[FEATURE]

NEGLIGENCE of Institutions

The Standard of Care

BY LORETTA MERRITT

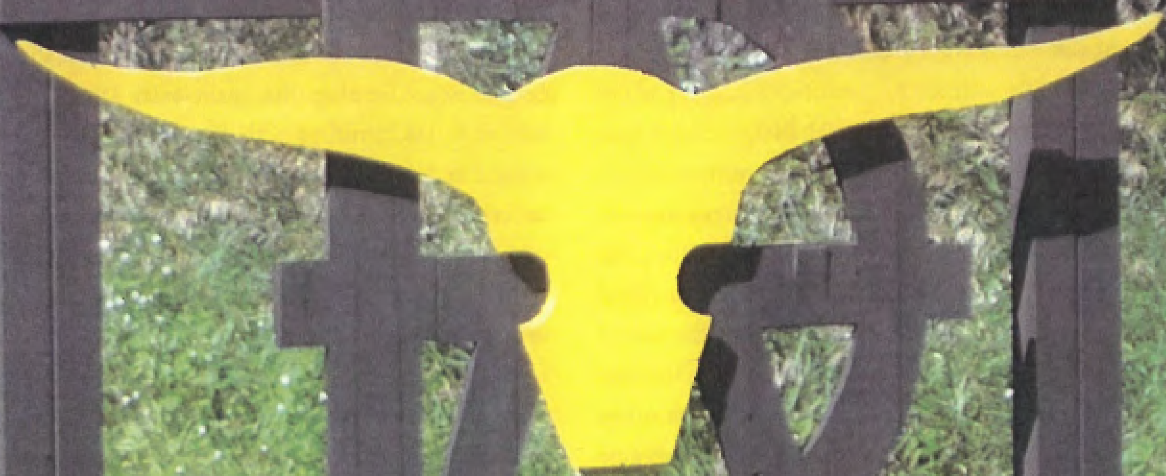
Sexual abuse of children has a devastating effect and causes significant damages. However, a civil action against the perpetrator(s) may not be possible (if they are deceased) or worthwhile (if they are impecunious). The abuse survivors' only recourse may be against an institutional defendant. If an institutional defendant is liable for the abuse, it will often have means to satisfy the judgment and, in many cases, the institutional defendant will also have insurance coverage for such claims. There are three possible ways an institutional defendant may be liable for sexual abuse by its employees: vicarious liability, breach of non-delegable duty and negligence. This article will explore the circumstances in which institutional defendants are found negligent in sexual abuse cases.

A finding of negligence is based on three elements; 1) a duty of care owed (proximity and foreseeability); 2) a breach of the duty owed (falling below the standard of care); and 3) causation. Establishing a duty of care involves determining whether the Courts have previously recognized a *prima facie* duty of care and, if not, a consideration of whether a new duty of care should be recognized. In order for the Court to recognize a new duty of care, there must be both a proximate relationship and foreseeable harm. If there is foreseeable harm and a proximate relationship, the Court then considers whether there are any residual policy considerations that justify negating the duty. In cases where a child is abused in an institutional context, there is usually a previously-recognized duty of care. The real challenge in negligence cases against institutions is determining the standard of care, particularly in historical cases.

Breach of Duty of Care – Standard of Care

In all negligence cases the question is: what would a reasonable institution in similar circumstances do? Negligence is the doing of something a reasonable institution would not do, or the failure to do something which a reasonable institution would do. In examining the case law dealing with allegations of negligence against institutions in cases involving childhood sexual abuse, several important principles emerge: 1) industry standards are important but not determinative; 2) Courts will consider any statutory duties, for example in cases involving public schools or Children's Aid Societies; 3) institutions are

GENCE



Breach of Duty of Care Owed by Institutions

judged according to the "standards of the day", and therefore the date of the alleged negligence is key; and 4) in cases involving historical allegations of institutional negligence, an important consideration is when society generally became aware of the prevalence of childhood sexual assault.

