ) (Court labeled accused a bully and would have sentenced him to more time for the assault but for a joint sentencing submission).

60. *Driver v. Driver* [2000] BCJ No. 1612, para. 67 (BCSC).
61. *R. v. D.C.* [1996] OJ No. 1590 (Ont. CJ-Prov. Div.), para. 19-22.
62. *R. v. D.C.* [1996] OJ No. 1590 (Ont. CJ-Prov. Div.), para. 20.
63. This is especially important for families faced with the costs of injuries, since if a schoolyard fight is deemed to have been consensual, homeowner's insurance will not cover the damage, even if it can be shown that the extent of the ultimate injuries far exceeded what the combatants intended. *Buchanan v. GAN Canada Insurance Co.* [2000] 50 OR (3rd) 89 (CA).
64. A number of cases from the U.S. and Australia where claimants have successfully sued school authorities for failing to protect them from a hostile school environment in which they were bullied or physically and sexually assaulted are summarised and discussed in: D. Stewart, 'Student Sexual Harassment', ANZELA Reporter, vol. 5, no. 1, pp. 32-42 (October, 1998).
65. *Gould v. Regina (East) School Division No. 77* [1996] SJ No. 843 (Sask. QB).
66. *Walsh v. Buchanan* [1995] OJ No. 64 (Ont. CJ – Gen. Div.).
67. See the section below on non-delegable statutory duty.
68. *A.S. (Litigation Guardian of) v. Toronto District School Board* [2001] OJ. No. 3669 (Ont. S.C.J.).
69. *Gianfrancesco v. Junior Academy Inc.* [2001] OJ No. 2730 (Ont. Sup. Ct. J.).
70. *Jubran v. North Vancouver School District No. 44* [2002] BCHRTD No. 10, para. 95, 102, 116 (BC Human Rights Tribunal), referring to *Ross v. New Brunswick School District No. 15* [1996] 1 SCR 825.
71. *Schmidt v. Calgary Board of Education and Alberta Human Rights Commission* [1975] 6 WWR 279 (Alta. SC), affm. on other grounds [1976] 6 WWR 717 (Alta. SCAD).
72. *Jubran v. North Vancouver School District No. 44* [2002] BCHRTD No. 10, para. 121.
73. *Jubran v. North Vancouver School District No. 44* [2002] BCHRTD No. 10, para. 130, 133.
74. *Jubran v. North Vancouver School District No. 44* [2002] BCHRTD No. 10, para. 206, 213-15.
75. Reported in the Globe and Mail newspaper on July 19, 2002, the action is between David and Katherine Knight and the Halton District School Board.
76. Reported in the Edmonton Journal newspaper on July 23, 2002.
77. *E.B.J. (Litigation guardian of) v. Upper Canada District School Board* [2001] OJ No. 4174 (Ont. SCJ).
78. *McLeod v. Board of School Trustees of School District No. 20* (Salmon Arm) [1952] 2 DLR 562 (BCCA); *Wilkinson v. Thomas* [1928] 2 WWR 700 at 701 (Sask. KB) (compulsory attendance provisions give a right which 'is the right of the child itself to receive proper instruction, and it is not a matter left in the discretion of the parent or in the school board').
79. E.g. *Mills v. Board of Education of the District of Columbia*, 348 F. Supp. 866 (1972), in which the U.S. Court held that exclusion of children from school without provision for adequate and immediate alternative measures constitutes a denial of due process and equal protection of the law.
80. *Patrick v. Trustees Yorkton School District No. 159* (1914) 6 WWR 1107 (Sask. SC); *Damus v. Board of Trustees of St. Boniface School Division No. 4* [1980] 3 WWR 197 (Man. QB).
81. *Bales v. Board of School Trustees, School District 23* (Central Okanagan) (1984) 8 Admin. LR 202 (BCSC) (separate schools for mentally challenged children are not necessarily harmful, so that a claim in negligence will not succeed without more).

82. For a full discussion of these elements, see James W. Rea and Sandra M. Anderson, 'Education Malpractice: What's in Store for Canada?' in: 1990 CAPSLE Proceedings, ed. William F. Foster, pp. 162-195.
