

# lawmatters

J. Paul R. Howard

## School Board Liability for Student-Peer Harassment and Discrimination: “Deliberate Indifference” and Beyond?



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Most of us accept that schools play an important role in the lives of young children as socializing agents. But to what extent do we - or does the law - expect our schools to act as insurance agents or insurers of student conduct? That is, to what extent, if at all, should the law hold school boards liable for the misconduct of students and, more specifically, for misbehaviour amounting to discrimination and harassment?

**T**hat question is at issue in certain cases currently being investigated by the Ontario Human Rights Commission. One such case involves a seemingly spontaneous single incident of alleged student-peer or “student-on-student” discrimination. It arose out of an accident that occurred during a lunch-time soccer game on an elementary school’s playground. The game was not part of an intramural league or any “official” school-organized activity; it was simply a matter of some children playing soccer during the lunch hour. There was an appropriate number of teachers on yard duty supervising all of the children, but the monitors were not specifically refereeing or coaching the game. The playground at the school in question was too small to allow all interested students to play at the same time, and thus a compromise rotating

schedule had been worked out whereby different grades had the use of the soccer field on different days.

On the day in question, it was the grade four children’s turn. However, the complainant, a grade three boy (who was larger in physical stature than both his classmates and many of the older children), decided to “sneak in” and join the grade four game. At one point, the complainant and one of the older boys each darted for the soccer ball, collided together, and the complainant was knocked to the ground where he lay injured and crying in pain. Two first aid-trained teachers attended to the boy, the ambulance was called and ultimately, on the paramedic’s advice, the boy was sent home with a neighbour because the single parent-mother could not be reached at any one of the three emergency contact phone numbers on

file, and neither the complainant nor his older grade six sister knew how to contact their mother or where she worked.

It was not until two days after the accident that the mother contacted the school principal, explanations were demanded, the principal's recounting of the events was disputed and, in the end, the parent alleged that the grade four boy intentionally injured her son because of his Muslim faith. The parent filed a complaint of religious discrimination against the school board and the principal under the Ontario *Human Rights Code*, claiming general damages for pain and suffering and injury to the child's dignity.

In a previous "Law Matters" column,<sup>1</sup> I noted the courts' current willingness to broaden the scope of school board liability for the misconduct, crimes or other legal wrongs committed by individuals, and this trend is now best reflected in the recent decisions of the Supreme Court of Canada that have held certain social agencies vicariously liable for acts of sexual misconduct perpetrated by their employees upon children under their care.<sup>2</sup> But for present purposes the question of greater interest involves student behaviour that falls short of criminal wrong-doing; acts of discrimination and harassment, even sexual harassment, may not amount to sexual assault, the liability for which the courts have seemingly less difficulty in addressing.

The question of board liability for student-initiated discrimination has escaped scrutiny by Canadian courts to date. But the U.S. Supreme Court considered whether school boards have a legal duty under federal civil rights legislation to stop students from sexually harassing their classmates in *Davis v. Monroe County Bd. of Educ.*<sup>3</sup> There, in a 5-4 decision, a sharply divided Court answered the student-peer question in the affirmative, subject to some important conditions.

In *Davis*, a parent of a female student sought to bring a private action for damages against a school board and elementary school officials for the alleged sexual harassment of her daughter by one of her fifth-grade classmates. The lawsuit alleged that over a six month period the boy made attempts at sexual

contact, uttered vulgar statements and acted in a sexually suggestive manner toward the complainant. Significantly, the acts of sexual harassment were reported by the student and her mother to, variously, the classroom teacher, a physical education teacher and the school principal. Ultimately, the boy was charged with and pleaded guilty to sexual battery, and subsequently the mother commenced suit in the civil courts for sexual harassment.

At first instance, the U.S. District Court dismissed the mother's action for failure to state a claim upon which relief could be granted under Title IX of the *Education Amendments of 1972*, and the Court of Appeals for the Eleventh Circuit agreed no such claim was permissible. The U.S. Supreme Court reversed, with Justice O'Connor writing the Opinion of the majority of the Court, and Justice Kennedy, with whom three other judges concurred, dissenting. The majority held that a private damages action may lie directly against school officials under Title IX for "student-on-student" harassment, but only where the following three conditions are satisfied: (1) the school authorities must have actual knowledge of the acts of harassment in their programs or activities; (2) they must act with "deliberate indifference" to the harassment; and (3) that harassment must be so "severe, pervasive and objectively offensive" that it effectively deprives the victim of access to an educational opportunity or benefit provided by the school (the most obvious example of which would include, but not be limited to, cases of physical exclusion, in which "male students physically threaten their female peers every day, successfully preventing the female students from using a particular school resource – an athletic field or a computer lab, for instance"). Applying this test to the facts in *Davis*, the Supreme Court held that the facts alleged in the mother's suit were capable of supporting such a claim, and it therefore remanded the case for further proceedings consistent with the majority Opinion.

It is important to note that under the "deliberate indifference" standard for student-on-student discrimination,

educators do not attract liability based on any theory of vicarious liability (as operates in the case of an employer's responsibility for certain acts of its employees) since students are obviously not employed by the board and do not act within a "scope of authority" as that notion is traditionally understood; nor is it based on any agency principle, which, again, would be conceptually difficult to apply to the student-board relationship. Rather, deliberate indifference is a theory of *direct* responsibility that imposes legal liability on a school board for its own decisions to remain idle in the face of known student-peer discrimination. Similar concepts of direct liability for discriminatory conduct already exist in Canadian human rights jurisprudence.