In *Blackwater v. Plint,* [2005] S.C.J. No. 58, there were allegations of negligence against the Church and the Crown arising out of sexual abuse which occurred in a residential school between 1940 and 1970. The Court held that there was no general awareness of the prevalence of childhood sexual abuse in the late 1960's or early 1970's. In *John Doe v O'Dell* and *The Roman Catholic Episcopal Corporation for the Diocese of Sault Ste. Marie,* 2003, Carswell, Ont. 3456, the Court held that the absence of monitoring or supervision of priests was not negligent because sexual abuse was not really "on the horizon" in the late 1970's and early 1980's. In *D.W. v Canada (Attorney General),* [1999] S.J. No. 742, again the Court said that in the late 1960's and early 1970's society was generally unaware of the prevalence of childhood sexual abuse, that it was not until the early 1980's that the police were instructed to thoroughly investigate allegations of child sexual abuse, and it was not until 1985 that complaints of child sexual abuse became prevalent.

In order to determine whether or not a Court is likely to find institutional negligence, it is helpful to look at the factors which Courts rely upon when finding negligence, as well as the factors considered when negligence is not found.

Factors in Favour of Finding of No Negligence

In several reported cases *(D.W. v Canada (Attorney General), J.L. v Canada (Attorney General),* [1999] B.C.J. No. 1306 and *R.E.E. v W.O.T.,* [2000] B.C.J. No. 342), Courts relied on the fact that there was no actual knowledge of the sexual misconduct on the part of the institution in finding that the institution was not negligent. In *D.W. v Canada (Attorney General),* the Court relied on the fact that the perpetrator had evaluations, which portrayed him as a competent administrator with the best interests of the students at heart, in finding that the Government was not negligent. The Court found the Government not to have been negligent even though suspicions about the perpetrator had been raised; when confronted with the allegations, the perpetrator had provided a "credible explanation".

In *A.B. v C.D.,* [2011] B.C.J. No. 1087, the plaintiff was a female student who was sexually touched by her high school teacher. The Court found that the School Board was not negligent notwithstanding some arguably suspicious circumstances. The Court imposed a high standard of care, that of a "careful and prudent parent", on the School Board. However, the Court said that the fact that a student might have a crush on a teacher did not establish the teacher would likely commit an act of sexual touching. The teacher's reputation was that of an "inspiring" teacher, and the fact that the student spent many hours in class was not something that could cause or should have caused concern. The Court found the Board was not negligent even though the teacher was previously suspended because the administration thought he was involved in a sexual relationship with a student. The Court said that a single incident of suspected but unproven student touching cannot be said to establish a trend thus supporting a finding of negligence on the part of the Board. Although the dates of the disclosure and previous incident are not specified, the Plaintiff was in her fourth year of University at the time of trial. In *K.G. v B.W.,* [2000] O.J. No. 2155, the Court found that there was no negligence on the part of the School Board, stating that in the early 1970's most teachers had close relationships with the students both at and after school, and there was no Board policy against same. Similarly, in *S.G.H. v. Gorsline,* [2001] A.J. No. 263 (appeal to the Court of Appeal [2004] A.J. No. 593), the Court said that in the late 1970's it was not negligent not to have programs of awareness or protection against sexual abuse in schools.

In cases where a child is abused in an institutional context, there is usually a previously-recognized duty of care.

