
CANADA / JUDGMENT

D.G. (E.) v. Hammer

2001 BCCA 226

COURT

British Columbia Court of Appeal

DECIDED

27 March 2001

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Citation:

E.D.G. v. North Vancouver School District No. 44

Date: 20010327

2001 BCCA 226

Docket:

CA024602

Registry: Vancouver

COURT OF APPEAL FOR BRITISH COLUMBIA

BETWEEN:

E.D.G.

PLAINTIFF

(APPELLANT)

(RESPONDENT BY CROSS-APPEAL)

AND:

SVEIN HAMMER

DEFENDANT

AND:

THE BOARD OF SCHOOL TRUSTEES

OF SCHOOL DISTRICT NO. 44 (NORTH VANCOUVER)

DEFENDANT

(RESPONDENT)

(APPELLANT BY CROSS-APPEAL)

Before:

The Honourable Chief Justice McEachern

The Honourable Madam Justice Prowse

The Honourable Mr. Justice Mackenzie

M. R. Ellis

Counsel for the Appellant

R.B.T. Goepel, Q.C. and

H. C. Hayden

Counsel for the Respondent

Place and Dates of Hearing:

Vancouver, British Columbia

December 4-8 and 11, 2000

Place and Date of Judgment:

Vancouver, British Columbia

March 27, 2001

Dissenting Reasons by:

The Honourable Madam Justice Prowse

Written Reasons in the Majority by:

The Honourable Mr. Justice Mackenzie (Page 37, para. 72)

Concurring Reasons in the Result by:

The Honourable Chief Justice McEachern (Page 41, para. 81)

THIS IS A CASE IN WHICH THE PLAINTIFF SHOULD NOT BE REFERRED TO BY NAME OR OTHERWISE IDENTIFIED. SHE IS NOW AN ADULT BUT WAS A CHILD AT THE TIME OF THE RELEVANT EVENTS.

Reasons for Judgment of the Honourable Madam Justice Prowse:

NATURE OF APPEAL

- [1] Ms. G. is appealing from the decision of Mr. Justice Vickers, made April 20, 1998 (reported at (1998), 53 B.C.L.R. (3d) 89), dismissing her claim for damages against the Board of School Trustees of School District No. 44 (North Vancouver) (the "Board") arising from a series of sexual assaults perpetrated against her by Mr. Hammer between 1978 and 1980. Mr. Hammer was then employed by the Board as a janitor at the elementary school Ms. G. was attending. The assaults took place in the school.
- [2] The Board is cross-appealing from the award of damages assessed by Mr. Justice Vickers against Mr. Hammer. Vickers J. awarded damages against Mr. Hammer in the amount of \$211,800, including general damages of \$150,000. The Board seeks to reduce this award in the event that Ms. G.'s appeal is successful.
- [3] This appeal was heard together with the appeals in *M.B. v. Her Majesty the Queen in Right of the Province of British Columbia*, 2001 BCCA 227, and *K.L.B. v. Her Majesty the Queen in Right of the Province of British Columbia*, 2001 BCCA 221, which are being released at the same time as this decision.

ISSUES ON APPEAL AND CROSS-APPEAL

- [4] The only ground of appeal set forth in Ms. G.'s factum is that Mr. Justice Vickers erred "in holding that the sexual assaults on the Plaintiff by the school janitor were not a breach of the fiduciary duty owed by the defendant School Board to the Plaintiff." Counsel for Ms. G. also argued that Vickers J. erred in failing to find that this duty was a non-delegable duty, akin to that found to exist in *Lewis (Guardian ad litem of) v. British Columbia*, [1997] 3 S.C.R. 1145.
- [5] In its cross-appeal, the Board alleges that Mr. Justice Vickers erred in failing to properly apportion damages between Mr. Hammer and individuals who sexually assaulted Ms. G. in the years following the assaults upon her by Mr. Hammer.
- [6] Negligence and vicarious liability are not issues on this appeal. A claim against the Board based in negligence was abandoned at trial, and Mr. Justice Vickers' conclusion that vicarious liability would not lie against the Board was not appealed.

BACKGROUND

- [7] Ms. G. was sexually assaulted by Mr. Hammer over a two-year period between 1978 and 1980 when she was in grades three and four at a North Vancouver school. The circumstances giving rise to these assaults were described by Mr. Justice Vickers at paras. 13 and 18 of his reasons:

In grade 3, Ms. [G.] was assigned the task of cleaning blackboard brushes. The school had a vacuum brush cleaner. While there was some dispute as to where it was located, I conclude that at all material times it was in the boiler room on the lower floor of the school. This room was the domain of the school janitors. In addition to the boiler, the room contained a table for the use of

the janitors. Ms. [G.], whose classrooms were on the upper floor, took dirty brushes in a box down a spiral metal staircase at the north end of the building into the boiler room. The brush cleaner was to the left, at the bottom of these stairs, directly across from the janitors' table... In the late fall of 1978, while Ms. [G.] was a grade 3 student, Mr. Hammer began a series of sexual assaults on her that did not end until she completed grade 4 and he was transferred to another school. He would regularly take her into a storage area adjacent to the boiler room where gym mats were stored. There he would lock the door and engage in sexual acts with her. These acts began with kissing and the fondling of her chest area and vagina. They eventually progressed to digital penetration and sexual intercourse. I conclude there were approximately 20 sexual assaults over a two year period, with sexual intercourse taking place in approximately half of these sexual encounters. [8] Ms. G. was assigned the task of cleaning brushes by her teacher. Although Ms. G. did not tell anyone that the sexual assaults were occurring (because she did not think that anyone would believe her), she testified that she asked her teacher if she could be relieved of brush-cleaning responsibilities and was told that this could not be done.

