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• TEACHER AND SCHOOL CIVIL LIABILITY FOR SEXUAL ABUSE OF A STUDENT •

Brian Vail, QC, Field LLP

***B. (A.) v. D. (C.)*, [2011] B.C.J. No. 1087, 2011 BCSC 775, per Gray J. [3851]**

The plaintiff AB sued a teacher CD and the Board of School Trustees of District EF with respect to alleged sexual abuse she claimed to have suffered at the hands of her former high school teacher CD. The allegations related to the time she went to high school at the GH School.

The court substituted alphabetical pseudonyms for people and places pursuant to an order prohibiting publication of any information that would tend to identify the plaintiff. The court felt it necessary to employ pseudonyms with respect to the name of the teacher, the high school and the school board that were involved on this basis.

The plaintiff AB excelled academically throughout her schooling. When she attended high school, she lived with her parents and siblings in a small British Columbia community. She attended high school at the GH School, a school of 1,200 students (250 in each grade).

In the summer between her Grade 9 and Grade 10 years, AB had “unwanted sexual intercourse” with a boy her own age. Although she was initially interested in the sexual activity, she withdrew her consent during the course of the event, but the boy persisted. The plaintiff referred to this event as a “date rape”.

When AB began Grade 10, one of her teachers was CD. He was a male, in his 50s, with a long career in teaching. He was the head of the English Department. He was charismatic. His students performed well in provincial examinations. Neither the school board nor the school had ever received a complaint of inappropriate

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In association with Catholic Principals’ Council of Ontario

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sexual activity against him. The only complaints that had previously been made against him were that he could be harsh with students who performed poorly.

In Grade 10, the plaintiff was in CD's Grade 10 English class for advanced English students. She was sometimes singled out by him for praise. She enjoyed and did well at English literature and writing, something which CD encouraged her to develop.

In her Grade 11 year, the plaintiff took an English class and a Writing class from another teacher, winning a prize in the Writing class. She did not take any classes from CD in Grade 11, but still considered him to be her favourite teacher. She regularly visited his classroom, about once a week, discussing the status of her English studies and educational plans. Other students were present on those occasions. She had a boyfriend for most of her Grade 11 year.

Near the end of AB's Grade 11 year, another teacher (YZ) was suspended from the GH School for allegedly having become sexually involved with another student. The allegation was that YZ had engaged in this contact outside school and school hours. The student who was allegedly abused by teacher YZ was a "peer tutor". That teacher was eventually acquitted of the allegations.

The GH School encouraged students to take on the role of "peer tutor". A peer tutor was a senior high school student who assisted a teacher in teaching junior high school students in a subject area for which the peer tutor showed a particular interest and aptitude.

At the GH School, students who had enough credits to graduate were allowed to have spares during class blocks, during which time they were not required to be in school. In the plaintiff's

Grade 12 fall semester, of the eight blocks of school time, she had two spares, two blocks for a college-transfer English class with CD, one block of English literature with a different teacher, two blocks of other academic courses, and one block of peer tutoring with CD. She was a peer tutor for one of CD's Grade 8 classes. This involved her making photocopies, marking parts of the exams, playing videos for the class and sometimes individually tutoring students who were having difficulty.

During the plaintiff's Grade 12 fall semester, one of her spares corresponded with CD's preparation block (a block during which he did not have to teach class). During that block, the plaintiff typically spent time in CD's classroom. Most of the time, AB and CD were the only people there but sometimes other students were present. CD's class door was usually open and other students and teachers sometimes came into the classroom during that block.

CD's classroom windows faced two school sports fields. Student lockers were located in the hall outside of the classroom.

CD's classroom door was rarely shut. There were usually students in the class. Other teachers occasionally dropped in during and between classes. The principal and vice-principal occasionally dropped in during and outside class hours.

At the beginning of her Grade 12 academic year, the plaintiff was preparing applications to go to university. She was "passionate about English literature and writing" and decided to pursue a university education in journalism, with the encouragement of CD. She wanted to attend university outside British Columbia. CD encouraged her to go to a particular university because of its writing program.

In October of her Grade 12 year, the plaintiff broke up with her boyfriend. When she discussed this with the defendant CD, he encouraged the break-up because he felt that the boy was not her intellectual equal. He praised both her work and her appearance. The plaintiff did well academically. Her religious involvement was "minimal". That fall, she was involved romantically and sexually with several boys her own age.

In the fall of her Grade 12 year, AB flirted with the defendant CD. She would study or sit near him and brush up against him. He commented on her "sexiness". At one point, he asked her if she was flirting with him. She became embarrassed and cried. He told her that if he were not her teacher, he would love to make love to her but said that he could not become involved with her while she was his student.

The curriculum of CD's college-transfer English class, in which the plaintiff was enrolled, "explored sexual themes and the power of women's sexuality". The teacher also suggested that the plaintiff explore other literature and films beyond the course curriculum, some of which involved relationships between older men and younger women.

During the plaintiff's Grade 12 year, there were seven incidents of sexual touching by the defendant CD on the plaintiff, between November and March.

The first incident, in November, occurred in CD's classroom during a spare. The teacher asked her if he had ever given her a hug and, when she responded in the negative, he closed the door, took her to a part of the classroom that was difficult to see into and "touched her sexually for two to three minutes". Specifically, he

"hugged her, kissed her neck, smelled her hair, and touched her back, shoulders, and bottom".

There was a similar incident in December.

A third incident occurred in December after the plaintiff and two other girls had visited CD in his classroom. After the two other girls left, the defendant teacher came up behind the plaintiff, "massaged her shoulders, and put his hands down the front of her shirt, touching her bare breasts and nipples with his hands, for about one minute". He moved in front of her and she leaned towards him "in preparation to kiss him" but he refused to kiss her, indicating that he was still her teacher. It was around this time that the defendant teacher told the plaintiff not to tell anyone about what was going on between them because he could lose his job. He told her not to drink at parties, lest she say something about the relationship to others. Nonetheless, she did drink at parties and told a friend about the fact that the defendant teacher had hugged her.

Around this time, the plaintiff became engaged in an online chat with a friend. She indicated that she had read a Canadian Justice website and learned that the age of consent was 18 years where there was a position of trust, authority or dependency, and for other sexual activity the age of consent was 14 years. She indicated that she was trying to think of ways to get around the law. She indicated that if she denied the relationship with CD or refused to press charges, she could get around the law and no one would find out about it. She indicated that the defendant teacher was afraid that she would get angry with him and charge him. Her online friend responded that she should just keep reassuring the teacher that she would not press charges.

Also at this time, the plaintiff learned about criminal proceedings against a former Vancouver teacher, Ellison, who had had sexual relationships with his high school students in the 1970s. The plaintiff commented to the defendant CD that Ellison was a sexual offender. He asked her if she thought that their relationship was different to which she responded that it was because Ellison had carried on with 20 students, which she said was different than carrying on with one.

