

# FACING THE RISK

## ABUSE LITIGATION AND ITS IMPACT ON FUTURE CHARITABLE WORK:

An Update On Recent CANADIAN COURT RULINGS - BY KENNETH A. HALL

### **BACKGROUND:**

Sexual abuse claims are a recent phenomenon in Canadian courts and the past decade has witnessed a number of precedent-setting civil cases involving the imposition of vicarious legal liability against both public and private institutions. According to William J. Blakeney of the law firm Lafleur Brown, the "...Supreme Court of Canada has played a decisive role in creating the judicial atmosphere in which institutional sexual abuse claims have flourished".

In weighing the individual, social and public policy issues in recent cases, the court has gone to great lengths to ensure that the victims of abuse have been afforded ample opportunity for financial compensation. Although this is a praiseworthy effort for the benefit of legitimate victims, it has also contributed to a great deal of uncertainty and anxiety for the institutions who seek to serve those individuals. The great paradox is that charitable organizations, institutions operating without a profit motive and often with meager financial and human resources, are now being held to extraordinarily high standards of care which may increasingly result in drawing their focus and limited resources away from charitable work and toward risk management. Rather than looking for new opportunities to serve those most in need in society, charities will become more defensive and will be increasingly preoccupied with limiting legal liability and maintaining insurability by reducing or eliminating activities which pose any significant potential for abuse claims.

For Christian charities the resulting chill caused by legal liability concerns has already had both positive and negative consequences. Awareness of the issue has prompted many churches and other Christian charitable organizations to implement effective prevention plans designed to discourage and reduce the possibility of abuse against children in their care. However, the current legal climate is beginning to discourage ministries and activities conducted for the benefit of children and young people, both within the Christian community, and in society in general.

### **SEXUAL ABUSE CASE PRECEDENTS**

To properly understand the current state of civil litigation with respect to abuse claims, it is important to review some of the issues settled by rulings in Canadian courts in recent years, including the following:

#### **i) Limitation of Actions**

Generally speaking, civil damage actions must be commenced within six years of the alleged occurrence. However the Supreme Court of Canada in K.M. v. H.M. (1992) ruled that the victim of childhood incest was still eligible to sue her father for damages even though the alleged incidents had taken place eighteen years earlier. This ruling held that the limitation period did not begin to run until the victim "discovered" through counselling and therapy as an adult, the connection between her father's acts and her mental and emotional injuries, which she was not reasonably capable of understanding as a child. The Court held that in addition to being an action in tort, this case also involved a breach of fiduciary duty (i.e. a parent's position of trust) for which there existed no statutory time limit. This case was significant in that it opened the floodgates for future claims involving incidents of abuse against children which took place decades ago.

#### **ii) Vicarious Legal Liability For Employees**

In Bazley v. Curry (1999), also known as the Children's Foundation case, a non-profit organization operating residential care facilities in British Columbia for the treatment of emotionally troubled children was sued as the result of abuse inflicted by an employee. In its defence, the Foundation argued that it was not liable for the actions of its employee as it had not been negligent in screening, hiring or supervising. Appropriate reference checks had been done and as soon as the abuse was discovered and substantiated, the employee was immediately terminated. However the lower Court judge and the British Columbia Court of Appeals ruled that the Foundation was vicariously liable as employer for the acts committed by their employee and the case was appealed to the Supreme Court. In her introductory remarks in last year's landmark decision, Justice B. McLachlin, now Chief Justice of the Supreme Court of Canada, summarized the key legal issues involved:

"It is tragic but true that people working with the vulnerable sometimes abuse their positions and commit wrongs against the very people they are engaged to help. The abused person may later seek to recover damages for the wrong. But judgement against the wrongdoer may prove a hollow remedy. This raises the question of whether the organization that employed the offender should be held liable for the wrong. The law refers to such liability as "vicarious" liability. It is also known as "strict" or "no-fault" liability, because it is imposed in the absence of fault by the employer. The issue in this case is whether such liability lies for an employee's sexual abuse of children in his care".