- [9] On February 24, 1995, Mr. Hammer was convicted by a jury of rape and indecent assault and sentenced to 30 months' imprisonment.
- [10] In addition to the sexual assaults perpetrated upon her by Mr. Hammer, Ms. G. was sexually assaulted by as many as seven other men when she was 11 to 13 years of age. The impact of all of these sexual assaults upon Ms. G. was discussed by Mr. Justice Vickers in the context of the award of damages.

DECISION OF THE TRIAL JUDGE

- [11] Mr. Justice Vickers described the nature of Mr. Hammer's employment as a janitor, and the extent of his interaction with students at the school, at paras. 14-16 of his decision:

There were two janitors, one of whom worked a day shift, 7 a.m. to 3 p.m. The second janitor worked a night shift, 3 p.m. to 11 p.m. Mr. Hammer was the night shift janitor while Ms. [G.] was in grades 3 and 4. There was no written job description for janitors at this time. As might be expected, the work of the janitors was to keep the school clean and to perform maintenance tasks, making minor repairs as required. The day shift janitor opened the school each morning and the night shift janitor was responsible for securing the school when he left at the end of his shift. Both janitors would assist students, staff and the public from time to time as required. This assistance was of a general nature such as giving advice as to where something or someone might be found. Neither janitor had any direct duties relating to students. In short, they were not required to provide care or instruction to students. Janitors reported to a supervisor who was the Custodial Operations Manager of the Board. As his office was at the offices of the Board, he was not physically available to supervise and direct the janitors at the school on a daily basis. Day to day instructions, if any, were given by the school principal. Any negative performance of a janitor was reported by the principal to the Custodial Operations Manager. In the event a janitor saw a child misbehaving, he did not have the power or authority to discipline. In such circumstances he would admonish the student and ask him or her to behave. More often than not, students

would comply with the directions of a janitor. If they did not comply, a janitor would report misconduct to the principal. [12] Mr. Justice Vickers found that the principal and teachers at the school were "intelligent, caring and responsible people" who had no reason to suspect that Mr. Hammer was engaged, or might be likely to engage, in any inappropriate behaviour with the children. He found that Mr. Hammer discharged his janitorial duties to the satisfaction of his supervisor and the principal.

[13] With respect to Mr. Hammer's liability, Vickers J. noted that judgment was granted against him in default of appearance and that there could be no doubt as to the propriety of that judgment.

[14] With respect to the Board's liability, Mr. Justice Vickers noted that Ms. G. had abandoned her claim against the Board in negligence, but sought to find the Board directly liable for breach of fiduciary duty, and vicariously liable for the intentional torts of Mr. Hammer.

[15] Mr. Justice Vickers concluded that the Board owed a fiduciary duty to Ms. G., but that it had not breached its duty in the circumstances. His findings in that regard are found at paras. 40 and 41 of his reasons:

Perhaps it goes without saying that the Board, by virtue of its statutory position, enjoys a position of overriding power and influence over its students. It is a power dependent relationship, one characterized by unilateral discretion. See *Hodgkinson v. Simms*, [1992] 2 S.C.R. 226. While in its care, the Board has a duty to nurture, care for and protect the lives and the best interests of students. It has a duty to provide a safe, non-threatening learning environment. In my view, the duty remains similar to the duty of a parent. Based on trust and dependency, with inherent vulnerability of the student and an undisputed power imbalance, the relationship is fiduciary in nature. The nature and scope of the fiduciary duty is similar to the fiduciary duty imposed on a parent. The difficulty in this case is that it was not the Board which committed the grave assaults on Ms. [G.]. It was an employee of the Board and, in particular, an employee who had no direct duties relating to students attending the school. On the evidence it would be impossible to conclude the Board failed to adequately supervise its employees; failed to protect the students from assault; and failed to investigate credentials and qualifications of persons involved with students, as alleged in the statement of claim. Those allegations were not pressed in the claim based on negligence because they could not succeed. Equally, they cannot succeed in the claim for breach of fiduciary duty.

[16] Mr. Justice Vickers went on to find that "there was no evidence to support a conclusion that the Board failed to nurture, care for and protect the lives and best interests of his students" and that the fact that Ms. G. found herself in an "unsafe, threatening learning environment" was not attributable to the actions of the Board. Nor had the Board abused its position of authority over Ms. G. or otherwise breached its position of trust. Rather, Vickers J. found that the Board had done all that it could to ensure that Mr. Hammer was a person suited to work as a janitor in an elementary school.

