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DEFINING "DISABILITY": IT IS BROAD, BUT IT IS NOT THE FLU

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A. INTRODUCTION

The British Columbia Court of Appeal ("BCCA") recently confirmed that in cases involving apportionment of liability the blameworthiness or fault of young children will generally be less because of their age.[1] In a unanimous decision on November 14, 2014, the BCCA upheld the British Columbia Supreme Court's ruling that a 12 year-old boy was only 25 percent at fault for serious injuries sustained after jumping off a school roof.[2] The School District was found 75 percent liable because it did not trim a tree near the building that the boy had climbed to reach the roof. This decision is illustrative of the general trend that courts are hesitant to find children contributively negligence. This *Charity Law Bulletin* will review this decision and discuss the implications for charities and not-for-profits that provide services and activities for children.

B. FACTS

At the time of the incident, Owen Paquette was a 12-year old student in grade seven at Peach Arch Elementary School in Surrey, British Columbia. On March 4, 2008, he and another student climbed a cherry tree onto the roof of the school. After the Vice-Principal of the school yelled at the boys to get off of the roof, Paquette tried to get off of the roof. While doing so, he slipped and fell approximately 20 feet onto a cement surface at the bottom of a stairwell, which caused him to sustain significant injuries.

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[1] *Paquette v School District No 36 (Surrey)*, 2014 BCCA 456.

[2] *Paquette v School District No 36 (Surrey)*, 2014 BCSC 205.

At trial, the Principal of the school testified about other occasions when he either saw other people on the school roof or was told that people had been on the roof. In response to these incidents the School Board trimmed and removed some of the trees near to the roof and also erected a barricade in one spot to make the roof less accessible. However, the cherry tree that Paquette used to climb onto the roof was not trimmed because it was "flimsy".[3]

C. JUDICIAL HISTORY

At trial, Paquette acknowledged partial liability, but submitted that the defendant should be 60–75 percent liable because it was negligent and breached its duties under the British Columbia Occupiers Liability Act ("OLA").[4] In response, the defendant school board denied any liability. Justice Sharma concluded that the School Board had not satisfied its duties under the OLA and was 75 percent liable.

On appeal, the school board submitted that the trial judge erred in apportioning 75 percent fault, in applying a standard of care amounting to perfection, and in finding that the school board breached its duty of care by not fully preventing access to the roof.

D. RELEVANT LEGISLATION

Section 5(1) of the Code provides persons with protection from discrimination in employment. The protected grounds, set out below, include disability:

> Every person has a right to equal treatment with respect to employment without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, record of offenses, marital status, family status or disability.

Section 17 of the Code set outs a limitation on the right to be protected from discrimination on the basis of disability, stating that:

> A right of a person under this Act is not infringed for the reason only that the person is incapable of performing or fulfilling the essential duties or requirements attending the exercise of the right because of disability.

[3] *Ibid* at para 42.
[4] *Ibid* at para 1.

Section 10(1) of the Code defines "disability" as follows:

> a) Any degree of physical disability, infirmity, malformation or disfigurement that is caused by bodily injury, birth defect or illness and, without limiting the generality of the foregoing, includes disabilities mellitus, epilepsy, a brain injury, any degree of paralysis, amputation, lack of physical coordination, blindness or visual impediment, deafness or hearing impediment, muteness or speech impediment, or physical reliance on a guide dog or other animal or on a wheelchair or other remedial appliance or device,
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> b) A condition of mental impairment or a developmental disability,
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> c) A learning disability, or a dysfunction in one or more of the processes involved in understanding or using symbols or spoken language,
>
> d) A mental disorder, or
>
> e) An injury or disability for which benefits were claimed or received under the insurance plan establish under the *Workplace Safety and Insurance Act, 1997*.

E. REASONS OF THE TRIBUNAL

1. Was the training a *bona fide* occupational requirement?

The Tribunal referred to the Meiorin test established by the Supreme Court of Canada (SCC) to consider whether the required training was a "*bona fide* occupational qualification" and whether the College could have accommodated Burgess. The three elements of the Meiorin test are:

> 1) That the employer adopted the standard for a purpose rationally connected to the performance of the job;
>
> 2) That the employer adopted the particular standard in an honest and good faith belief that it was necessary to the fulfilment of that legitimate work-related purpose; and
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> 3) That the standard is reasonably necessary to the accomplishment of that legitimate work-related purpose. To show that the standard is reasonably necessary, it must be demonstrated that it is impossible to accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship upon the employer.5

[5] *British Columbia (Public Service Employee Relations Commission) v BCGSEU*, [1999] 3 SCR 3, 1999 CanLII 652.

The Tribunal accepted that the training program was rationally connected to the examiner's job and that the College developed its training program in good faith. Therefore, the College passed the first two steps of the Meiorin test. However, the Tribunal did not find that it was an undue hardship for the College to provide alternative training to people who could not attend the training on the appointed days. In reaching this decision, the Tribunal specifically considered how, on two prior occasions, the College had provided individual training to examiners who were unable to attend the required training.[6]

Therefore, the Tribunal concluded that the College could have accommodated Burgess without undue hardship.

2. Was Burgess' illness a disability?

However, the Tribunal's initial finding was secondary to the conclusion that the flu and other similar transitory illnesses are not protected under the Code because these conditions are not disabilities within the above noted Code definition. Vice-chair Whist commented that "although human rights legislation is to be interpreted broadly, the Tribunal has held that not every medical condition constitutes a disability within the meaning of the Code." He further noted that "it was not the intent of the legislation to include literally everyone suffering from a few days illnesses."[7]

In reaching the decision, Vice-chair Whist commented extensively on the SCC's finding in *Quebec (Commission des droits de la personne et des droits de la jeunesse) v Montreal (City)*.[8] In this case, the SCC provided guidelines to facilitate interpreting the meaning of "disability". It held that disability should be interpreted broadly and contextually with regards to the circumstances of the person.[9] However, in *Montreal (City)*, Justice L'Heureux-Dubé also stated that "these guidelines are not without limits" and that because "there is not normally a negative bias against these kinds of characteristics or ailments [i.e. the flu] they will generally not constitute a 'handicap' for the purposes of s. 10."[10]

[6] *Ibid* at 15.
[7] *Ibid* at 29.
[8] 2000 SCC 27 (CanLII).
[9] *Ibid* at 80.
[10] *Ibid* at 82.

Vice-chair Whist therefore concluded that "while the appropriate approach in applying the facts to the definition of 'disability' is to be broad, it is not to be so broad as to render the definition of disability meaningless."[11] He firmly stated that if transitory ailments, such as the flu, were protected under the Code it would trivialize the Code's protections.[12]

F. CONCLUSION

The *Burgess* decision demonstrates that tribunals and the courts will accept a broad definition of disability under the Code, but there are limits to Code protections. Employers, including charities and not-for-profits, should therefore be mindful that they must reasonably accommodate employees with disabilities, but they can also be secure in the knowledge that transitory illnesses, like the flu, are not Code protected. For all employers, developing and implementing sick leave policies applicable to both short term transitory illnesses and more serious medical conditions is an important part of human resource and risk management. Employers need to know when and how to respond to an employee's accommodation request, and should seek legal advice in cases where they are unsure how to appropriately deal with such a request.

The text of this decision is available online at: http://canlii.ca/t/g2397.