In order to make this determination in the Children's Foundation case, in the companion case Jacobi v. Griffith (1999) commonly known as the Boys' & Girls' Club case, and for the benefit of guiding decisions in future cases, the Court attempted to establish a framework for determining vicarious legal liability. Rather than trying to decide whether the wrongful acts committed by an organization's employee fall within their scope of employment, as had been the rationale guiding previous decisions, the emphasis was placed on whether the acts were sufficiently related to the conduct and responsibilities authorized by the employer.

Also at issue was whether this authority significantly increased the potential risk of harm to children in the care of their employee. The Supreme Court ruling also introduced "subsidiary factors" which must be considered in future cases in order to determine the connection between the employer's creation of potential risk and any resulting injury, including the following:

- (a) the opportunity that the enterprise afforded the employee to abuse his or her power;
- (b) the extent to which the wrongful act may have furthered the employer's aims (and hence be more likely to have been committed by the employee);
- (c) the extent to which the wrongful act was related to friction, confrontation or intimacy inherent in the employer's enterprise;
- (d) the extent of power conferred on the employee in relation to the victim; and
- (e) the vulnerability of potential victims to wrongful exercise of the employee's power."

On the basis of these criteria, the Supreme Court ruled that the Children's Foundation was vicariously liable for the abuse committed against the young boy who was in the care of its employee. In Paragraph 50 of the judgement it is argued that the imposition of legal liability on this basis "may also deter other incidents of sexual abuse by motivating charitable organizations entrusted with the care of children to take not only such precautions as the law of negligence requires, but all possible precautions to ensure that their children are not sexually abused". However the significance of this ruling is that although the Court intended to create greater incentive for organizations to prevent abuse, it may have unintentionally undermined some of the legal incentive to manage such risk. This is because it has introduced "no-fault" factors which determine legal liability strictly on the basis of the nature of an organization's aims purposes and activities, the scope of trust and authority given to an employee and the inherent vulnerability of potential victims, rather than on traditional tangible grounds of legal liability such as negligent screening, hiring or supervision. This ruling implies that in future similar cases, no matter how well an organization manages the risk of abuse and how contrary the employee's wrongful acts are to the organization's

purposes and good intentions, the employer can nevertheless be held vicariously liable and subject to civil damages. The bottom line is that the Children's Foundation ruling places organizations working most closely with children in significantly greater jeopardy by imposing "strict" legal liability and by not allowing a "reasonable and prudent" defence.

### iii) Vicarious Legal Liability For Volunteers

Another interesting implication raised by the Children's Foundation ruling is hinted at in a short paragraph addressing the issue of wrongful acts committed by volunteers of non-profit organizations. The Court rejects out of hand the notion that there should be any distinction between an organization's legal responsibility for the acts of "those whom they entrust with their important work", whether they are employees or volunteers. The inclusion of this brief opinion does not appear to be thoroughly reasoned and ignores the very real and practical distinctions between screening, hiring and managing employees and overseeing volunteers, including the following considerations:

- (a) There is no formal contract, monetary consideration or mutual material gain inherent in a volunteer arrangement, as there is in an employer/employee relationship.
- (b) Volunteer labour is often provided as a gift or contribution of time, effort and ability and to compel such individuals to be subject to the same degree of oversight, control and loss of personal privacy would effectively and significantly reduce the level of volunteer participation available to non-profit and charitable organizations.
- (c) The mere fact that an organization utilizes the services of volunteers rather than employees is an indication that it does not have the financial resources and administrative structure to hire and manage employees to carry out its work. The alternative to the use of volunteers in such circumstances is not to hire employees instead, it is to curtail or cease operations altogether.

The Court's outright rejection of any distinction between the legal responsibility for employees and volunteers ignores these and other contractual and practical considerations and is cause for serious concern in future cases involving organizations utilizing volunteer participation.