- [17] Mr. Justice Vickers rejected the submission that, even in the absence of "fault" and of lack of foreseeability of Mr. Hammer's actions, he could find that the Board had breached its fiduciary duty to Ms. G. He concluded that a claim for liability without fault on the part of the Board could only succeed in the context of a claim for vicarious liability.
- [18] In discussing the issue of vicarious liability, Mr. Justice Vickers relied on the decision of this Court in *B.(P.A.) v. The Children's Foundation ("Bazley")* (1997), 30 B.C.L.R. (3d) 1 (B.C.C.A.). He concluded that the claim could not succeed on the basis of any of the three analyses found in that judgment. At para. 52 of his reasons, he stated:

No matter which test is applied to the facts of this case, Ms. [G.] cannot succeed. Mr. Hammer had no direct duties involving students. In the performance of his duties as janitor, he was not assigned specific duties to care for and provide support to the children in the school. Students, and in particular, Ms. [G.], were not assigned to his care. All that can be said to support a finding of vicarious liability is that Mr. Hammer was employed as a janitor at the school and his duties provided him with the opportunity to commit the wrongful acts. In my view, that is insufficient to impose liability on the Board.

- [19] The only direct reference to the argument that the Board owed a non-delegable duty of care to Ms. G. is the statement by Mr. Justice Vickers at para. 53 of his reasons that: "This is not a case involving a delegation of duty and for that reason it cannot be compared with other decisions where the court has considered claims arising out of abuse by care providers." The cases he referred to in that regard were the trial decisions in *A.(C.) v. C.(J.W.)* (1996), 35 B.C.L.R. (3d) 234 (S.C.) and *B.(K.L.) v. British Columbia* (1998), 51 B.C.L.R. (3d) 1 (S.C.) and the decision of this Court in *M.M. v. R. F.* (1997), 52 B.C.L.R. (3d) 127 (S.C.).
- [20] Mr. Justice Vickers raised the policy issue of where liability should fall as between the innocent victim and the innocent Board. He concluded that this was not a proper policy consideration for the court, but was a determination better left to the legislature.

DISCUSSION

(a) Introduction

- [21] The trial decision in this case was released prior to the decision of this Court in *A.(C.) v. C.(J.W.)* (1998), 60 B.C.L.R. (3d) 92 (C.A.) (the "Critchley" decision) and the decisions of the Supreme Court of Canada in *Bazley v. Curry*, [1999] 2 S.C.R. 534 and *Jacobi v. Griffiths*, [1999] 2 S.C.R. 570. Those decisions, which are binding on this Court, are of particular significance in this case.
- [22] The Critchley decision is significant because, in my view, it precludes Ms. G. from succeeding in a claim against the Board founded solely on breach of fiduciary duty. In Critchley, after reviewing numerous decisions of the Supreme Court of Canada dealing with breach of fiduciary duty, Chief Justice McEachern, speaking for the Court on this point, stated at para. 85:

... I conclude that it would be a principled approach to confine recovery based upon fiduciary duties to cases of the kind where, in addition to other usual requirements such as vulnerability and the exercise of a discretion, the defendant personally takes advantage of a relationship of trust or confidence for his or her direct or indirect personal advantage. This excludes from the reach of fiduciary duties many cases that can be resolved upon a tort or contract analysis, has the advantage of greater certainty, and also protects honest persons doing their best in difficult circumstances from the shame and stigma of disloyalty or dishonesty. In effect, this redirects fiduciary law back towards where it was before this experiment began but with much broader remedies, such as damages, when fiduciary duties are actually breached.

[23] In this case, given the findings of Vickers J., there is no basis for finding that the Board took advantage of a relationship of trust or confidence for its own direct or indirect personal advantage; nor is there any taint of disloyalty or dishonesty on the part of the Board.

[24] In my view, based on the Critchley decision, Ms. G.'s claim that the Board is liable to her for breach of fiduciary duty must fail. A remedy, if any, in that regard, must await further consideration by the Supreme Court of Canada.

[25] The other aspect of this case which has been affected by subsequent decisions is the rather remarkable reference to this case by Mr. Justice Binnie, speaking for the majority, in *Jacobi*. The issue in *Jacobi* was whether a non-profit Boys' and Girls' Club could be found liable for sexual assaults committed by one of its employees upon two children who belonged to the club. In reviewing decided cases in Canada and elsewhere in which similar issues had arisen, Mr. Justice Binnie made the following comments at para. 45 of the decision:

As McLachlin J. notes at para. 40 of [Bazley, *supra*], "any employment can be seen to provide the causation of an employee's tort. Therefore, 'mere opportunity' to commit a tort, in the common 'but-for' understanding of that phrase, does not suffice", to impose no-fault liability (emphasis in original). The "janitor" cases, for example, illustrate that the creation of opportunity without job-created power over the victim or other link between the employment and the tort will seldom constitute the "strong connection" required to attract vicarious liability. In *E.D.G. v. Hammer*, [1998] B.C.J. No. 992 (QL) (S.C.), Vickers J. found there was no vicarious liability on a school board for the sexual assault committed by a janitor since "[a]ll that can be said to support a finding of vicarious liability is that Mr. Hammer was employed as a janitor at the school and his duties provided him with the opportunity to commit the wrongful acts" (para. 52). With regard to the policy considerations in such cases, Vickers J. expressed concern about courts encroaching on matters better left to the legislature (at para. 54):

The choice is whether to impose the burden of these damages on an innocent School Board as opposed to leaving them to lie with the innocent victim. It is not a proper policy choice to impose on the court. If school boards are to become insurers for all of the actions of their employees then that is a policy choice that must be made by Members of the Legislative Assembly. [Emphasis added.]

- [26] In the face of this statement by Binnie J., it is not surprising that counsel for Ms. G. determined that it would be futile to pursue Ms. G.'s claim against the Board based on vicarious liability.
- (b) Non-Delegable Duty [27] This leaves the question of whether Ms. G. can succeed against the Board on the basis of the Board having a non-delegable duty to ensure that care was taken to protect her from harm while she was attending school. Counsel for Ms. G. has framed this question as if breach of non-delegable duty in this case were interchangeable with breach of fiduciary duty. If that were so, the appeal on this ground would have to be dismissed on the basis of this Court's decision in *Critchley*. To hold otherwise would be to permit Ms. G. to obtain relief through the back door which she would not be entitled to obtain through the front door.
- [28] Mr. Justice Vickers held that the Board had a fiduciary duty toward children attending a school under its jurisdiction. The Board has not taken issue with this finding and, in fact, agrees with Mr. Justice Vickers' analysis of the nature and scope of this duty. The more specific question to be asked in this case, however, is whether the Board owes a direct, non-delegable duty to children, such as Ms. G., to ensure that reasonable care is taken of them while they are attending school. If so, does that duty extend to protecting those children from intentional torts perpetrated upon them by individuals employed by the Board which occur on school premises during school hours? Assuming that such a claim is foreclosed against the Board on the basis of vicarious liability (by the majority judgment of the Supreme Court of Canada in *Jacobi*), can a claim based on non-delegable duty succeed?
- [29] Mr. Justice Vickers appears to have been of the view that, since the Board did not delegate any child-care duties to Mr. Hammer, as janitor, a claim in non-delegable duty could not succeed. With respect, however, this conclusion begs the question of whether the Board owed a non-delegable duty of care to children attending its schools in the first instance. In that regard, I note that Vickers J. did not refer to the analysis of non-delegable duty engaged in by the Supreme Court of Canada in *Lewis*, *supra*. He appears to have been of the view that his finding that vicarious liability would not lie on these facts was determinative of the question of whether liability would lie for breach of non-delegable duty. That is one of the questions with which we must grapple on this appeal.
- [30] In considering that question, it is important to observe, as the majority of this Court did in *M.B.*, *supra*, that breach of non-delegable duty is a direct form of liability, whereas vicarious liability is an indirect form of liability. The focus of the two is different. 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. (See paras. 52 to 58 of *M.B.*). In my view, this is an important distinction, and not merely one of semantics. The authorities to which we were referred which most clearly delineate this distinction are *Commonwealth of Australia v. Introvigne*, [1981-82] 150 C.L.R. 258 (Aust. H.C.) and *Kondis v. State Transport Authority*, [1984] 154 C.L.R. 672 (Aust. H.C.).

[31] In *Introvigne*, a 15-year-old student was injured on school property when part of a flagpole, on which school boys had been swinging before classes, became detached and fell on his head. The student sued, amongst others, the teaching staff at the school and the Commonwealth of Australia (the "Commonwealth"). The Commonwealth had the responsibility for administering and maintaining the school as part of the public system of education. The teachers were not servants of the Commonwealth, but of the State of New South Wales. Thus, the Commonwealth could not have been found vicariously liable for any negligence on the part of the teachers. The High Court, nonetheless, found the Commonwealth liable for the injuries suffered by the student on the basis of non-delegable duty. At pp. 269-70 of the decision, Mr. Justice Mason, with whom the other members of the court agreed, stated:

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.... The concept of personal duty, performance of which is incapable of delegation, has been strongly criticized, especially outside the master and servant relationship where its introduction was designed to overcome the consequences of the doctrine of common employment (see Glanville Williams "Liability for Independent Contractors" [1950] *Cambridge Law Journal*, p. 180). 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. This criticism fails to acknowledge that the law has, for various reasons, imposed a special duty on persons in certain situations to take particular precautions for the safety of others, e.g. the occupier of premises. 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. This was the view expressed by Kitto J. in *Ramsay v. Larsen* (1964) 111 C.L.R., at p. 28. 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, one 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. [Emphasis added.]