Factors Supporting a Finding of Negligence

Many of the cases where institutional negligence is found involve Children's Aid Societies. The Courts have clearly established that there is an ongoing duty to monitor and supervise children in care. In *M.B. v. British Columbia,* [2000] B.C.J. No. 909, (appeals to the Court of Appeal, [2001] B.C.J. No. 586 and the Supreme Court of Canada [2003] S.C.J. No. 53), the Court found that an absence of contact between the social worker and the child after placement in foster care is negligent. Similarly, in *K.L.B. vs. British Columbia,* [1998] B.C.J. No. 470, which was heard at the same time, the Court

found negligence based on, 1) no visits to a foster home for several months combined with issues concerning prior placements; 2) double the recommended number of children in the home; and 3) failure by the social workers to probe the unhappiness of the children in the home. In *J.A.K.E. v. British Columbia,* [2002] B.C.J. No. 597, a finding of negligence was based on the failure to evaluate the foster father's suitability (i.e., no home study done at all) combined with a failure to have proper supervision in the home. The home was in an isolated location with no telephone and was inaccessible in the winter months. Having only two visits in 14 months was found to be inadequate supervision. In *R.A.R.B. v. British Columbia,* [2001] B.C.J. No. 963, the Court found that housing a plaintiff in a group home with a sexually aggressive roommate, and failing to protect the plaintiff from a "known predator", was negligent.

Courts have acknowledged a higher level of awareness of childhood sexual abuse in cases involving child protection agencies. In *A.J. v. Cairnie Estate,* [1999] M.J. No. 176 (appeals to the Court of Appeal [2001] M.J. No. 177 and leave to appeal to the S.C.C. being dismissed [2001] S.C.C. No. 317), the Court held that in 1976, in child protection cases, where there were allegations of sexual abuse, steps would definitely be taken to apprehend children or remove offenders, and a failure to do so was negligent.

The standard of special diligence in placing a child has not been relaxed in cases where the child is being returned to the care of his or her natural parents after removal. Home studies and criminal record checks are still required, as is ongoing supervision. (See *C.H. v. British Columbia,* [2003] B.C.J. No. 1706). Similarly, failing to do a new risk assessment before removing a supervision order on a natural father, in the face of child protection reports, is negligent *(See B.M.(Litigation Guardian of) v. R.M.,* [2009] B.C.J. No. 303).

Courts have also found negligence on the part of the Crown and Churches in various contexts. In *F.S.M. v Clark,* [1999] B.C.J. No. 1973, both the Church and Crown were found negligent for abuse in a residential school in the early 1970's for failing to detect signs of abuse that would have been apparent to a reasonably prudent teacher. Other factors supporting the negligence findings were: 1) there were no rules of conduct for priests; 2) the priest was known to have students in his quarters; 3) there was gossip amongst the children; and 4) the problem became apparent to a novice teacher at the local public school who then acted swiftly. A Church was also found negligent when a priest was known to often have children visiting alone in his chambers with overnight visits as well. In *J.R.S. v. Glendenning,* [2004] O.J. No. 285, the Court held that a priest having children alone in his chambers was not in conformance with general practice and should have raised questions. The Court also said that the Church treated the issue of sex as "taboo" and, in finding negligence, cited the fact that the Church provided no education or counselling on the issue. In *K.M.M. v. Roman Catholic Episcopal Corporation of the Diocese of London, Ontario,* [2011] O.J. No. 1807, the Court found the Church negligent because of its failure to act on earlier complaints of abuse of children prior to a priest's appointment as pastor at a school in 1968.

In a recent jury decision (*S.L. v. R.T.M.,* [2013] O.J. No. 2913), a jury found a School Board liable in negligence for a teacher's sexual abuse of a student because: 1) the teacher was given a key to the school with no stipulations as to its use, which contravened Board policy; 2) the principal was aware that the teacher "preferred the company of young males"; 3) parents had expressed concerns; 4) there were homophobic slurs spray painted on the outside of the classroom, as well as rumours; and 5) the principal's determination to "watch him like a hawk" but do no more, was clearly negligent.

Causation

It is trite to say that in order to establish that an institutional defendant was negligent, the plaintiff must prove that the negligence caused harm. Proving causation involves establishing that the defendant's conduct made a difference to the plaintiff's outcome. In the majority of cases where the negligence is glaring (e.g., failure to act on prior complaints of sexual impropriety), there is little discussion of causation. It appears as though as long as the negligence occurred before the plaintiff's abuse, causation is presumed. However if the negligence is based on a failure to make enquiries of the child in the face of suspicious circumstances, causation may be more of an issue. There are some cases where the Court refers to the fact that the sexual assaults were carried out in secret and the victims were unlikely to make disclosure. In *D.W. v Canada (Attorney General),* and *R.E.E. v W.O.T.,* the Court found that there was no causation because even if there had been an investigation, the children were unlikely to have made disclosure.