### iv) Exemptions For Non-Profit Organizations?

Related to the question of legal liability for the acts of volunteers, the Supreme Court of Canada was asked to consider the general issue of whether non-profit or charitable organizations should be considered exempt from liability in light of the needed services they provide for the benefit of the general public. In its response the Court

conceded that "churches and aid societies undertake to care for society's most needy...they do work few others would, and they do it in a selfless, generous manner". Nevertheless, its ruling in the Children's Foundation case came down clearly on the side of the "innocent child who was the victim of the abuse".

According to the opinion of the justices, "the institution enhanced the risk of his being abused" and "that a ruling of legal liability against the Foundation may also deter other incidents of sexual abuse by motivating charitable organizations entrusted with the care of children to take not only such precautions as the law of negligence requires, but all possible precautions to ensure that their children are not sexually abused". This statement appears to beg the question of whether an organization can ever take sufficient precautions to satisfy the Court in order to avoid the imposition of strict legal liability on the basis of the subsidiary criteria contained in the ruling. Cynics who point to the gradual judicial expansion of the boundaries of vicarious legal liability over the past few decades will rightfully conclude that this is a rhetorical question and that liability will be imposed for virtually all instances of abuse where an organization is working with children, by virtue of their inherent vulnerability.

The Supreme Court decision fails to clearly address the fundamental nature of non-profit and charitable organizations, even apart from the issue of volunteer participation, including the following factors which set these types of organizations apart from a commercial venture:

- (a) Non-profits and charities do not have a profit motive and therefore cannot be accused of creating or enhancing the risk of harm for children in their care for the sake of financial gain or profit.
- (b) Most non-profit and charitable organizations are facing significant fundraising challenges in the current climate of limited donations and public funding cuts, resulting in an inability to institute sophisticated risk management procedures without reducing services and charitable work.
- (c) Unlike for-profit entities, most non-profits do not generally accumulate significant surpluses or equity fund balances and therefore do not have the same resources from which to pay civil damage awards.
- (d) Assets accumulated by charities are primarily considered to be "trust" property and are available exclusively for the charitable purpose to which they are given by donors. Since the organization and its leaders are prohibited from breaking this trust obligation, it is debatable whether such property should be available to satisfy civil damage awards. It is logical to argue that such property should be insulated from any legal liabilities if it is otherwise considered by law to be an inviolable trust.
- (e) The obligation of non-profits and charities to satisfy current or future civil damages without the benefit of any exemption or special relief will inevitably and

negatively impact future revenue from private donors and from public funding. It will be difficult to attract potential donors to give to a charity knowing that their contributions will go to pay third party claimants. This is precisely the issue facing parishioners who tithe local churches from denominations affected by native residential school claims. They are now painfully aware that this money may simply be funding the apparently bottomless pit of legal defense costs, settlements and damage awards from past abuse.

- (f) Finally, the general lack of financial and human resources available to most non-profits and charities, combined with the heightened liability standards imposed by the Supreme Court, make transference of the risk through insurance (either through commercial insurers or under a shared pooling arrangement), an unlikely possibility. Already the availability of liability coverage for the abuse hazard is rapidly drying up in Canada and the impact of this ruling on future cases may seriously jeopardize the remaining coverage sources. Without insurance protection for the abuse hazard, charitable organizations may have no alternative but to severely restrict their operations, activities and ministries involving children. The resulting public policy issue is one that the Supreme Court justices have failed to clearly address in their ruling.

#### **v) The Sale of Charitable Assets to Satisfy Claims**

In a decision rendered this April by the Ontario Court of Appeal, the Christian Brothers of Ireland in Canada have been ordered to sell school properties located in Vancouver in order to satisfy civil damages to compensate former students who were victims of abuse at the Mount Cashel Orphanage in Newfoundland. The Court ruled that such assets "whether owned beneficially, or as a trust for one or more charitable purposes" could be used by the liquidator in the winding-up procedure to pay the outstanding claims of tort victims.