During the fall semester of the plaintiff's Grade 12 year, she and a friend proposed to the principal to start a volunteer club. Each school club required a teacher sponsor and they proposed CD, to which the principal agreed. One of the reasons why the plaintiff did this was because she thought it would look good on her resume and in her applications for post-secondary education. Also, she was part of an existing club that did similar work that was supervised by a teacher she did not like. Although CD was the club sponsor, he did not attend any meetings.

A fourth event of sexual touching occurred during one of the classes in which the plaintiff was a peer tutor for the defendant CD. A movie was playing and the two were sitting beside each other, behind the teacher's desk. He put his hand up her skirt and touched her over her underwear. She put her hand on his crotch, over top of his clothes. He told her that he had an erection. He also told her that they would consummate their relationship once she ceased to be his student. She took that to mean after the first semester.

Towards the end of the fall semester, the plaintiff and a friend proposed to start a school newspaper with CD as a sponsor, to which the principal also agreed. Furthermore, the plaintiff asked for permission to become a peer tutor for CD in yet a second block of classes. Because she was already a peer tutor in one of his classes, the principal's approval was required. It was granted.

In the spring semester of the plaintiff's Grade 12 year, of her eight blocks, she had three spares, the second half of her English literature course, and two blocks of other academic courses. She had two blocks of peer tutoring with CD. Neither the school counsellor nor principal raised any concerns with the plaintiff about the fact that she had two blocks of peer tutoring with CD and that he was the teacher sponsor for two of her clubs. Again, the plaintiff had a spare that corresponded with the defendant teacher's preparation block. Again, they usually spent time together in his classroom.

An episode of sexual contact occurred in the spring when there was a power failure and classes were cancelled. The plaintiff spent the day in the defendant's classroom with other students. While she was sitting on a desk, in the presence of at least one other student, the teacher put his hand up her skirt and left it there for half an hour, although this was not apparent to any other student present.

Yet another sexual episode occurred in a book room. The plaintiff and defendant teacher had gone there during a spare to get books for the Grade 8 class for which she was a peer tutor. While they were alone in the room, the teacher pulled up her shirt, kissed her abdomen and touched her breasts. She "squirmed because she was nervous someone would see, and because she was uncomfortable with CD kissing her lower abdomen".

The final episode of sexual contact occurred in the early spring. The teacher attempted to put his hand under her underwear but she pushed it away. He asked her if she was scared and she told him that she was having her menstrual period (which was untrue). She testified that she did this because she felt that his touching her in that way would be "too personal".

All of the incidents of touching took place at the GH School, mostly during class hours and the rest of the times occurred close to class times when it was not unusual for teachers to speak to students.

The court noted that the plaintiff "agreed on Examination for Discovery that she had 'consented' to what CD was doing in the touching incidents, although it would be more accurate to say that she acquiesced in the touching".

None of CD's fellow teachers observed anything that they considered to be inappropriate. However, it did cross the mind of another teacher, ST, that the plaintiff might have a "teacher crush" on CD. ST testified that she considered such crushes to be common and that she thought that CD could handle it. She testified that if she thought that there was any real concern she would have reported things to the school administration. Although ST felt slightly uneasy that CD was spending a lot of time with AB, ST did not think anything was going on. She did not, at any time, suspect that there was a sexual relationship. Although she was a new teacher, ST talked about CD's style with her fiancée, another teacher at the school with more teaching experience. He reassured ST that CD's teaching style was acceptable and ST did not pursue the matter further.

In the early part of the plaintiff's spring semester of Grade 12, she "grew disenchanted with" CD. She felt that he was being critical of her and was attempting to take credit for her work. She felt that he was not "sharing his life with her", that he was "being controlling and was leading her on". She was upset because she felt that they had planned to have sex by the end of the first semester and "felt angry and rejected when that did not occur". She felt that she could not win an argument with the teacher because he was a mature adult.

At that time, the plaintiff discussed the relationship with a fellow student in CD's class. She told the student that the teacher was fondling her. The friend told her that the defendant CD was manipulating and abusing her, and that the relationship was wrong.

After the sexual activity between the plaintiff and defendant teacher stopped in the spring of her Grade 12 year, the plaintiff asked her mother to arrange counselling on the pretext that this was for the "date rape" that had occurred between her Grades 9 and 10 years. However, the plaintiff really wanted counselling with respect to her relationship with the defendant teacher. She withdrew from special relationships with the teacher. She began to distance herself from him. She stopped visiting him during her spare or after school. She began skipping classes for which she was his peer tutor.

The defendant teacher asked her if she was breaking up with him. In her response, she laughed and said nothing. He told her that he would have to mark her absent if she skipped her peer tutoring classes. Nonetheless, he only recorded four of the many classes that she skipped.

Late in the plaintiff's Grade 12 year, she partially disclosed the relationship to her mother, indicating that she did not care what the defendant teacher thought, that he had been "hitting on" her and that she did not wish to discuss it any further. She also began a relationship with a boy who remained her boyfriend, on and off, for the next year and a half.

At the end of the plaintiff's Grade 12 year, another female student (WX) was known to be spending a lot of time with the defendant CD. Teacher ST thought this was unusual and asked CD about it in the presence of WX. CD told teacher ST that student WX was having problems in her home. Teacher ST did not pursue this any further.

The plaintiff graduated and accepted a position in journalism at a university outside of British Columbia.

In the summer between the end of her Grade 12 year and the beginning of her first year of university, the plaintiff heard a rumour that CD was having an affair with student WX. The plaintiff met with WX. The plaintiff also told her mother and then the police that the defendant CD had touched her sexually. The police instructed her not to tell anyone about it, but to discuss it only with people who already knew. Accordingly, the plaintiff "felt isolated, and spent time primarily with people who already knew about the touching". Later in the summer, the defendant CD was suspended from teaching.

When the plaintiff went to university in journalism outside of British Columbia, her boyfriend went to Europe. She lived in university residence. She had a difficult first year of university. The year "had a rocky start" in that during frosh week she drank significantly and ended up joining a religious group.

During her first year of university, the defendant CD was charged with sexual exploitation contrary to s. 153(1)(*a*) of the *Criminal Code*, R.S.C. 1985, c. C-46, which provides as follows:

> Sexual exploitation
>
> 153(1) Every person commits an offence who is in a position of trust or authority towards a young person, who is a person with whom the young person is in a relationship of dependency or who is in a relationship with a young person that is exploitative of the young person, and who
>
> *(a)* for a sexual purpose, touches, directly or indirectly, with a part of the body or with an object, any part of the body of the young person;

Meanwhile, the plaintiff slept through a midterm exam and dropped the course in question. She also dropped her writing course and became a part-time student. She "hated her university studies generally and journalism in particular" because of the media coverage of the charge against CD, which she considered to be intrusive and enabled people to identify her despite the criminal court media ban. The plaintiff was "significantly distressed during her first year of university". She lost 15 lbs. She communicated with her parents on Skype almost daily (up to five hours at a time), even though she had rarely talked to her parents for such long periods while she was in high school. She did not form friendships until the end of her first semester. Although she had intended to return home to B.C. only at Christmas, she made three trips back to B.C. during her first year of university, to be with her family. She testified that she was uncomfortable when she was alone with a male pastor or with a male professor. She participated in classes with female professors, but not in discussions with male professors.

