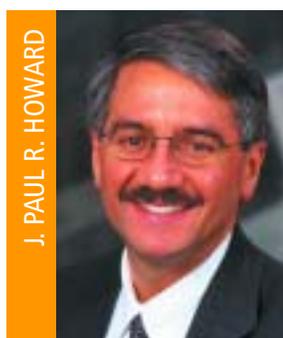


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J. Paul R. Howard

Following-Up on *Jubran*: Boards, Bullying, and Accountability



The latest in a growing list of teenage “bullying” tragedies that have befallen this country in recent years captured the nation’s attention again this summer when Halifax police charged a 15-year-old girl with extortion, assault, and uttering a threat, three months after the boy she is accused of terrorizing, Emmet Fralick, 14, shot himself at home, having “left a suicide note saying he was distraught after being tormented by students.”¹

Commenting on the Fralick case and other instances of teenage bullying that have resulted in loss of life (the suicide of Dawn-Marie Wesley and the swarming of Reena Virk, both of B.C.), *The [Halifax] Daily News* ran an interesting editorial asserting the need to distinguish between “bullying” and criminal behaviour:

Physical violence and financial extortion are not matters for the guidance counsellor. They are matters for the police. Hopefully, no more deaths will be necessary to impart that lesson.²

Implicit in the *Daily News* editorial is the important point that teenagers are independent moral actors. Persons younger than 12 years of age cannot be convicted of a criminal offence. Older than that, and the law will, generally speaking, hold you accountable for your actions.

That point leads us back to *Jubran v. North Vancouver School District No. 44*, a case I had referenced in a previous *Law Matters* column,³ in which a student alleged that throughout his high school years he suffered discrimination and harassment on the basis of sexual orientation at the hands of his fellow students, as a result of which he filed a complaint against the school board under the B.C. *Human Rights Code*. In specific terms, Jubran said that, while a student at Handsworth Secondary School from 1993 to 1998, he was subjected to name-calling such as “faggot”,

“queer”, “gay”, “homo” and was pushed, shoved and had things thrown at him. There was one incident where a small hole was burned into the back of Jubran’s shirt by a student(s) sitting behind him, although, fortunately, Jubran himself was not physically injured. None of the students alleged to have been responsible for the bullying were named in Jubran’s complaint; it was brought against the board trustees only.

When I referenced it in the earlier column, the case had not yet been decided. Subsequently, however, the B.C. Human Rights Tribunal released its so-called “precedent-setting” decision on April 8, 2002.⁴ Jubran had alleged that he reported all of the incidents to the school administration but they failed to take effective action to stop the bullying. The Tribunal expressly found otherwise:

... there is no evidence that the school condoned harassing conduct, or turned a blind eye to it. [Principal] Shaw and [Vice-Principal] Rockwell, for the most part, acted with diligence in responding to Mr. Jubran’s complaints. The evidence demonstrates that, with respect to each individual harasser but for one or two, the disciplinary steps taken by the administration were effective. Most of the students, when spoken to by Mr. Rockwell or Mr. Shaw, stopped the name-calling. The students who gave evidence, all of whom had been investigated as a

result of Mr. Jubran's complaints, testified that the disciplinary actions taken by the school were effective in respect of their own behaviour. I accept that the student population knew, for the most part, that the administration considered that harassing behaviour was unacceptable, and that action would be taken if such conduct was reported.

That finding would have ended the case if the context were employment instead of education. Nonetheless, the Tribunal ultimately held the school board liable for the student misconduct. As the April 9th press release of the B.C. Human Rights Commission put it, "it is the first Canadian human rights ruling that specifically holds schools accountable for responding to and preventing homophobic harassment by students".

How sad, then, that the Tribunal's analysis never truly addressed the central issue before it – whether educators should be held legally accountable for the wrongful acts of high school students. Nowhere in the Tribunal's 38-page decision is there any consideration of whether Jubran's tormentors should themselves bear some responsibility for their misdeeds, nor even seeming recognition that teenage students are independent moral actors.

In fairness, certainly the Tribunal evidently thought it was addressing the issue of whether the board is "responsible for student conduct that contravenes the Code". The Tribunal devoted a mere 15 paragraphs to that central question. However, its essential reasoning is contained in the following four sentences:

It is the statutory responsibilities of school boards as well as the compelling state interest in the education of young people [R. v. Jones], and the school board's obligation to maintain a non-discriminatory school environment for students [Ross v. New Brunswick Sch. Dist. 15] which gives rise to the School Board's duty respecting student conduct under the Code.

As a matter of legislation and case authority, there is a legitimate state

interest in the education of the young, that students are especially vulnerable [sic], that the School Board may make rules establishing a code of conduct for students attending those schools as part of its responsibility to manage those schools.

Given this, and the quasi-constitutional nature of the Code, I find that the School Board has the duty to provide students with an educational environment that does not expose them to discriminatory harassment. [Emphasis mine.]

Having found that Mr. Jubran was subjected to discrimination by students on the basis of sexual orientation or perceived sexual orientation, and that the School Board is liable for that conduct, I move now to the School Board's defence.

Having made this *prima facie* finding of liability, the Tribunal went on to reject the board's defence. But one of the problems with the Tribunal's fundamentally flawed argument, as set out above, is that it proves too much. If that's all it took, the emphasized syllogism above would also support a finding that the board was just as easily responsible for, say, any criminal conduct of the teenage students, because in the criminal context the Tribunal's three conditions would just as easily be satisfied: the state has the same legitimate interest, the students are just as "vulnerable", and the board has the same disciplinary rule-making powers. But a general rule that educators are criminally culpable for the crimes of their students would require a complete departure from our current criminal justice system.

In asserting the somewhat circular argument that the board is liable for student conduct that violates the Code because the school board has a duty to provide an environment free from student conduct that violates the Code, the Tribunal has forgotten one fundamental element of liability. Causation. It may be that the school board had a legal duty to provide Jubran with a non-discriminatory learning environment. And on the evidence found by the Tribunal, it is clear that Jubran was subjected to homophobic remarks and other

discriminatory treatment – of that there can be no doubt. So there is duty and there is harm. But there is no linkage between the two. That is, the Tribunal's analysis does not show that the educators' breach of their duty [let's assume there was breach] caused the harm suffered by Jubran. Indeed, at first blush, we all would have said that the injury done to Jubran was caused by his student peers. So in the end, the Tribunal's analysis never really explained the justification for holding the educators accountable for the students' unlawful conduct.

The Tribunal's decision is being judicially reviewed by the B.C. Supreme Court. In the interim, the ripple effects from the *Jubran* case continue to be felt across the nation, as reflected most recently in Ontario, where a "teenage brother and sister are suing their current and former high-school principals and vice-principals as well as the Halton District School Board for failing to protect them from a group of bullies."⁵

1 "Girl charged after Halifax teen's suicide," *The Toronto Star* (Tuesday, 23 July 2002).

2 "From bullying to criminality," *The [Halifax] Daily News* (Tuesday, 23 July 2002).

3 "School Board Liability for Student-Peer Harassment and Discrimination: Deliberate Indifference" and Beyond?" *Education Canada* (Winter 2002), vol. 42, no. 1, p. 47.

4 *Jubran v. North Vancouver School District No. 44*, [2002] B.C.H.R.T.D. No. 10; petition for judicial review of the Tribunal decision has been filed by the school board and is pending before the B.C. Supreme Court.

5 V. Malarek, "Ontario teens suing school board over bullying", *The [Toronto] Globe and Mail* (Monday, 3 June 2002).

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