83. As it was eloquently put by a U.S. judge: 'As delicate a balance exists in attempting to develop a child's body as in attempting to develop his mind. How to maintain that balance is largely a matter of judgment. To the extent that each child is given personal attention, thirty-nine others may be deprived. Which need is given preference upon a given time is a decision made hundreds of times a day by a teacher ... In making sensitive 'judgment calls' a teacher must not be made aware of the precariousness of his position, as was Damacles, beneath some economic falchion suspended by the hair of hindsight'. *Berg v. Merricks*, 20 Md. App. 666, 318 A.2d. 220 at 227 (1974).
84. 60 Cal. App. 3d., 131 Cal. Rptr. 854 (boy graduated from high school able to read only at a fifth grade level, and unsuccessfully sued the school district for negligently depriving him of basic academic skills and for intentionally misleading him by representing him to be functioning at or near grade level).
85. [1986] 2 SCR 284 at 304.
86. 469 N.Y.S. 2d 959 (App. Div. 2 Dept. 1983), aff. 485 N.Y.S. 2d 987 (Ct. App. 1984).
87. 474 N.E. 2d 223 (N.Y. 1984).
88. In *Williams v. Eady* [1893] 10 T.L.R. 41 (HL), Lord Esher imposed liability on a teacher for injury to a pupil from phosphorus negligently left within his reach with these oft-quoted words: 'The schoolmaster was bound to take such care of his boys as a careful father would take of this boys and there could not be a better definition of the duty of the schoolmaster'.
89. *Sutcliffe v. Governors of Acadia University* [1978] 95 DLR (3d) 95 at 99 (NSCA).
90. Davidson J., dissenting in *Hunter v. Montgomery County Board of Education*, [1982] 439 A.2d. 582 at 589.
91. *Rumley v. British Columbia* [2001] SCJ No. 39 (class action permitted to proceed); re: Indian Residential Schools [2000] AJ No. 638, at para. 58 (Alta. QB) (application to strike portions of pleadings grounded in educational malpractice and inadequate education denied because they are inextricably interwoven with the claims for breach of fiduciary duty and breach of Treaty claims).
92. As in *Gould v. Regina (East) School Division No. 77* [1996] SJ No. 843 (Sask QB); c.f. *Dassonville-Trudel (Guardian ad litem of) v. Halifax Regional School Board* [2002] NSJ No. 149 (NSSC) (application for mandamus to compel school board to comply with child's IPP dismissed).
93. *Haynes (Guardian ad litem of) v. Lleres* [1997] BCJ No. 1202 (BC Prov. Ct.) (allegation that teacher failed to teach 30% of a course, thus subjecting the student to foreseeable risk of educational harm, dismissed, along with claims that the school board was vicariously liable, unless gross negligence were proved under s. 112(2) of the B.C. *School Act*).
94. *Hicks v. Etobicoke (City) Board of Education* [1988] OJ No. 1900 (Ont. Dist. Ct. – York JD) (claim for damages for improper placement and breach of statutory duty dismissed); *Suriano v. Hyde Park Central School District*, 611 NYS.2d. 20 (A.D. 2 Dept. 1994) (claim for failure to discover and properly treat child's learning disability was solely one for education malpractice and must be dismissed).
95. *Wong v. University of Toronto* [1989] OJ No. 979; (1989) 79 DLR (4th) 652 (Ont. Dist. Ct. – York JD). (no cause of action for educational malpractice); *Quesnel v. Assn. des Jeunes de la Rue* [2001] OJ No. 2987, at para. 19-25 (Ont. SCJ) (no defined general duty of care owed to students by post-secondary institutions).
96. *Olar v. Laurentian University* [2001] OJ No. 5575 (Ont. SCJ).

97. *McKay v. CDI Career Development Institutes Ltd.* [1999] BCJ No. 561, at para. 18-19 (BCSC).
98. The wholesale exclusion of such claims by the Canadian Courts has been criticised by OISE staff member Sonia Ben Jaarar in 'Fertile Ground: Instructional Negligence and the Tort of Educational Malpractice'. 12 *Education & Law Journal* 1. In *Concerned Parents for Children with Learning Disabilities Inc. v. Saskatchewan (Minister of Education)* [1998] SJ No. 566 (QB), the Court decided that the claim for failing to accommodate the needs of children with learning disabilities within the public school system could proceed to trial, largely on the basis that the claim relied on the equality rights found in the *Canadian Charter of Rights and Freedoms*, s. 15.