In March of the plaintiff's first university year, the defendant teacher entered a plea of guilty and was convicted of the charge under s. 153(1)(*a*) of the *Criminal Code*. He was sentenced to 14 days in custody, reduced by two days with respect to pre-trial incarceration, plus one year of probation and was also ordered to provide a DNA sample and register under the *Sex Offender Information Registration Act*, S.C. 2004, c. 10.

The plaintiff completed her first year of university "with grades which for many students would be good, but which were poor in comparison with her prior and subsequent grades". She obtained one B, one B+, two A's and one A+.

After the plaintiff's first year at university, she had a well-paid, full-time summer job. She then attended university in British Columbia for second year in a subject unrelated to journalism. She lived at home with her parents and siblings. She broke up with her boyfriend (whom she had gone out with since Grade 12) and commenced a relationship with a new boyfriend. She also began counselling with a psychologist.

In the summer between the plaintiff's second and third years of university, the plaintiff again had a full-time seasonal job. During that summer, she began to see Dr. Korpach, a chartered psychologist. In her third year of university, she changed subjects. She worked the summer after her third year as an unpaid research assistant in that new academic discipline.

The plaintiff was in her fourth year of university at the time of trial, pursuing an honours program. She was expected to require five years to complete that program. She was happy in a relationship with her boyfriend and was achieving good grades. Although one of her friends thought she had been less confident after the sexual touching by the defendant CD, it was felt that the plaintiff had "significantly improved". The plaintiff's social circle was small because she avoided contact with former classmates and situations where she might be asked about CD.

Although she went long periods without any counselling, she renewed counselling a few months before trial. She was continuing to struggle emotionally. Although she was comfortable in a school setting, she had a tendency to become overwhelmed by minor things and was "very dependent on her family", more so than when she had been in high school.

Dr. Korpach gave expert evidence. He suggested that the plaintiff's prognosis was good. In the

year and a half since the plaintiff had begun seeing Dr. Korpach, the plaintiff had made "significant recovery". She was happy in her relationship with her boyfriend and performing well academically. The court summarized its findings about the plaintiff's psychological status in the following terms:

> [93] I generally accept Dr. Korpach's conclusions, although I have taken into account both AB's apparent improvement since Dr. Korpach's interviews, and the fact that some of AB's reports to Dr. Korpach were exaggerated with hindsight.
>
> [94] I accept the following findings:
>
> a) AB is suffering psychological symptoms including self-loathing, shame, embarrassment, anxiety, suspiciousness and interpersonal neediness. She manifests a chronic post-traumatic stress disorder ("PTSD"), including symptoms of arousal (anxiety, irritability, hyper-sexual arousal, crying, hypersomnia), and avoidance (feelings of detachment from others, efforts to avoid places or people associated with certain other people, skipping school, dropping out of journalism, withdrawing from the university), as a result of the abuse and related events by CD. Considering mitigating factors including AB's supportive family and high intelligence, the prospect for recovery from those symptoms is good.
>
> b) AB has substantial difficulties in personal relationships. She tends to sexualize male relationships, and avoids people with intellectual characteristics similar to CD's. CD's abuse contributed to significant damage for AB in this area, and the prognosis for recovery is fair, with some of these difficulties likely to continue through her life.
>
> c) AB is likely to continue to experience interpersonal difficulties including sexualization of male relationships and distancing and alienation of female relationships, which is likely to impact her employment.
>
> d) AB's recovery would be enhanced by moving out of the community of the GH School.
>
> e) AB is likely to have ongoing issues in an academic environment, including difficulty with courses involving writing, male instructors, English, and intellectual environments. Her prognosis to recover from these difficulties is good.

The plaintiff sued the defendant teacher CD for sexual battery. She alleged that she had suffered psychological injury. She claimed for general damages (which her lawyer argued to be $65,000) and aggravated damages. She claimed for loss of future income earning capacity. This was based on an argument that she would be delayed in entering the work force by a year because of the year she spent at university outside of B.C. in a subject area recommended by the defendant CD.

She also sought damages for the cost of future care. Specifically, she sought $43,750 for the costs of future counselling for herself and her family. Dr. Korpach had recommended four and a half years of therapy for her and also suggested that therapy for her parents and siblings should be considered.

The plaintiff also claimed for special damages ($16,453.90), comprised of $12,808.90 for the expenses of her first year of university and $3,645 for her past counselling expenses. The claims for expenses during her first year of university included $2,300 for the three times she travelled home, $4,800 for tuition and $5,700 for accommodation and other university charges.

The plaintiff pleaded for punitive damages but abandoned that claim at trial.

In addition to suing the teacher CD, the plaintiff claimed against the school board, alleging that it had been negligent, had breached her confidentiality/privacy, and on the basis that it was vicariously liable for the conduct of teacher CD.

Her argument in direct negligence was based on the following particulars, raised by her counsel at trial:

> [114] Ms. Ellis provided particulars of the alleged negligence in her argument. She argued that a careful or prudent parent would have done the following:
>
> 1) ensured that teachers and administrators were made aware of the conditions that gave rise to the situation with the teacher YZ specifically, and with cases of inappropriate teacher-student relationships generally;
> 2) required and encouraged teachers and administrators to share all concerns or suspicions about unusual teacher-student interaction or relationships;
> 3) made inquiries into Teacher ST's wondering whether AB had a "teacher crush" on CD;
> 4) provided close oversight in circumstances where a student is spending more than 25% of her or his school week with one teacher, particularly where that included peer tutoring; and
> 5) made very close inquiries in a situation where a student sought a second block of peer tutoring with the same teacher.

The claim for breach of confidentiality/privacy was based on a telephone call made on behalf of the school board to the plaintiff's home, which was answered by the plaintiff's aunt. The Board's representative indicated that he wanted to speak to the plaintiff about charges related to the defendant CD. The aunt did not recall whether it was said that those charges had to do with sexual touching but admitted that she may have simply guessed this to be the case. The aunt then phoned the plaintiff about the call she had received from the Board but before the aunt could provide any details, the plaintiff told the aunt about the situation with CD and the pending charges.

The matter went to an 11-day trial, during which the defendant CD appeared without counsel and did not testify.

HELD: for the plaintiff, in part. Defendant teacher CD found liable in sexual battery. The case against the school board was dismissed. Damages awarded: general damages of $50,000, plus $30,000 for loss of future income earning capacity, partial recovery with respect to the special damage claim and $20,000 for the cost of future care.