The ruling also decided that there is no such thing as a "doctrine of charitable immunity" that would protect charities of and/or charitable trust property from such claims. It appears that the Court makes no distinction between trust property being used to fund the charitable work for which it was intended or being used to pay civil damages to third parties. In essence, payment of such damages is now deemed to be a "cost of doing business" for charities and it is of no consequence whether the intended charitable purposes are completed and donors' wishes fulfilled. Although this creates a source from which to compensate the victim and appears to punish the negligent organization, it ignores the basic principles of trust law and actually deprives those individuals who are most in need of the charitable work and results in a loss of service to society in general.

Although the B.C. Supreme Court recently overturned the lower court ruling on appeal, their decision was based on the fact that the properties were originally purchased and

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held legally in trust for the specific purpose of operating a Catholic high school, and had no connection to the Mount Cashel orphanage. The original Ontario court ruling still leaves the door open to the use of charitable property to satisfy judgements in cases where the property is in any way related to the general charitable objects of the organization. It will also continue to have a significant impact on future court awards, particularly those involving religious organizations with significant property holdings.

With respect to the native residential schools litigation, a recently released Angus Reid survey commissioned by the Roman Catholic, Anglican and Presbyterian Churches, three of the denominations most affected by these claims, indicated that Canadians hold somewhat conflicting views of who is ultimately responsible to pay damages for the injuries suffered:

- 53% of Canadians believe the churches should sell property to pay abuse claims
- 80% believe that the federal government should rescue the churches from bankruptcy once they have made a serious effort to pay
- 60% of poll respondents agreed with the statement that "we are all responsible for helping aboriginal Canadians who suffered abuse as children in residential schools".

#### vi) Non-Compensatory Civil Damage Awards

According to the summary contained in the survey, "these findings suggest a real reluctance on the part of Canadians to endorse bankruptcy, or significant dismantling, of the of the churches in order to pay settlements". The survey does not in any way exonerate church involvement in the claims. However, it does clearly indicate that Canadians understand and appreciate the important role that Christian charities play in society. The results also reinforce their desire for a balanced response to the issue of legal responsibility.

In 1976 the Supreme Court of Canada placed a monetary cap of \$100,000 on court awards for non-pecuniary compensatory damages. These awards include general damages for pain and suffering, mental injury, humiliation, etc. Taking into account the effects of inflation since it was first imposed, the monetary cap for individual claimants now stands at about \$275,000. Special damages for such items as loss of future earnings and payment of future medical and rehabilitation expenses are dealt with separately and are in addition to the cap on non-pecuniary general damages. There has also been an introduction of court-imposed protocol in certain cases involving multiple abuse claimants, such as with the Christian Brothers and the native residential schools, whereby specific monetary caps are imposed as means of fairly dividing the available monetary resources. This type of arrangement avoids a situation where the limited resources available to satisfy damages are exhausted before the later claimants have an opportunity to take action.

Once again however, the British Columbia Court of Appeals has led the way in challenging the existing legal framework by allowing the possibility of awarding non-pecuniary compensatory damages in an abuse case which exceed the prevailing monetary cap for individual claimants. In Yeo v. Carver (1996) the Court circumvented the cap by making the distinction between tort injuries, which it said should remain subject to limited damages, and breach of fiduciary duties, which it said should not be subject to any compensatory damage limitations. This novel approach will likely be subject to judicial review by the Supreme Court of Canada to determine whether the distinction will stand.