[32] In *Kondis*, an employee was injured on the job as a result of the negligent operation of a crane by an independent contractor hired by the same employer. The majority of the court found the employer directly liable to the injured employee on the basis of a non-delegable duty to provide a safe system of work. After reviewing authorities in England and Australia discussing situations in which a non-delegable duty was found to exist (not all of which would necessarily apply in Canada), Mason J. stated, at 687:

In these situations the special duty [to ensure that care is taken] arises because the person on whom it is imposed has undertaken the care, supervision or control of the person or property of another or is so placed in relation to that person or his property as to assume a particular responsibility for his or its safety, in circumstances where the person affected might reasonably expect that due care will be exercised.... [33] Mason J. in *Kondis* referred to the *Introvigne* decision with approval. At 686 of the *Kondis* decision, Mason J. stated:

Likewise with the school authority. It is under a duty to ensure that reasonable care is taken of pupils attending the school. It is the immaturity and inexperience of the children and their propensity for mischief that lie at the basis of the special responsibility which the law imposes on a school authority to take care for their safety: *Introvigne*. The child's need for care and supervision is so essential that it is a necessary inference of fact from the acceptance of the child by the school authority, "that the school authority undertakes not only to employ proper staff but to give the child reasonable care", to use the words of Kitto J. in *Ramsay v. Larsen* (1964) 111 C.L.R., at p. 28. [34] In Australia, therefore, it appears to be accepted that a school board has a non-delegable duty of care to children attending its schools; that is a duty, not simply to take reasonable care, but a duty to ensure that reasonable care is taken.

[35] In its factum, the Board neither acknowledges nor denies that such a duty exists, but adopts the position of Vickers J. that the question does not arise because the Board did not delegate any child-care duties to Mr. Hammer.

[36] Several of the relevant Canadian authorities - Bazley, this Court in *Critchley*, and the majority of this Court in *M.B.* - discuss situations in which vicarious liability, and/or liability for breach of a non-delegable duty, were imposed where the employer had placed the employee (or independent contractor) in a parent-like relationship with the victim of intentional torts. As noted by Mr. Justice Vickers, that is not the situation here. Mr. Hammer was not placed in a parent-like role in relation to students at the school. There is, however, no appellate authority (of which I am aware) which stands for the proposition that an employer can only be found liable for intentional torts committed by its employee where this parent-like relationship is found to exist. In that regard, I note the following comments of Binnie J., for the majority, at para. 64 of *Jacobi*:

I would not want to be taken as suggesting that creation of a parent-type relationship constitutes a precondition to vicarious liability in child abuse cases. However, not only do the "parental" cases have a particular relevance to the facts of this appeal, they show how high the courts have set the bar before imposing no-fault liability. I think Huddart J.A. was correct in this case in the B.C. Court of Appeal to emphasize job-created power as the most relevant source of "connectedness" (p. 7) to the present appeal. Of course, other power relationships have also been held to supply the necessary "strong connection" in different fact situations....

[37] Those comments were made, of course, in the context of a claim based on vicarious liability, rather than on the basis of a claim founded on non-delegable duty. Mr. Justice Binnie made a point of emphasizing that there was no claim before the court based on direct liability of the employer (see para. 81). In that regard, he stated, at para. 74 of the decision:

There is much to be said for developing and refining the paths of potential direct liability against employers which introduce child-related enterprises into the community, but that is not the issue before us on this appeal. [Emphasis in original] [38] In the result, the majority in *Jacobi* remitted the case back to the trial court to determine whether the Club could be found directly, as opposed to vicariously, liable for the damages suffered by the plaintiffs.

[39] In *M.B.*, the majority of this Court approached the analysis of non-delegable duty in accordance with the direction of the Supreme Court of Canada in *Lewis*, supra.

[40] In *Lewis*, the question was whether the Crown could be found liable for the negligence of an independent contractor hired by it to maintain the highways. A motorist was killed by a falling rock as a result of the independent contractor's negligence. The court was unanimous in finding that liability would lie on the basis that the Crown owed a non-delegable duty to ensure that care was taken of motorists using the highway which the Crown had a duty to maintain. The Court found liability both as a matter of statutory interpretation and as a matter of policy.

[41] In *Lewis*, the key statutory provisions in issue were s. 8 and 33 of the Highway Act, R.S.B.C. 1979, c. 167 and ss. 14 and 48 of the Ministry of Transportation and Highways Act, R.S.B.C. 1979, c. 280, which provide as follows:

8. (1) The minister may construct, keep open and maintain a highway 33. (1) The control of the construction and maintenance of every arterial highway is vested in the ministry. * * * 14. The minister has the management, charge and direction of all matters relating to the acquisition, construction, repair, maintenance, alteration, improvement and operation of government . . . highways and public works 48. The minister shall direct the construction, maintenance and repair of all . . . highways

[42] It was these provisions, particularly s. 48, which Mr. Justice Cory, speaking for the majority in *Lewis*, found created a non-delegable duty of care upon the Crown to ensure that care was taken of motorists using the highway. That duty was a personal duty upon the Crown. The Crown could delegate the work involved in carrying out the duty, but it could not delegate the duty itself. Cory J. found that policy considerations supported this conclusion.