The court noted that the tort of battery requires proof of touching and that consent is a defence, summarizing the law as follows:

> [95] The tort of battery requires proof of touching. If the plaintiff consented to the touching, or a reasonable person in the position of the defendant would have thought the plaintiff did so, the tort has not been established. That was set out by McLachlin J. (as she then was), for the majority, in *Non-Marine Underwriters, Lloyd's of London v. Scalera*, 2000 SCC 24, [2000] 1 S.C.R. 551 at para. 2, as follows:
>
>> [2] As Goff L.J. (as he then was) stated in *Collins v. Wilcock*, [1984] 3 All E.R. 374 (Q.B.), at p. 378, "[t]he fundamental principle, plain and incontestable, is that every person's body is inviolate". The law of battery protects this inviolability, and it is for those who violate the physical integrity of others to justify their actions. Accordingly, in my respectful view, the plaintiff who alleges sexual battery makes her case by tendering evidence of force applied directly to her. "Force", in the context of an allegation of sexual battery, simply refers to physical contact of a sexual nature, and is neutral in the sense of not necessarily connoting a lack of consent. If the defendant does not dispute that the contact took place, he bears the burden of proving that the plaintiff consented or that a reasonable person in his position would have thought that she consented. …

The court rejected the school board's argument that, despite the defendant teacher's conviction for sexual exploitation under s. 153(1)(*a*) of the *Criminal Code* (for which the defence of consent is not available), consent was still a defence to a civil action for sexual assault. The court relied on the decision of Madam Justice Stromberg-Stein in *Olsen v. Olsen*, [2006] B.C.J. No. 759, 2006 BCSC 560, which held that a young person in an inferior position to an adult may not be seen to be capable of consent:

> [99] Stromberg-Stein J. held that the plaintiff was not able to consent to the sexual contact. She wrote as follows at paras. 37-39:
>
> > [37] In my view, there is no reason to depart from Bennett J.'s analysis in *M.(M.) v. M.(P.)*. It is appropriate to apply the criminal age of consent in a civil action for sexual battery. The age of consent, set at fourteen, is a matter of public policy to protect children from sexual exploitation. That public policy can dictate the law with respect to the legality of consent was confirmed in *Norberg v. Wynrib*, [1992] 2 S.C.R. 226, 92 D.L.R. (4th) 449 at para. 34, where the Supreme Court of Canada commented:
> >
> > > … in certain situations, principles of public policy will negate the legal effectiveness of consent in the context of sexual assault. In particular, in certain circumstances, consent will be considered legally ineffective if it can be shown that there was such a disparity in the relative positions of the parties that the weaker party was not in a position to choose freely.
>
> [38] Because of their relative immaturity and susceptibility to influence, young children are in an inherently weak position vis-à-vis an older initiator of sexual contact. For that reason, children must be protected by a clear rule of public policy setting an age limit under which any apparent consent is not legally valid.
>
> [39] Both the criminal and civil law share the common goal and responsibility of protecting children from sexual exploitation. The tort of battery is particularly suited to further that purpose because, as Chief Justice McLachlin emphasized in *Sansalone*, [2000] 1 S.C.R. 627, battery is a tort that is focused on the child's right to physical inviolability and personal autonomy. It would introduce an odd inconsistency in the law if children were considered legally incapable of consenting to sexual activity for the purposes of the criminal law, but were capable of giving such consent in a related civil action.

Furthermore, the court relied on the *Criminal Code* to conclude that public policy mandates that consent of a person under 18 to sexual contact with a person in authority should not be recognized, as a matter of law:

> [101] In this case, AB was a very intelligent young woman who was approaching the age of 18. While she was mature in many ways, she was too young to appreciate the emotional and psychological impact of a relationship with a man who was in a position of trust and authority over her.
>
> [102] The *Criminal Code* provisions recognize that young people are inherently vulnerable to persons in positions of authority or trust. While such young people may think that they are making a free choice to engage in a relationship with a person in authority, the very nature of the relationship precludes a free choice.
>
> [103] Like Stromberg-Stein J., I conclude that it would introduce an odd and problematic inconsistency in the law if young people were considered legally incapable of consenting to sexual activity for the purposes of the criminal law, but were capable of giving such consent in a related civil action.
>
> [104] The public policy set out in the *Criminal Code* has the effect that a young person under the age of 18 cannot consent to sexual contact with a person in authority, as a matter of law, whether the applicable proceedings are criminal or civil.
>
> [105] As a result, CD is liable to AB for any damages she suffered as a consequence of the sexual battery.

Accordingly, CD was found liable in sexual battery.

The court dismissed the plaintiff's claim against the defendant school board for breach of confidentiality. It was held that in the circumstances, the plaintiff had not established that when the school board representative spoke to the plaintiff's aunt that sexual charges were mentioned. Additionally, the court held (at para. 109) that even if the Board had breached a duty of confidentiality "AB did not suffer damages, because AB chose to disclose all the details to her aunt before she knew what the aunt had been told".

The court recognized that school authorities owe a duty of care to students, the standard of care being that of the careful and prudent parent:

> [110] Board EF owes a duty of care to its students to protect them from unreasonable risk of harm at the hands of other members of the school community:

> see *H.(S.G.) v. Gorsline*, 2001 ABQB 163, [2001] 6 W.W.R. 132 at para. 84, aff'd 2004 ABCA 186, [2005] 2 W.W.R. 716, leave to appeal ref'd [2004] S.C.C.A. 385, [2005] 1 S.C.R. xv.
>
> [111] The standard of care to be exercised by school authorities in providing for the supervision and protection of students for whom they are responsible is that of the careful and prudent parent. This was set out by the Supreme Court of Canada in *Myers v. Peel County Board of Education*, [1981] 2 S.C.R. 21.

Nonetheless, the court held that the school board had not breached its duty of care owed to the plaintiff in this case.

(i) The court rejected the plaintiff's argument that after the prior allegations against teacher WZ, the school board ought to have taken steps to ensure that teachers and administrators were aware of the conditions that gave rise to the teacher WZ's situation and required or encouraged teachers to disclose any suspicions about unusual teacher-student interaction. The court noted as follows:

> [115] Ms. Ellis argued that Board EF ought to have learned from the events with Teacher YZ, and developed a policy that involved careful scrutiny whenever a student was spending a lot of time with a teacher, such as by being a peer tutor. Essentially, Ms. Ellis argued that allowing a student to take many classes with a teacher led to a risk that the teacher would touch the student sexually, and that a careful or prudent parent would take the steps suggested by Ms. Ellis.
>
> [116] There are several difficulties with this argument. First, Teacher YZ was acquitted of any charges relating to his conduct with the student. There was no admissible evidence at trial that Teacher YZ did anything improper. Board EF was concerned that Teacher YZ may have acted improperly outside school hours and off the school premises, and as a result Board EF suspended Teacher YZ from teaching. However, that does not establish that Teacher YZ had an improper relationship with a student who was his peer tutor.

(ii) The court also rejected the plaintiff's argument that the school board ought to have implemented "close oversight" procedures "in circumstances where a student is spending more than 25% of her or his school week with one teacher", particularly where that included peer tutoring and that closer inquiries ought to have been made when a student seeks more than one block of peer tutoring with the same teacher. The court noted that the fact that a teacher may spend a great deal of time with a particular student, while providing an opportunity for the teacher to abuse that student, does not create an inherently dangerous situation for a student and, further, that the unproven prior allegations against teacher XY ought not to have affected such a conclusion:

> [117] The fact that a student spends more time with a teacher will increase the opportunity for a teacher to touch the student sexually. However, the single case of suspected but unproven student touching by Teacher YZ cannot be said to have established a trend.
>
> [118] The evidence shows that peer tutoring is a useful program for students who have a particular interest in a subject area. While CD sexually touched his peer tutor AB, and Teacher YZ is also alleged to have sexually touched his peer tutor, it is not clear that the time the relevant parties spent together because of peer tutoring was a significant factor in developing the inappropriate relationship. Peer tutoring occurs in a class with a group of students, as do all classes. Group classes do not put the student in the position of being likely to be abused.
>
> [119] I am not able to conclude that it is inherently dangerous for a student to act as a peer tutor.