Failure to Respond Appropriately After Disclosure

Often clients complain about the response they received from an institution after a disclosure of sexual abuse. There

are few reported cases where the claim is based solely on an inappropriate response to disclosure where there is no further sexual abuse. In such cases, the plaintiff is complaining that he or she was further traumatized or that the damages were exacerbated by the institutional response to disclosure (as opposed to seeking to hold the institution liable for further assaults occurring after disclosure). In *J.L. v. Canada (Attorney General),* [1999] B.C.J. No. 1306, the plaintiff was in the armed forces and sexually harassed by her supervisor. After her disclosure, the plaintiff was moved (as opposed to the harasser being moved). As well, she was forced to stand beside the perpetrator at the military trial and answer questions posed by him, with no-one there from the armed forces to support her. She was also forced to report to the same supervisor as the perpetrator's common-law wife. The Court found that a "lack of sensitivity" does not equal harassment and is not sufficient to ground liability. In *S.M. v. Clarke,* [1999] B.C.J. No. 1973, the opposite conclusion was reached. The Court found institutional negligence on the part of the Church which did nothing after the plaintiff's disclosure and thus deprived another defendant (the Crown) of the opportunity to "contain" the psychological injury, thereby denying the plaintiff rehabilitative measures to deal with the trauma, shame and guilt. Similarly, in *J.R.S. v. Glendenning,* the Court found that the Church was negligent for failing to render assistance after abuse was exposed in 1974 and failing to take steps to reduce its impact.

Conversely, in *K.M.M. v. Roman Catholic Episcopal Corporation of the Diocese of London, Ontario,* the Court found that failing to attend to the needs of the plaintiff after a 1979 disclosure was not negligent considering the lack of knowledge about sexual abuse at the time. In *P.D. v. Allen,* [2004] O.J. No. 3042, the Court did not find negligence in responding to a 1992 disclosure of abuse. The Court said that a failure to provide counselling or funds combined with the Bishop's callus conduct may have aggravated the injury but was not negligent. Most recently, in *K.L.P. v. Thames Valley District School Board,* [2015] O.J. No. 437, a jury found that the School Board responded inadequately to a disclosure of sexual assault on a special needs student and that the response caused damage to the student, her mother and grandmother because of what occurred when the trust in the school system was irretrievably broken. Damages were awarded to the student in the amount of $80,000.00, and to the mother ($68,000.00) and to the grandmother ($8,000.00).

Conclusion

It is clear from reviewing the case law that where an institution has actual knowledge of sexual abuse of children and fails to take any steps, it will be found to be negligent. Whether an institution will be found to be negligent for failing to act on circumstances which should have given rise to a suspicion depends more on the time in question and nature of the institution. Institutions whose function it is to protect children, such as Children's Aid Societies, are subject to a particularly high standard of care and less glaringly suspicious circumstances will be sufficient to impose liability. It is important to remember when assessing potential institutional negligence, as well as when applying or distinguishing case law, that it is the date of the negligent acts and not necessarily the date of the abuse which is relevant. Often expert evidence is required to assist the Court in determining the standard of care, as well as whether the standard has been breached.

With respect to allegations of negligence for failing to respond appropriately after a disclosure, expert evidence will likely be needed both on the general awareness of abuse at the time as well as the specific awareness that therapy and support is needed in cases of abuse. Also, the plaintiff will need expert evidence to establish that appropriate response to disclosure would have made a difference in his or her particular case.

***Loretta Merritt** is an OTLA member and practices with Torkin Manes LLP in Toronto, Ontario*