[43] Madam Justice McLachlin, in concurring reasons, did not find that s. 48, in itself, was determinative of the existence of a duty. She concluded that it was a combination of statutory interpretation and policy considerations which gave rise to a non-delegable duty upon the Crown, not only to take reasonable care, but to ensure that reasonable care was taken in maintaining the highways.

[44] In coming to their conclusions in *Lewis*, both Cory J. and McLachlin J. relied on the *Kondis* decision, *supra*. At para. 32 of *Lewis*, Mr. Justice Cory stated:

To begin with, it seems both logical and reasonable to assume that members of the travelling public would look to the respondent to take reasonable care in the construction and maintenance of the provincial highways. It can be reasonably assumed that those who travel provincial highways have a reasonable expectation that the province will be responsible for the negligent acts of its employees or independent contractors which occur in the course of repairing and maintaining those highways. This, in my view, is a further factor which indicates that liability for the negligence of its independent contractors should rest with the respondent. This approach has been considered with approval in two decisions of the Australian High Court. In *Kondis v. State Transport Authority* (1984), 154 C.L.R. 672, Mason J. stated (at p. 687):

[I]t appears there is some element in the relationship between the parties that makes it appropriate to impose on the defendant a duty to ensure that reasonable care and skill is taken for the safety of the persons to whom the duty is owed.... In these situations the special duty arises because the person on whom it is imposed has undertaken the care, supervision or control of the person or property of another or is so placed in relation that person or his property as to assume a particular responsibility for his or its safety, in circumstances where the person affected might reasonably expect that due care will be exercised. [Emphasis added by Cory J.]

[45] In this case, the relevant statutory provisions which must be considered are found in the *Public Schools Act*, R.S.B.C. 1960, c. 319, as amended and subsequently consolidated in the *School Act*, R.S.B.C. 1979, c. 375. Each of these acts was in effect during a portion of the relevant time, and the key provisions are similar, if not identical. I will, therefore, refer to the provisions of the *School Act* as a matter of convenience. Some of the relevant provisions of that Act are as follows:

3. The minister [of Education], subject to this Act, . . .
 - (b) has charge of the maintenance and management of all Provincial schools established under this Act; . . .
4. (1) The minister shall . . .
 - (d) supervise all schools operated under this Act;
- . . . 6. (1) Each district superintendent of schools, in respect of his superintendency, shall
 - (h) in consultation with the professional staff of the school district, supervise all matters relating to school organization, instruction, counselling, services and discipline, and encourage the raising of the level of pupil achievement and the advancement of public education; 9.(1) The board of a school district... may, after prior consultation with the ministry, appoint an officer to be known as the superintendent of schools, who has and may be assigned or delegated the same powers and duties assigned or delegated to, or conferred or incumbent on, a district superintendent of schools.

. . . 88. The board of each school district shall . . .

- (b) determine local policy in conformity with this Act for the effective and efficient operation of schools in the school district; (c) delegate those specific and general administrative duties which require delegation to one or more employees of the Board;

89. The board of a school district may . . .

- (c) authorize the appointment of employees, in addition to teachers, considered necessary by the board to secure the efficient operation of the public schools of the school district, fix wages or remuneration, and, by lawful process, dismiss a person so appointed;

[46] Thus, the Minister of Education, in the first instance, has charge of the maintenance and management of all Provincial Schools and is required to supervise the schools. Those duties are carried out in practice by the district superintendent and by local school boards. The local boards, for example, are responsible for hiring and firing, not only teachers, but also additional employees considered necessary to secure the efficient operation of the schools. This would include janitors.

[47] Section 113 of the School Act provides for compulsory school attendance. It states, in part:

113. (1) Subject to the exemptions under subsection (2), every child over the age of 7 years and under the age of 15 years shall attend some public school during the regular school hours every school day, and every parent or guardian who fails or neglects to cause such a child under his care to attend some public school during the regular school hours every school day commits an offence and is liable on conviction to a fine not exceeding \$10, and each day's continuance of this failure or neglect shall constitute a separate offence.

...

[48] Sections 114 and 116 of the School Act provide:

114. Every pupil shall observe the rules of the school as sanctioned by the board of the school district having jurisdiction in respect of that school and shall carry out the learning activities his teachers require within this Act or the regulations, or within the terms of reference of the curriculum prescribed under this Act. 116. The board of each school district shall enforce the provisions of this Act for the compulsory attendance of children at public schools. [49] Thus, children are compelled by statute to attend schools supervised by the District Boards and are required to carry out the "learning activities" required by their teachers. While cleaning black board brushes may not be a "learning activity" per se, it is an activity which encourages children to accept responsibility for sharing school-related tasks. In any event, there is no doubt that Ms. G. was required to carry out this duty by her teacher and that she was not permitted to be excused from this duty despite her request.

[50] 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.