The other way in which the compensatory damage cap has been circumvented is through the introduction of punitive damages into statements of claim which allege vicarious legal liability against organizations and their leaders for wrongful acts committed by their employees or volunteers. Courts traditionally award punitive damages in cases where there has been gross, repeated or outrageous conduct on the part of the defendant, whether an individual or organization, and the award is intended as a punishment for such egregious conduct. These damages have been more common in civil courts in the United States but now appear to be taking greater hold in recent civil actions in Canada. The implications of this trend are serious and can be summarized as follows:

- (a) Since there is currently no cap in place for punitive damages in Canada, the amount of such damages is limited only by the creativeness of plaintiffs' lawyers and the willingness of Courts to shower victims with monetary awards. In essence, an abuse claimant can potentially seek compensatory damages up to, and possibly in excess of, the current limit of the cap and can also be eligible to seek punitive damages into the millions of dollars.
- (b) Since the vast majority of liability insurance policies limit coverage to compensatory damages only, especially for the abuse hazard, the punitive damages element of a civil action will not trigger any duty on the part of the insurance company to defend or indemnify the defendant organization as policyholder. Within the context of a rapidly changing and uncertain legal climate, it is entirely understandable that many insurance companies are unwilling to provide coverage for such damages. It is virtually impossible for underwriters to quantify the risk and potential quantum of damages that might be awarded now, or in abuse claims which may only emerge many years from now when the effects of judicial inflation may have reached astronomical proportions.

#### **CONCLUSION:**

Taken as a whole, the content of recent Court decisions and the increased level of litigation activity aimed at non-profits and charities does not paint a very rosy picture for the future of organizations serving the needs of children and young people in Canadian society. The combination of

relaxed civil action limitation periods, the ever-widening net of vicarious legal liability for the actions of employees and volunteers, the lack of distinction between non-profit and for-profit entities, the refusal to exempt charitable trust property from satisfying civil judgements and the circumvention of monetary caps on compensatory damages, results in the clear impression that Canadian Courts are performing logic-defying intellectual gymnastics in an effort to satisfy the desire to monetarily compensate abuse victims.

In continuing to cast an ever wider net of vicarious liability, the authors of recent judicial decisions have refused to clearly address the resulting impact that their rulings will have on institutional charitable work and volunteerism. The imposition of unrealistic standards of care will inevitably lead to even greater levels of future litigation, withdrawal of liability insurance protection for the abuse hazard, reduction or elimination of certain charitable activities and general uncertainty and anxiety for leaders and workers involved in charities. This is an issue of social and public policy which has been largely ignored by the Courts.

The right of a victim to obtain financial compensation from the perpetrator and/or the negligent employer is undeniably just and fair and satisfies the fundamental legal necessity to provide a practical remedy for harm, and to deter future harm. However there is a wide chasm between affording that right to the victim, and eliminating any practical opportunity for an organization to avoid legal liability through appropriate management of the risk. It does not appear that the Courts are able or willing to strike a balance between the need to compensate victims of abuse with the need to safeguard and promote non-profit service and charitable activity in society, particularly with respect to the needs of children. Based on recent history it also seems unlikely that the Courts can be relied upon to strike this balance at any time in the near future. Faced with the prevailing legal and judicial climate, the leaders of charitable organizations are left asking the question "What do we do now?" The answer is two-fold:

(1) The risk of actual or alleged abuse inherent in working closely with children makes it more important than ever for charities and non-profits to adopt pro-active screening and abuse prevention procedures. Risk management material and resources are now widely available through many church denominations, group associations, lawyers, risk managers, other charities and non-profits, and can be customized to suit your organization's particular needs and circumstances. Failure to adopt and implement effective screening and prevention measures will place children in your care at greater risk, put your organization's volunteers and employees in adverse and awkward circumstances and will probably prevent your organization from being able to obtain liability insurance coverage for abuse claims in the future.

(2) Apart from implementing effective risk management procedures, the only other practical remedy open to Christian charities and the individual Canadians who support them is to seek legislative intervention and relief in order to place constraints on future Court decisions. Now may be the time for the non-profit and charitable sector to actively communicate with federal and provincial lawmakers and their constituents to assist in achieving a constructive, just and equitable solution to the challenge raised by abuse claims.

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