99. [2000] HLJ No. 49; [2000] 4 All ER 504 [HL].
100. Building on the decision by the House of Lords in *X (Minors) v. Bedfordshire County Council* [1995] 3 All ER 633, on appeal from *E (a minor) v. Dorset County Council and other appeals* [1994] 4 All ER 640 (CA), all of which involved applications to strike out claims based in all or some part on education malpractice.
101. And possibly the ambit of those who can claim may be extended to include *parents*. Shortly after *Phelps* was decided, the House of Lords allowed the appeal of parents from a strike out of their claim in negligence, independent of their children's, against a council and a social worker who, without informing the parents, had placed a foster child in their home who had a history of serious sexual crimes. When they learned that he had sexually abused their children, they suffered psychiatric injury and the break-up of the family and claimed damages as primarily, not just secondarily, injured by the negligence of the defendants: *W. v. Essex County Council* [2000] 2 All ER 237 (HL).
102. For a thoughtful analysis of the shortcomings of implementing a tort of education malpractice in creating a balance between society's interests in protecting school institutions and the best interests of children, see: S. Sydor, 'Within the Limits of the Law: Is there a Rational Approach to Educational Malpractice?' in: 1994 CAPSLE Proceedings, ed. William F. Foster, pp. 324-333; also see J. Holloway, 'The Rights of Individuals who Receive a Defective Education' in: 1994-95 16 *Education & Law Journal*, pp. 279-299, who advocates, for England, a legislated compensation remedy, while acknowledging that this would 'involve public expenditure on damaged individuals rather than on the public as a whole'.
103. [2001] BCJ No 586, at para. 73 (BCCA)
104. In *X (Minors) v. Bedfordshire County Council* [1995] 3 All ER 633 (HL), the traditional view prevails: a private right of action will lie for negligent performance of a statutory duty, 'simply because careless performance of the act amounts to common law negligence and not because the act is performed under statutory authority', at para. 4. A common law duty of care may co-exist with a statutory duty; in either case, once there is 'some duty of care to a pupil in relation to his educational well being', a claim will not be struck out, at para. 118. However, a claim which rests solely on a breach of statutory duty and the exercise of statutory discretion will be struck out, at para. 134, 139.
105. See below.
106. *Canada v. Saskatchewan Wheat Pool* [1983] 1 SCR 205 (statutory breach not giving rise to a cause of action, where no negligence pled into which the civil consequences of a statutory breach could be subsumed. Breach of statute provides a useful specific standard of conduct).
107. See Hon. Sydney L. Robins, 'Protecting Our Students', a report commissioned by the Government of Ontario (Toronto: Queen's Press, 2000); Jim Davies, 'Sexual Abuse of Children by Teachers' (2000-2001) 11 *Education & Law Journal* 131.

108. *W.R.B. v. Plint* [2001] BCJ No. 144, at para. 255 (BCSC) (Canada was guardian of the plaintiffs and owed them a duty of special diligence because of its control over selection of staff and placement of students and its regular inspections, para. 323, but the Court dismissed punitive damages because, although Canada breached its non-delegable statutory duty and was also vicariously liable, there was no misconduct on their part; the loss was allotted to Canada solely on legal principles and by reason of the relationship between the defendants, the tortfeasor Plint, and the plaintiffs, at para. 419. Canada was 75 percent liable, the United Church of Canada 25 percent).
109. *B.(P.A.) v. Curry, aka Bazley v. Curry* [1999] 2 SCR 534.
110. [1999] 2 SCR 570.
111. *M.(K.) v. M.(H.)* [1992] 96 DLR (4th) 289 (SCC) (because of the special fiduciary relationship between parent and child, incest is a breach of fiduciary duty, so as to overcome the hurdles of the limitation period where the child's memory has for many years been repressed, as well as a tort of assault and battery); *K.L.B. v. BC* [2001] BCJ No. 584 (BCCA) (Crown liable under a 'special diligence' standard taken from the *Protection of Children Act*, RSBC 1960, c. 30-33, for failing to supervise foster parents who had been seriously negligent in carrying out their responsibilities, but there was no breach of fiduciary duty on the part of the negligent social workers); *A.(C.) v. Critchley, aka A.(C.) v. C. (J.W.)*, [1998] 166 DLR (4th) 475 (BCCA) (although Crown did not keep proper records and failed to investigate complaints, Crown not liable where at trial no findings of negligence against the employees for lack of care alone and excessive physical discipline had been made); *Roose v. Hollett* [1996] 154 NSR (2d) 161 (NSCA), leave to appeal to SCC refused (1997) 160 NSR (2d) 80n (Crown liable to female complainant for abuse by male counselor in a Crown facility, which occurred after credible evidence of his wrongdoing had been received, yet he was permitted to continue in his employment).