- [51] In coming to this conclusion, I agree entirely with the following comments of Vickers J. at para. 40 of his decision (in relation to his analysis of fiduciary duty):

Perhaps it goes without saying that the Board, by virtue of its statutory position, enjoys a position of overriding power and influence over its students. It is a power dependent relationship, one characterized by unilateral discretion....While in its care, the Board has a duty to nurture, care for and protect the lives and the best interests of students. It has a duty to provide a safe, non-threatening learning environment. In my view, the duty remains similar to the duty of a parent.

- [52] Vickers J. expressly found that Ms. G. found herself in an "unsafe, threatening learning environment" [para. 42]. He concluded, however, that the Board could not be held liable for the injuries which befell Ms. G. as a result of being placed in that environment, since "it was not the Board which committed the grave assaults on Ms. [G.]" but, rather, "an employee of the board, and, in particular, an employee who had no direct duties relating to students attending the school." In the absence of proof of negligence in the hiring or supervision of Mr. Hammer, (as alleged in the statement of claim) he was not prepared to find liability on the part of the Board.

- [53] While the analysis of Vickers J. may be sustainable in relation to vicarious liability, I am not persuaded that it can stand when analyzed from the standpoint of a direct, non-delegable duty on the Board to ensure that reasonable care was taken to protect children under its care from harm. The Board could not delegate the responsibility for its direct obligations toward children attending its schools in that regard. Nor can the Board escape responsibility by showing that it exercised reasonable care in the hiring of Mr. Hammer. This is apparent from the Lewis decision. While the legislature could absolve Boards from liability where children are harmed during school hours on school property by school employees, whether as a result of negligence or intentionally tortious conduct while under the Board's care and supervision, in my view it would take clear language to achieve that result.

- [54] 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. Further, Ms. G. was required by her teacher to go into Mr. Hammer's "territory" within the school in order to perform her assigned duty of cleaning chalkboard brushes. This was in a part of the school far removed from any form of supervision or place of refuge. Ms. G. felt that she had no choice other than to do what she had been instructed by her teacher to do. According to s. 14 of the School Act, she was undoubtedly correct in that regard. She was repeatedly victimized by a person hired by the Board, the very entity charged with the responsibility to provide a safe learning environment. Ms. G. was caught in

a trap unwittingly set by the Board when it hired Mr. Hammer and placed him in a position of proximity to the children under its care.

- [55] 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.
- [56] In my view, this conclusion, which rests thus far on the construction of the relevant legislation, is also supported by policy considerations.
- [57] As earlier stated, Mr. Justice Vickers was not inclined to engage in a policy analysis on the basis that matters of policy are best left to the legislature. Apparently, his attention was not directed to the Lewis decision, which was heavily influenced by policy considerations. Nor did he have the benefit of the Supreme Court of Canada decisions in Bazley and Jacobi, both of which also undertake a thorough policy analysis. This Court has the benefit of those decisions which were directly raised in argument before us in this and the related appeals of M.B. and K.L.B..
- [58] In M.B., a majority of this Court found that policy considerations supported a finding that the Crown owed a non-delegable duty to ensure the care of foster children who were under the guardianship of the Superintendent. This duty gave rise to a cause of action against the Superintendent of Child Welfare for breach of non-delegable duty arising from intentional torts committed by foster parents chosen by the Superintendent to care for the children. A majority of this Court rejected the policy arguments proffered by the Crown to justify a finding that, as between the Crown and the injured foster child, the consequences of the tortious acts of the foster parent should fall on the child.
- [59] A similar conclusion emphasizing policy considerations was reached by the Supreme Court of Canada in Bazley, albeit on a vicarious liability analysis. Although the majority in Jacobi rejected a finding of liability based on vicarious liability, it left open the possibility of direct liability on the part of the Crown.
- [60] As earlier noted, the Australia High Court in Introvigne and Kondis relied heavily on policy considerations as the foundation for direct liability in those cases.
- [61] The Supreme Court of Canada in Lewis, in turn, relied on the Australian decisions as articulating the foundation for a finding of direct liability. This is apparent from the extract from the Kondis decision quoted by Mr. Justice Cory and Madam Justice McLachlin in Lewis and referred to at para. 44 of these reasons.
- [62] Although the Australian cases dealt with situations involving negligence, rather than intentional torts, the policy considerations remain persuasive.