(Along the same lines, see our comments below with respect to vicarious liability.)

(iii) The court also rejected the plaintiff's argument that the school board should have required teachers to share all concerns or suspicions about unusual teacher-student interactions. It was held that the evidence established that all teachers "knew they had an obligation to advise the administration if they suspected an improper

relationship". In this case, none of them had suspected an improper relationship between the defendant CD and the plaintiff AB. Even teacher ST did not believe that an inappropriate relationship was taking place although, "with the benefit of hindsight", she came to feel uncomfortable about the nature of that relationship. Indeed, teacher ST was held to be the only person who considered that the plaintiff might have a "teacher crush on CD". The court held (at para. 122) that "the fact that a student might have a crush on a teacher does not establish that the teacher would be likely to commit the criminal and unprofessional act of sexual touching".

(iv) The court noted that both the defendant CD and the plaintiff herself were determined to keep the relationship a secret such that if the school board had approached either one of them with respect to an inquiry about sexual touching, both would have denied it at the time, and the inquiry would not have stopped or prevented the touching:

> [125] In this case, AB was determined to keep her relationship with CD secret from her parents and people in authority while the relationship was underway. This is apparent from AB's discussion with her friend on the instant messenger service. AB knew that the law provided that the age of consent to sexual activity with a person in authority was 18. AB did not reveal the relationship to her mother, even in part, until after the relationship was over, and did not reveal all of the details to her mother until AB came to believe that another girl was receiving similar attention from CD.
>
> [126] As a result, it is probable that if AB had been approached before any sexual touching occurred, or during the period when CD was touching AB sexually, AB would not have revealed any details about an improper relationship. An inquiry would not have stopped or prevented the touching.
>
> [127] Similarly, it is probable that CD would not have revealed the relationship, and that an inquiry would not have stopped or prevented his touching AB. He knew that the relationship was wrong, as demonstrated by his initial comments to AB that he would not pursue the relationship until she was no longer his student. He also tried to keep the relationship secret, by touching AB only privately, and by telling her not to tell anyone what was happening between them.

(v) The court concluded as follows, to the effect that the school board had not breached the standard of care and, even if it had, causation had not been established:

> [128] The evidence does not establish that any omission by Board EF caused the sexual touching. To establish negligence, AB must establish, on a balance of probabilities, that the injury would not have occurred but for the negligence of Board EF (*Athey v. Leonati*, [1996] 3 S.C.R. 458 at para. 14). AB's claim does not fall within the exceptions to the "but-for" test. The particulars of the alleged negligence refer to making "inquiries" or providing "oversight." Essentially, Ms. Ellis argued that Board EF ought to have asked AB or CD or both about the nature of their relationship.
>
> [129] However, even if Board EF had failed to act in the manner of a careful or prudent parent by failing to make inquiries of AB and CD about their relationship, such inquiries would not have had any effect on whether CD would have sexually touched AB. Making inquiries of AB and CD would not have revealed the nature of the relationship.
>
> [130] AB's claim of negligence against Board EF is dismissed.

The court commented on the law of vicarious liability, summarizing the applicable *Salmond* test as follows:

> [131] Employers are sometimes held vicariously liable for the acts of their employees even when the employer did not act negligently. The question of vicarious liability for sexual assaults committed by employees has been the subject of several cases in the Supreme Court of Canada. Two companion cases are the starting point for the analysis: *Bazley v. Curry*, [1999] 2 S.C.R. 534; and *Jacobi v. Griffiths*, [1999] 2 S.C.R. 570 ("*Jacobi/Griffiths*").
>
> [132] The Supreme Court of Canada confirmed that the test for vicarious liability is governed by the *Salmond* test, which provides that employers are vicariously liable for (a) employee acts authorized by

the employer; or (b) unauthorized acts so connected with authorized acts that "they may be regarded as modes (albeit improper modes) of doing authorized acts".

[133] The test is set out in paras. 10-11 of *Bazley* as follows:

> [10] Both parties agree that the answer to this question is governed by the *Salmond* test, which posits that employers are vicariously liable for (1) employee acts authorized by the employer; or (2) unauthorized acts so connected with authorized acts that they may be regarded as modes (albeit improper modes) of doing an authorized act. Both parties also agree that we are here concerned with the second branch of the test. They diverge, however, on what the second branch of the test means. The Foundation says that its employee's sexual assaults of Bazley were not "modes" of doing an authorized act. Bazley, on the other hand, submits that the assaults were a mode of performing authorized tasks, and that courts have often found employers vicariously liable for intentional wrongs of employees comparable to sexual assault.
>
> [11] The problem is that it is often difficult to distinguish between an unauthorized "mode" of performing an authorized act that attracts liability, and an entirely independent "act" that does not. Unfortunately, the test provides no criterion on which to make this distinction. In many cases, like the present one, it is possible to characterize the tortious act either as a mode of doing an authorized act (as the respondent would have us do), or as an independent act altogether (as the appellants would suggest). In such cases, how is the judge to decide between the two alternatives?

The court noted that the analysis of vicarious liability involves a two-step process, first considering whether or not there is any unambiguously applicable precedent and, failing that, to consider whether or not liability should be imposed based on public policy:

[135] The Supreme Court of Canada sets out a two-step process for determining when an unauthorized act is so connected to the employer's enterprises that vicarious liability should be imposed. This is set out in para. 15 of *Bazley* as follows:

> [15] This review suggests that the second branch of the *Salmond* test may usefully be approached in two steps. First, a court should determine whether there are precedents which unambiguously determine on which side of the line between vicarious liability and no liability the case falls. If prior cases do not clearly suggest a solution, the next step is to determine whether vicarious liability should be imposed in light of the broader policy rationales behind strict liability. This Court has an additional duty: to provide guidance for lower tribunals. Accordingly, I will try to proceed from these first two steps to articulate a rule consistent with both the existing cases and the policy reasons for vicarious liability.

