
THE OTTAWA REGION CHURCH & CHARITY LAW™ SEMINAR

Ottawa – February 6, 2008

Sexual Abuse of Minors – Navigating the Flood

By David Sherriff-Scott

Partner, Borden Ladner Gervais LLP, Ottawa

CARTERS™.ca

CARTERS PROFESSIONAL CORPORATION

Société professionnelle Carters

Barristers, Solicitors & Trade-mark Agents

Affiliated with **Fasken Martineau DuMoulin LLP**

Avocats et agents de marques de commerce

Affilié avec Fasken Martineau DuMoulin S.E.N.C.R.L., s.r.l.

Offices / Bureaux

Ottawa (613) 235-4774

Mississauga (416) 675-3766

Orangeville (519) 942-0001

Toll Free: 1-877-942-0001

By Appointment / Par rendez-vous

Toronto (416) 675-3766

London (519) 937-2333

Vancouver (877) 942-0001

www.charitylaw.ca™

Lawyers - Patent and Trade-mark Agents

Sexual Abuse of Minors: Navigating the Flood

Presented to Carters Professional Corporation
Church & Charity Law Seminar: Recent
Developments
February 6, 2008
David Sherriff-Scott

Lawyers • Patent and Trade-mark Agents

Lawyers - Patent and Trade-mark Agents

Background

- Legal claims for sexual abuse of minors have skyrocketed over the last two decades. Why?
- Population growth.
- Changing social/familial dynamics.
- Greater awareness caused by large scale scandals in Canada/United States.

2

Lawyers - Patent and Trade-mark Agents

- Resultant studies, investigations and inquiries.
 - Rix Rogers Report
 - Winter Report
 - Bagdley Report
 - CCCB: From Pain to Hope
 - Kaufman Report
- Higher judicial damage awards for general damages coupled with successful claims for long-term economic damage caused by perpetrators.

3

Layman - Patent and Trade-mark Agents

Who Are The Perpetrators

- Historical preconceptions
- Current understanding
- Pedophiles/Hebephiles
- Grooming
- Access/opportunity

4

Layman - Patent and Trade-mark Agents

Conceptual Basis of Liability for Abuse Perpetrated by Employees, Agents or Volunteers

- **Negligence**
 - Proximity
 - Foreseeability
 - Duty of care
 - Damages

5

Layman - Patent and Trade-mark Agents

Vicarious Liability

- What happens when an organization takes all reasonable and prudent steps to avoid abuse and is not negligent? Can it still be found liable for the acts of its employees or volunteers?

6

Layman - Patent and Trade-mark Agents

Vicarious Liability: What Is It?

- How does it operate and why?
- Does it apply to charities/non-profits?
- Does it only apply to employees?

7

Layman - Patent and Trade-mark Agents

- Vicarious liability is a judicial tool for the allocation of loss.
- It is a social policy choice allocating victims' losses to the person/organization most able to bear them.
- It does not require fault. It does not require negligence.


8

Layman - Patent and Trade-mark Agents

- Therefore, when an organization's employee commits a wrong, and the organization is free from fault or negligence, it may still bear the victim's loss because the courts have concluded:
 - Vicarious liability improves the chances of an innocent victim recovering losses
 - Since an employer introduces an "enterprise" in the community which may carry certain risks, it is fair for the employer to bear a loss if the risk materializes.

9


Layton - Patent and Trade-mark Agents



10

- Employers are better able to spread losses through insurance, higher prices, contractual indemnities, etc.
- Visiting liability on an employer increases deterrence because employers are often in the best position to take active steps to control circumstances which give rise to abuse

Layton - Patent and Trade-mark Agents




11

"If sexual predation is to be stamped out, there must be a powerful motivating factor acting on those who can control it."

Bazley v. Curry, [1999] 2 SCR 534


Layton - Patent and Trade-mark Agents



12

- When will a court find and impose vicarious liability on an employer for the acts of an employee or volunteer?
- The fundamental question is whether the wrongful act is sufficiently related to conduct authorized by the employer.
- There must be a significant connection between the creation or enhancement of a risk and the wrong that happens, even if unrelated to an employer's desire.


Lawyer - Patent and Trade-mark Agents



13

- To determine whether there is sufficient connection between the enhanced risk and the wrong complained of, the courts will look at the following factors:
 - The opportunity that the enterprise afforded the employee to abuse his or her power. "Mere opportunity" is not enough. A random attack unrelated to the business conducted by an employer will not justify vicarious liability.

Lawyer - Patent and Trade-mark Agents




14

- The extent to which the wrongful act may have furthered the employer's aims.
- The extent to which the wrongful act was related to friction, confrontation or intimacy inherent in the employer's enterprise.
- The extent of power conferred on the employee in relation to the victim.
- The extent of the vulnerability of potential victims through wrongful exercise of the employee's power.

Lawyer - Patent and Trade-mark Agents


Example 1 – Vernon Boys & Girls Club



15

- Vernon Boys & Girls Club, incorporated as a non-profit. Its objects were to provide behaviour guidance, social education, vocational and character development of boys and girls. The Club operated a recreational facility.
- The Club employed two salaried employees, a Director of Operations, Griffiths, and an Executive Director. Otherwise, it used volunteers.


Lawyer - Patent and Trade-mark Agents



- Griffiths' employment activities were to supervise volunteers, organize recreational outings and to create a positive rapport with children at a recreational facility.
- Griffiths abused two teens attending the recreational facility. The abuse occurred at Griffiths home outside the facility and its operational hours.
- Was the Club vicariously liable for the intentional wrongdoing of Griffiths?

16


Lawyer - Patent and Trade-mark Agents



- No. Why?

17

Lawyer - Patent and Trade-mark Agents



- Mere opportunity not enough.
- No supervisory role re children, no special opportunity for intimacy, control or manipulation.
- No quasi-parental role.
- Job role did not materially increase risk.
- While every situation which places adults in contact with children creates some risk of abuse, merely requiring an employee to encourage a positive rapport is not enough to create vicarious liability.

Jacobi v. Griffiths, [1999] 2 SCR 570

18

Layton - Parent and Trade-mark Agents

BORDON
LADNER
GERVAIS
LLP

Example 2

- Religious charity operates residential school. It is responsible for social as well as educational needs and development of children in residence. Supervisory tasks relate to emotional health, education and daily needs, including food, bathing and bedtime.
- Charity hires "C" and carries out extensive interviews, background and criminal records checks. It takes all reasonable steps and is not negligent in hiring "C."
- "C" abuses a number of children.
- Was the charity vicariously liable?

19

Layton - Parent and Trade-mark Agents

BORDON
LADNER
GERVAIS
LLP

- **Yes. Why?**
 - Job called for high levels of intimacy.
 - Job created quasi-parental role
 - Job provided extensive opportunity.
 - Victims highly vulnerable.
 - "C" given position of power.

20

Layton - Parent and Trade-mark Agents

BORDON
LADNER
GERVAIS
LLP

- Between Examples 1 and 2, there is a grey zone. Application of the principles to the facts will decide the issue.

21

Lawyers • Patent and Trade-mark Agents

Avoidance/Protection

- Ontario screening initiative – “The Safe Steps”
- Internal structural considerations
- Policies
- Insurance
- Contracts/Contractors

22

Lawyers • Patent and Trade-mark Agents

Reporting and Managing the Claims

- Children’s Aid Societies
 - Section 72 of the *Child and Family Services Act*, RSO 1990, c.C.11.
- Police
- Insurance
- Management of the employee/volunteer
- Investigation

23

Lawyers • Patent and Trade-mark Agents

Thank You!

Lawyers • Patent and Trade-mark Agents