- [63] In M.B., I noted that the Crown had not established any foundation for its argument that exposing the Crown to liability for the intentionally tortious acts of foster parents against children placed in their care by the Superintendent would unleash a flood of claims against the Crown. Similarly, there is no suggestion in this case that school children are frequently subjected to assaults by school janitors (or other employees of Boards) such that a finding of liability would hamstring Boards in carrying out their statutory duties. If this is, or becomes, a real problem, it is open to the legislature to act so as to limit liability in such circumstances. Boards may also be able to obtain insurance to protect against such occurrences.
- [64] In terms of policy, I am not persuaded that a child who is compelled to be under the care and supervision of the Board during school hours is any less vulnerable or deserving of protection than a child compelled to be under the care of a foster parent, or, for that matter, a motorist, forced to use the Province's highways for transportation. The short answer, in my view, is that there is no policy basis for finding liability in one case, but not in the others.
- [65] In my view, Mr. Justice Binnie left it open to the courts to determine whether direct liability could lie in situations such as that before us here. In the result, based on both principles of statutory interpretation and the policy considerations referred to in the Australian authorities, Lewis, Bazley, and the majority in M.B., I have concluded that this is a case in which liability against the Board should lie on the basis of non-delegable duty.
- [66] I would, therefore, allow the appeal, set aside the order dismissing the action against the Board, and make an order finding the Board liable for the injuries suffered by Ms. G. at the hands of Mr. Hammer.
- [67] I now turn, briefly, to the issue of damages.

(c) Damages

- [68] As noted at para. 2 of these reasons, Mr. Justice Vickers awarded damages against Mr. Hammer in the amount of \$211,800. These damages were broken down as follows:

General Damages

\$150,000

Special Damages

\$1,800

Cost of Future Care

\$30,000

Future Wage Loss

\$30,000

- [69] The Board does not challenge the amount of damages awarded but submits that Mr. Justice Vickers failed to properly apportion the award between Mr. Hammer and subsequent tortfeasors. As earlier noted, Ms. G. was sexually assaulted by seven other men in the years following the assault upon her by Mr. Hammer. It is also apparent that the award of \$150,000 for general damages includes an unspecified component representing aggravated damages.
- [70] Since I am dissenting on the issue of the liability of the Board, I do not consider it appropriate or useful to attempt to resolve the issues raised by the Board with respect to damages. In the event this case is appealed to the Supreme Court of Canada, that issue will be before it for consideration.

CONCLUSION

- [71] I would resolve the appeal as set out in para. 66 of these reasons.

"The Honourable Madam Justice Prowse"

Reasons for Judgment of the Honourable Mr. Justice Mackenzie:

- [72] The central issue on this appeal is whether the appellant's claim for damages can succeed against the respondent School Board as a claim for breach of a non-delegable duty of care by the Board. The claim arises from the sexual assault of the appellant at her school by Svein Hammer, a janitor employed by the Board at the school. The judgment at trial against Hammer has not been appealed.
- [73] Any claim against the Board for negligence was abandoned at trial. The appellant has not appealed the conclusion of the trial judge that the Board was not vicariously liable for the sexual assaults of Hammer, apparently because counsel concluded that appeal was foreclosed by the approval of the trial judgment on that point in the reasons of Binnie J., for the majority of the Supreme Court of Canada, in *Jacobi v. Griffiths*, [1999] 2 S.C.R. 570, at para. 45. Madam Justice Prowse has quoted the relevant passage at para. 25 of her reasons.
- [74] The issues remaining are breach of fiduciary duty and non-delegable duty. I agree that the claim for breach of fiduciary duty cannot succeed for the reasons given by Madam Justice Prowse.
- [75] I respectfully differ with my colleague, however, on the issue of non-delegable duty. In my view, 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.

[76] As I read Australian authorities, quoted by my colleague, those cases appear to contemplate a direct liability of the institutional defendant either as an occupier, or for negligent supervision and control in breach of a stringent standard of care in negligence. In this case the trial judge emphatically rejected such claims. He said at para. 41:

. . . . On the evidence it would be impossible to conclude the Board failed to adequately supervise its employees; failed to protect the students from assault; and failed to investigate credentials and qualifications of persons involved with students, as alleged in the statement of claim. Those allegations were not pressed in the claim based on negligence because they could not succeed. . . . [77] I do not understand the reasons in Jacobi as supporting a claim for breach of non-delegable duty for the tort of an employee where there is no vicarious liability. There does not appear to have been an employer/employee relationship that could have supported a vicarious liability claim in either of the Australian cases relied on by my colleague; *Commonwealth of Australia v. Introvigne*, [1981-82] 150 C.L.R. 258 (Aust. H.C.) and *Kondis v. State Transport Authority*, [1984] 154 C.L.R. 672 (Aust. H.C.).

[78] The leading case in this jurisdiction, *Lewis (Guardian ad litem of) v. British Columbia*, [1997] 3 S.C.R. 1145, involved liability of the Crown for the negligence of an independent highway contractor. There was no employment relationship that would have permitted a claim for vicarious liability.

[79] In the foster parents cases heard together with this appeal, the foster parents were independent contractors and not employees of the Crown. 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.

[80] In summary, in my respectful view the claim of the appellant for breach of a non-delegable duty of the Board must fail. Accordingly, I would dismiss the appeal.

"The Honourable Mr. Justice Mackenzie"

Reasons for Judgment of the Honourable Chief Justice McEachern:

[81] I agree with the result reached on this appeal by Mr. Justice Mackenzie, for the reasons he has given and for the reasons I gave relating to non-delegable duty in *M.B. v. British Columbia*, 2001 BCCA 227, which was argued at the same time as this case.

"The Honourable Chief Justice McEachern"

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