The court went further and considered the law with respect to the second part of the test, applying public policy rationales in the analysis of a vicarious liability case, referring to the Alberta Court of Appeal decision in *H. (S.G.) v. Gorsline*, [2001] A.J. No. 263, 2001 ABQB 163, aff'd [2004] A.J. No. 593, 2004 ABCA 186, leave to appeal to S.C.C. refused [2004] S.C.C.A. No. 385, [2005] 1 S.C.R. xv:

[151] However, because *Gorsline* is not binding on this Court, I will go on to consider whether liability should be imposed in light of the broader public policy rationales behind the concept of strict liability. This is set out in para. 41 of *Bazley* as follows:

> [41] Reviewing the jurisprudence, and considering the policy issues involved, I conclude that in determining whether an employer is vicariously liable for an employee's unauthorized, intentional wrong in cases where precedent is inconclusive, courts should be guided by the following principles:
>
> 1) They should openly confront the question of whether liability should lie against the employer, rather than obscuring the decision beneath semantic discussions of "scope of employment" and "mode of conduct".
>
> 2) The fundamental question is whether the wrongful act is *sufficiently related* to conduct authorized by the employer to justify the imposition of vicarious liability. Vicarious liability is generally appropriate where there is a significant connection between the *creation or*

> *enhancement of a risk* and the wrong that accrues therefrom, even if unrelated to the employer's desires. Where this is so, vicarious liability will serve the policy considerations of provision of an adequate and just remedy and deterrence. Incidental connections to the employment enterprise, like time and place (without more), will not suffice. Once engaged in a particular business, it is fair that an employer be made to pay the generally foreseeable costs of that business. In contrast, to impose liability for costs unrelated to the risk would effectively make the employer an involuntary insurer.
>
> 3) In determining the sufficiency of the connection between *the employer's creation or enhancement of the risk* and the wrong complained of, subsidiary factors may be considered. These may vary with the nature of the case. When related to intentional torts, the relevant factors may include, but are not limited to, 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;
>
> e) the vulnerability of potential victims to wrongful exercise of the employee's power.

[Emphasis by McLachlin J.]

[152] The Court stressed the importance of finding a "strong connection" or "material increase in the risk" as a consequence of the employer's enterprise. This is set out in paras. 42 and 46 of *Bazley* as follows:

> [42] Applying these general considerations to sexual abuse by employees, there must be a strong connection between what the employer was asking the employee to do (the risk created by the employer's enterprise) and the wrongful act. It must be possible to say that the employer *significantly* increased the risk of the harm by putting the employee in his or her position and requiring him to perform the assigned tasks. The policy considerations that justify imposition of vicarious liability for an employee's sexual misconduct are unlikely to be satisfied by incidental considerations of time and place. For example, an incidental or random attack by an employee that merely happens to take place on the employer's premises during working hours will scarcely justify holding the employer liable. Such an attack is unlikely to be related to the business the employer is conducting or what the employee was asked to do and, hence, to any risk that was created. Nor is the imposition of liability likely to have a significant deterrent effect; short of closing the premises or discharging all employees, little can be done to avoid the random wrong. Nor is foreseeability of harm used in negligence law the test. What is required is a material increase in the risk as a consequence of the employer's enterprise and the duties he entrusted to the employee, mindful of the policies behind vicarious liability.
>
> ...
>
> [46] In summary, the test for vicarious liability for an employee's sexual abuse of a client should focus on whether the employer's enterprise and empowerment of the employee materially increased the risk of the sexual assault and hence the harm. The test must not be applied mechanically, but with a sensitive view to the policy considerations that justify the imposition of vicarious liability — fair and efficient compensation for wrong and deterrence. This requires trial judges to investigate the employee's specific duties and determine whether they gave rise to special opportunities for wrongdoing. Because of the peculiar exercises of power and trust that pervade cases such as child abuse, special attention should be paid to the existence of a power or dependency relationship, which on its own often creates a considerable risk of wrongdoing.
>
> [Emphasis by McLachlin J.]

The court found that the school board was *not* vicariously liable for the acts of the defendant teacher CD in this case. The court relied heavily on the *Gorsline* decision from the Court of Appeal of Alberta where a 12-year-old student was sexually abused by her teacher (also the track and field coach) at school, at his home, in

his vehicle and in a park. In that case, the Alberta Court of Appeal had affirmed the trial judge's decision that there had not been a significant connection between the teacher's duties and his wrongful acts so as to give rise to vicarious liability on the part of the school board. The Alberta Court of Appeal concluded that the teacher's work had only provided him with the opportunity to commit the offences and a measure of authority over students but that this was insufficient. In this case, the court noted as follows:

> [143] As in this case, the student in *Gorsline* lived with her parents, who retained control and authority over her. As in this case, the teacher in question was only one of several teachers who taught the student. The student also had interaction with other administrators and counsellors that would dilute any influence the teacher may have had. The trial judge in *Gorsline* wrote that "[w]hen the School Board encouraged teachers to be role models and to develop a relationship of trust with students, it did not thereby encourage sexual intimacy" [at para. 77, cited to W.W.R.].
>
> [144] The trial judge wrote at paras. 78-79 that:
>
>> [78] ... It was a series of independent acts by this abuser for his own gratification that led to the wrongs committed. He carefully cultivated his relationship with the plaintiff; he made her feel special; he crafted an aura of secrecy and then intimacy. ...
>>
>> [79] The fact that this teacher found a way to carry out his abuse during the school year and even within the school building does not satisfy the "close connection" required between his *duties* and his acts. Again, to paraphrase [*Bazley*] at para. 42, it cannot here be said that the school board significantly increased the risk of harm by hiring a teacher to teach. [Emphasis in original.]

The court rejected the plaintiff's argument that *Gorsline* should be distinguished because it related to events that occurred in the mid-1970s and that the public consciousness of risk has increased since that time:

> [146] While it may be that consciousness of that risk has increased, the analysis in *Gorsline* focused on whether the school board's undertaking, and the duties imposed on the teacher, substantially increased the risks of sexual assault. In my view that analysis applies in 2011 as it did in *Gorsline* regarding events which occurred in 1977.

The court concluded that *Gorsline* was an unambiguous precedent in the school board's favour, rejecting a contrary conclusion in the Newfoundland Supreme Court decision of *Doe v. Avalon East School Board*, [2004] N.J. No. 426, 2004 NLTD 239:

> [150] In my view, *Gorsline* is an unambiguous appellate decision that a school board should not be held vicariously liable for the sexual battery by a high school teacher who does not have intimate contact with the student in the course of the teacher's employment. While not binding on this Court, it is persuasive.

Notwithstanding the court's decision in accepting *Gorsline*, the court went on to consider the public policy factors as applicable in this case, concluding that they did not mandate a contrary conclusion. The court noted that the fact that a teacher is supposed to be a "positive role model" does not "equal intimacy, and mentoring does not put an employee on the slippery slope to sexual abuse" citing the *Jacobi* case:

> [155] The Court concluded that acting as a positive role model did not equal intimacy, and mentoring does not put an employee on the slippery slope to sexual abuse. Binnie J., for the majority, wrote as follows at paras. 82-83:
>
>> [82] My colleague finds that because the Club's formal constitutional objectives include the provision of "behaviour guidance and to promote the health, social, education, vocational and character development of boys and girls" (para. 16) it must be taken to have "encouraged an intimate relationship to develop between Griffiths and his young charges" (para. 17). With respect, using words like "intimate" and "trust and power" to describe the ordinary relationship between recreational directors and their after-school participants robs these words of their capacity to

differentiate situations where vicarious liability may be appropriate from those where it is not. As noted by Professor H. J. Laski over 80 years ago in "The Basis of Vicarious Liability" (1916), 26 Yale L.J. 105, at p. 114:

> The real problem in vicarious liability, in fact, is not so much the rectitude of its basal principles, as *the degree* in which they are to be applied.