Although some aspects of the deliberate indifference test are a particular function of Title IX legislative requirements, much of the underlying rationale of the standard is consistent with Canadian courts' treatment of human rights liability. The *Davis* majority opined that deliberate indifference is appropriate only where school officials have authority to take remedial action, that is, where the school exercises substantial control over both the harasser and the context in which the known harassment occurs. In *Davis*, it could be said that since the harassment occurred during school hours on school grounds, the misconduct took place under an operation of the school, over which the school exercised control. However, it is not at all certain that in the context of the first case outlined above the provision of teacher playground supervision during lunchtime or the alternating-grade schedule for use of the soccer field constitute sufficient indicia of substantial control so as to satisfy the American standard, despite the fact that the alleged discrimination (putting aside the other obvious weaknesses in that claim) occurred during school hours and on school property.

The *Davis* Court intended that the deliberate indifference test remain a flexible standard, recognizing the reality that "schools are unlike the adult work-

the background had been tuned to a news broadcast, which was airing the events live as they occurred. This is when reality really sank in. As I looked around the classroom, somber faces became reddened, eyes began to water, noses began to drip. Floodgates of emotion were waiting to be released, waiting for the breaking point. It didn't take long. Girls entered seeking their friends to share the news that they had family in one of the towers. Tears began to flow freely, and even those without family there couldn't help but feel grief. I watched people I've known throughout high school become people I'd never known them to be. Anger, sadness, shock, sympathy were portrayed on every face. I remember witnessing a scene which will forever replay in my memory as characteristic of that day. A young girl sat on the phone trying to get in touch with her parents. I'm not sure what was said on the other end, but I do remember her reaction. The phone fell from her hands as she began to sob. I remember her cries. "No! No!" was all she could say, and even now I feel that I have fallen short of truly portraying the anguish I witnessed.

I remember discussing over lunch the possibility of a draft, of war. We were frightened, afraid, unsure of what would come next. Ms. Borrin began my third period class by saying that she couldn't watch what was going on, and that she would rather do work. Thankfully, I was signed out at that moment because I doubt I could have sat through that class.

At home the sun was shining, the air was warm, and the TV predicted the end of the world. It was inescapable. It was on every channel. I went to my friend's house that night, but it was there, too. I kept thinking, if I could just make it go away long enough, I could cope better.

Eventually the press relaxed, the frenzy subsided, but the fear remained. I couldn't relax. I always felt I shouldn't be calm when there were rescue workers who couldn't even sleep, that I shouldn't be happy when millions out there had lost someone. I remember grocery shopping with my mother. We were still able to see the smoke on Sunday, nearly a week later. It seemed as though everyday activities were wrong, somehow - like our continuing to live insulted the memory of those who died.

And so now it's 22 days later, and life is semi-normal again. We can go out without the fear of not ever coming home. We can live without feeling ashamed about it. Has this changed my life? Not in a way I've seen yet. I'm more careful now, a little more stressed now. But I'm still living the same way, and now I live with the knowledge that I survived history. And maybe I won't ace this assignment; maybe you'll read this and tell me I was off topic or too long. But that doesn't matter. Because this is history. It's not something that can be graded right or wrong. It just is. And soon there will be a war, and that will be history too. And I will lose friends and loved ones. And that's how I will get by. Just by being. And then it will be my turn to be a part of history, and perhaps someone will grieve for me. Until then, I will just be. 🍌

place and ... children may regularly interact in a manner that would be unacceptable among adults. ... Indeed, at least early on, students are still learning how to interact appropriately with their peers. It is thus understandable that, in the school setting, students often engage in insults, banter, teasing, shoving, pushing and gender-specific conduct that is upsetting to the students subjected to it." Accordingly, the Court doubted whether a single instance of one-on-one harassment would satisfy the requisite standard. Similar reservations would, in my view, preclude liability in the first case noted above, where, even if one accepted that the soccer field accident was motivated by anti-Muslim animus, the spontaneous single incident would seem insufficient to impose liability on the school authorities, who learned about the incident only after the fact and were thus deprived of any ability to exercise effective control over the alleged offender.

Not so in the case of *Jubran v. North Vancouver District No. 44*, a case presently before the British Columbia Human Rights Tribunal, which may provide the first real opportunity for consideration of a *Davis*-type of analysis in the Canadian context. Asmi Jubran alleges that while he was a student at Handsworth Secondary School from 1993 to 1998, he was subjected to physical assaults and verbal harassment including racial and, particularly, sexual orientation insults from other high school students. Jubran alleges that he repeatedly advised the school administration of the incidents and that the school failed to enforce its anti-bullying policy based on perceived sexual harassment. If supported by the evidence, the latter all-important allegations would at least satisfy the first and second elements of the U.S. deliberate indifference standard, i.e., that the Handsworth Secondary administration proceeded with deliberate indifference to known acts of harassment. Of course, that would still leave open the questionable notion that schools boards should be held directly liable for spontaneous single incidents of student-peer discrimination, as is currently being investigated by the Ontario Commission. 🍌

1 "Altering the Structure of the School System: Broadening the Lines of Liability?", *Education Canada* (Summer 1999), vol. 39, no. 2, at p. 24.

2 *Jacobi v. Griffiths* (1999), 174 D.L.R. (4th) 71 (S.C.C.); *Bazley v. Curry* (1999), 174 D.L.R. (4th) 451 (S.C.C.).

3 *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629; 119 S.Ct. 1661 (1999). Subsequent to *Davis*, lower federal District Courts have seemingly been reluctant to follow the Supreme Court's lead: see *Manfredi v. Mount Vernon Board of Education*, [2000] NY-QL 6776; No. 97 Civ. 7103 (S.D.N.Y., April 12, 2000) and *Vaird v. School District of Philadelphia*, [2000] PA-QL 1324; No. 99-2727 (E.D. Pa., May 12, 2000).

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