112. *Muir v. Alberta* [1996] (Crown liable for significant damages for its misdiagnosis and placement of normal child in an institution for 'mental defectives', including poor schooling); *A.J. v. Cairnie Estate* [1999] MJ NO. 176 (Man. QB), reversed [2001] MBCA 59 (Man. CA) (Crown not liable for negligence of social worker in ignoring the complaints of a young girl in her caseload that she was being molested by her stepfather, since although the social worker was known to have alcohol abuse and absenteeism problems, there was no proof that the failure to supervise her adequately led to Mrs. Cairnie's negligent acts).
113. [2001] AJ No. 263; [2001] 6 WWR 132 (Alta. QB).
114. *R. v. Gorsline* [1993] AJ No. 961 (Alta. Prov. Ct.-Crim. Div.) (sentenced to 8 years consecutive for 4 counts of sexual assault for molesting students aged 12-14, the Court finding, at para. 11, 14, that 'in certain respects the trust obligations towards them as their teacher exceed even that of parents towards their children. The victims' abilities to withstand the illicit overtures and advances in many situations would be weaker than in almost any other example of predatory transgression, bearing in mind the profound effect a teacher could have on their futures ... as a matter of law, lasting and harmful emotional and psychological trauma to the victims is to be assumed unless the accused establishes otherwise').
115. [2001] AJ No. 263, at para. 120.
116. [2001] BCJ No. 585; [2001] 5 WWR 70 (BCCA) (leave to appeal to SCC granted).
117. [2001] BCJ No. 585, at para. 75, 79.
118. [2001] BCJ No. 585, at para. 30.
119. [1981-82] 150 CLR 258 (Aust. HC) (Commonwealth found liable for injury to teenage student when a schoolyard flagpole on which he had been swinging, fell on him because of its non-delegable duty to ensure reasonable care is taken of students, not because of any vicarious liability for the acts or

omissions of the teachers, who were not employed by the Commonwealth anyway, but by the State of New South Wales).

- 120.[1984] 154 CLR 672 (Aust. HC) (employer found liable for the injury on the job of its employee based on the negligence of an independent contractor hired by the employer, based on a non-delegable duty to provide a safe work system).
- 121.[1981-82] 150 CLR 258 at 269-70 (Aust. HC).
- 122.[2001] BCJ No. 585, at para. 35-36.
- 123.[1997] SCJ NO. 109; [1997] 3 SCR 1145.
- 124.*Kondis v. State Transport Authority* [1984] 154 CLR 672 (Aust. HC), described *supra*.
- 125.[2001] BCJ No. 585, at para. 50, 54-56, 62.
- 126.[2001] BCJ No. 584 (BCCA)
- 127.[2001] BCJ No. 586 (BCCA). Leave to appeal to SCC granted.
- 128.*K.L.B. v. BC* [2001] BCJ No. 584, at para. 27. Chief Justice McEachern dissented on this point. Ultimately, all but one sexual abuse claim were disallowed because they were time-barred. Leave to appeal to SCC dismissed.
- 129.*M.B. v. BC* [2001] BCJ No. 586, at para. 83-84. However, Justice MacKenzie found liability under the principle of non-delegable statutory duty only, at para. 90, while Chief Justice McEachern continued his cautions about ‘this expanding search for legal liability’, at para. 117, and rejected no-fault liability as imposing a higher standard on the Crown than would be imposed on the parents themselves, at para. 144, pointing out that ‘circumstances that may give rise to no-fault liability on the part of the Superintendent [of Child Welfare] for minor or serious injury are ubiquitous in every family setting. I do not find in the language of the *Act* any expectation that the Superintendent would have such a measure of control over the conduct of the family home that might be expected, for example, in the maintenance of a highway or in an institutional setting’, at para. 156.