I do not accept that an enterprise that seeks to provide a positive role model thereby encourages intimacy. Nor do I believe that "mentoring", as such, puts one on the slippery slope to sexual abuse. If it did, any organization that offered "role models" would be looking at no-fault liability. Most organizations dealing with children inevitably involve role models, from the neighborhood soccer league to Girl Guides to the Duke of Edinburgh awards programs. "Mentoring" is characteristic of everything from Air Cadets to Big Sisters. I can find in the evidence nothing to suggest that Griffiths' own role required anything more than the establishment of a "rapport" with the children. There is no suggestion that physical intimacy would be either necessary or desirable. Intimacy between Griffiths and one or more of the members, even if maintained on a wholly non-sexual level, would have been destructive of the Club's program, leading to problems of favoritism, feelings of exclusion, and dissension.

[83] The Club did not confer any meaningful "power" over the appellants. They were free to walk out of the Club at any time. They went home to their mother every night. In the circumstances I agree with the point made by Newbury J.A. in the British Columbia Court of Appeal in the *Children's Foundation* case (1997), 30 B.C.L.R. (3d) 1 (sub nom. *B. (P.A.) v. Curry*), at pp. 39-40:

> Where, for example, a teacher uses his or her authority to develop a relationship with a pupil in his or her class and then abuses that relationship by approaching the child at a park during the summer holidays, it may be said that by employing the teacher and giving him or her some authority (albeit not parental authority) over the child, the teacher's employer "made the wrong more probable". But it is likely vicarious liability would not be imposed on the employer given the absence of a close connection between the teacher's duties and his or her wrongful acts. To put the matter another way, *the fact that the teacher took advantage of his opportunity at the school to develop a relationship with the child is not enough: something more is required — a close connection between the teacher's duties and his or her wrongful acts — to render the school board liable without proof of negligence or other fault on its part*.

[Emphasis added by Binnie J.]

The court concluded as follows with respect to public policy considerations:

> [156] Board EF provided CD with the opportunity to spend time with AB. The fact of being a teacher gave CD some power over AB, because CD was responsible to give her grades and recommendations.
>
> [157] The factors discussed in para. 41 of *Bazley* as they apply here can be analyzed as follows:
>
> a) While Board EF gave CD opportunity to spend time with AB, this opportunity was modest. The contact arranged by Board EF was for group teaching, with some opportunities for individual work around class hours and during spare periods. This is not a case of overnight visits or a case where there was intimate physical care such as bathing.
>
> b) It would not further the aims of Board EF for CD to touch AB sexually.
>
> c) The relationship between an English teacher and a student is not inherently intimate. The teaching of English can involve discussing issues of sexuality and life, but that does not inherently lead to physical intimacy. Students and teachers can share interests in many subjects, including music, sports, and science. That does not inherently lead to physical intimacy.
>
> d) The power conferred by Board EF on CD was to provide grades, and maintain classroom discipline.
>
> e) AB's vulnerability in the situation was limited, because there were many teachers and administrators available, and AB was under the care of her parents.
>
> [158] As a result, Board EF is not vicariously liable for CD's sexual touching of AB.

The court summarized the general principles with respect to the assessment of general damages in sexual cases:

[159] The purpose of an award for non-pecuniary damages is to provide solace to AB for such things as pain, suffering, inconvenience, and loss of enjoyment of life. Non-pecuniary losses are the personal injury losses that have not required an actual outlay of money. One purpose of an award for damages for non-pecuniary losses is to substitute other amenities for those that AB has lost. The award must address losses AB suffered not only to the date of trial, but also those that AB will suffer in the future.

[160] Non-pecuniary losses have no objective ascertainable value, because there is no market in health and happiness. It is generally not possible to put a claimant back in the position she would have been in had the injury not occurred, and this is especially true of non-pecuniary loss. The Court must fix a sum that is tailored to AB, and that is moderate but fair and reasonable to both parties, keeping in mind that AB will be fully compensated for her future care needs and other pecuniary losses. The Court does not try to assess a sum for which AB would have voluntarily chosen to suffer such pain, inconvenience, and loss of enjoyment of life.

[161] Awards in other cases can provide some assistance, but each case varies depending on its facts.

. . . . .

[164] The Court of Appeal commented on the limited assistance provided by considering other cases, and the difficulty of making a fair assessment of damages for harm caused by sexual abuse, as follows in *Y.(S.)* [*v. C.(F.G.)* [1997] 1 W.W.R. 229] at paras. 50, 55-57 [cited to W.W.R.]:

> [50] The foregoing cases present a variety of circumstances, and describe differing degrees of harm caused by sexual abuse. They exemplify the difficulty of giving solace or satisfaction to a person who has been abused by one he or she was entitled to trust, and who may suffer from the psychological impact of that abuse for years to come. What amount of money is sufficient as a substitute for lost pleasures and amenities, and as compensation for what yet remains to be suffered? Prior to 1990 a respected judge thought $40,000 to be sufficient. Within about five years other judges of the same Court thought $80,000 - $85,000 to be fair. Now awards by judges appear to range from about $100,00 to $175,000. It is understandable that juries, without guidance as to the range of awards in comparable cases, may have more difficulty than judges in keeping their emotions under control, and in making awards as a result of reasoned analysis.
>
> ...
>
> [55] What is fair and reasonable compensation for general damages, including aggravated damages, in this case is not easy to say. This is an evolving area of the law. We are just beginning to understand the horrendous impact of sexual abuse. To assess damages for the psychological impact of sexual abuse on a particular person is like trying to estimate the depth of the ocean by looking at the surface of the water. The possible consequences of such abuse presently are not capable of critical measurement.
>
> [56] Comparison with the awards made in similar cases is helpful in maintaining consistency, and therefore giving fair and equivalent treatment to all victims. But the impact on individuals in particular circumstances of sexual abuse is so difficult to measure that other cases can only provide a rough guide for assessment in this case.
>
> [57] Critical to any assessment is the view which the trier of the facts takes of aggravating features. In this case the jury was entitled to consider a number of very significant aggravating factors. The defendant occupied a position of trust with respect to this child. Instead of providing an environment for a happy childhood, and for normal development of character, he made her childhood a nightmare. After seven years she told her mother. His response was not remorse. It was anger at being exposed. In different ways, he continued the abuse until life became so unbearable that the girl left home. The psychiatric evidence indicated the extent of the impact on the plaintiff, and on her relationships with others. She needs a great deal of help in dealing with the psychological trauma she has suffered. Another aggravating feature is the defendant's response to the claims made by the plaintiff. He did not admit liability. His response was to threaten the plaintiff, her mother, and the family doctor. The jury may have taken into account that he did not testify in order to mitigate his conduct, or to apologize.

The court listed the factors to be taken into account in assessing general damages in a sexual case:

> [165] The factors to be considered in making awards for damages in sexual assault include the following:
>
> a) the frequency of assaults;
>
> b) the nature of the assaults;
>
> c) the age of the complainant at the time;
>
> d) the vulnerability of the complainant;
>
> e) the relationship between the parties;
>
> f) whether force or violence was used;
>
> g) the effect and consequence on the victim; and
>
> h) whether aggravated damages are included.

In this case, the court concluded that the appropriate award for general damages was $50,000:

> [166] The factors in this case are as follows:
>
> a) The assaults consisted of seven incidents over a period of about five months.
>
> b) The nature of the assaults was hugging, kissing, and touching, with touching of AB's breasts and nipples under her clothes, and touching her lower body over her clothes.
>
> c) At the time of the assaults, AB was 17 years old.
>
> d) AB was vulnerable to CD because of her high regard for him and because he had the power to give her grades and recommendations. However, in contrast to some of the cases cited, AB was not vulnerable to being forced to spend time alone with CD. She was able to limit her contact with CD to group situations. She was capable of turning to her parents or other teachers and the school administration if she chose to do so.
>
> e) The relationship between the parties was a teacher-student relationship, which is a relationship of trust, and one where the teacher has power over the student. CD also had power because he was in his 50s, while AB was an adolescent.
>
> f) CD did not use any physical force or violence beyond that inherent in the touching.
>
> g) The effect and consequences on AB can be summarized as serious distress in her first year of university, with chronic PTSD, continuing difficulties in interpersonal relationships, including sexualisation of relationships with males, and difficulties with intellectual environments. This is discussed in more detail above regarding Dr. Korpach's evidence.
>
> h) The aggravating feature is that the conduct occurred within a relationship of trust.
>
> [167] This is a case in which the touching itself was not particularly invasive, and CD did not use force or threats of physical harm. However, AB has suffered significantly on a psychological level, and is likely to suffer on an ongoing basis.
>
> [168] In all the circumstances, an appropriate award is $50,000.

The court accepted the plaintiff's argument that she was entitled to a future wage loss award of $30,000 because she would be delayed a year in entering the workforce in her chosen career because she had spent a year pursuing a subject area recommended by the defendant teacher. The court rejected the defence argument that the plaintiff's delay in entering the workforce was as a result of her own choice to pursue an honours program in a different discipline:

> [171] AB was significantly distressed in her first year of university. She did not achieve the grades she would have achieved but for CD's abuse.
>
> [172] Many first year students struggle with the transition to the larger university environment and with moving away from their parents and home. However, few suffer the degree of distress that AB suffered. AB's distress was apparent from the fact she lost 15 pounds, stopped eating in the cafeteria, and spoke on a daily basis for up to five hours to her parents.
>
> [173] If the abuse had not occurred, AB may well have continued in her journalism studies. Alternatively, she might have chosen to change her area of focus.
>
> [174] AB's decision to drop out of courses in journalism and courses relating to that program were the result of the abuse by CD. Had AB not dropped out of those courses, with the benefit of taking summer programs, she would likely have been able to complete an honours degree in four years even if she had chosen to change her area of emphasis.
>
> [175] It is a real possibility that AB will be delayed a year in entering the workforce. In addition, there is a

> real possibility that AB will suffer problems in future employment dealing with male supervisors and coworkers.
>
> [176] In all the circumstances, it is fair to assess the impact of the abuse on AB's future earnings at $30,000. That is a fair assessment of what she would be likely to earn in a year at the start of her career. AB is entitled to an award of $30,000 for future wage loss.

The plaintiff was *not* awarded all of her claims for special damages. The court found that the plaintiff was entitled to the $3,645 she claimed for counselling expenses. As for the plaintiff's claim for the expenses involved in her first year of university, the court was not satisfied that all of those expenses could be attributed to CD's wrongdoing. Holding that, but for the sexual abuse, she would only have returned home once during the first year of university, as opposed to the three times that she did, the court awarded her $1,600 with respect to the two extra trips. The court rejected the plaintiff's arguments for $5,700 for accommodation (university residence) because those charges "arose because she chose to go to university outside B.C.". She was held to be entitled to $4,800 for the tuition paid for her first year of university.

With respect to the plaintiff's claim for the cost of future care, the court declined to award the plaintiff the full $43,750 claimed. The court took into account the fact that the plaintiff had chosen to leave a number of counsellors and spent significant periods of time without receiving any counselling. The court concluded that a fair number was $20,000:

> [186] AB made significant improvement following Dr. Korpach's report, even though she did not undergo counselling for many months. AB was obtaining counselling at the time of trial, and is likely to receive further counselling. She has recovered significantly since the time of Dr. Korpach's report, and she is not likely to require all of the counselling suggested by Dr. Korpach.
>
> [187] AB and her family are likely to require a total of 3 years of weekly counselling. At the rate of $175 per hour, for 40 sessions per year, that would cost about $21,000 over 3 or more years.
>
> [188] In these circumstances, a fair award for AB's cost of future care is $20,000.

Although the plaintiff abandoned her claim for punitive damages at trial, the court made interesting comments, noting [at para. 189] that the decision to abandon that claim was "likely because CD was sentenced for his crime, and there was nothing in the conduct of the Board EF which would attract punitive damages". (There is much case law to the effect that punitive damages, intended to punish as opposed to compensate, have no place where a defendant has already been punished by the criminal justice system.)

COMMENTARY: With all due respect, this is a disturbing case. We submit that, in many respects, it is wrongly decided.

(i) The application of the *Criminal Code* to a finding of liability in this civil case is unwarranted, with respect. Parliament specifically legislated the provisions of the *Criminal Code* for purposes having nothing to do with compensation or the principles of tort law. To suggest that they can be translated *holus bolus* into the civil justice system is unjustified. We note that the decision to apply the *Criminal Code* provisions in this civil case (at paras. 102-105) is based upon a very brief analysis with virtually no reference to legal precedent. With the greatest of respect, this aspect of the decision should *not* be followed in subsequent cases. For the purposes of the criminal law, Parliament has chosen to render certain kinds of contact between an accused and a person in a position of trust or authority with that accused to be criminal, regardless of consent. Such legislation has *not* been passed with respect to civil liability. It is

respectfully submitted that, in civil law, the true question is as to whether or not the complainant student genuinely consented to the activity. In considering whether or not such consent is valid, the court ought to take into account any power imbalance between the two. However, taking that into account, a finding of consent should result in a finding of no liability for sexual battery in the civil court. In terms of arguments to the effect that contact between teachers and students should be considered wrong in civil law, perhaps this argument could be taken into account in the context of the tort of breach of fiduciary duty. It has been held that teachers occupy a fiduciary relationship vis-à-vis their students. In the context of a breach of fiduciary duty allegation, the fact that a student consents may not amount to a total defence.

(ii) With respect, the damage award in this case is excessive. We are talking about a student who fully consented to the contact that took place. Indeed, the evidence established that at the time it was going on, she recognized that it was illegal and voiced a desire to "skirt the law" so as to be able to maintain her relationship with the teacher in question. Additionally, it is difficult to accept that seven episodes of minor sexual touching, falling far short of intercourse, digital penetration or oral sex, could conceivably be held to have had such an impact on the life of this complainant.

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