

The Top Five 2006

Each year Justice Stephen Goudge of the Ontario Court of Appeal identifies five cases that are of significance in the educational setting. This summary, based on his comments and observations, is appropriate for discussion and debate in the classroom setting.



***Childs v. Desormeaux*, [2006] 1 S.C.R. 643**

<http://scc.lexum.org/en/2006/2006scc18/2006scc18.html>

Party hosts found not responsible for injury to another caused by an intoxicated party guest who is in a car accident after leaving their home.

Two individuals hosted a BYOB party at their private home, during which they only served three-quarters of a bottle of champagne in small glasses at midnight. D, a party guest, was walked by one of the hosts to his car and asked whether he was “ok”. D answered “no problem”, then left the party and drove his car into oncoming traffic and collided head-on with another car. He seriously injured three of the other car’s passengers and killed one passenger. C (one of the passengers) was rendered paraplegic in the accident. C brought an action against the hosts of the party for the injuries she suffered.

The trial judge and the Ontario Court of Appeal concluded that social hosts of parties do not owe a duty of care to members of the public who may be injured by an intoxicated guest’s conduct.

The Supreme Court of Canada agreed with the lower courts and affirmed that social hosts are not responsible for the actions of their guests on public highways after they leave the hosts’ homes. In this case there was not enough proximity between the social hosts and harm caused to the passenger by the inebriated party guest in order to find liability. There was no evidence that the hosts knew, or ought to have known, that D, who was leaving the party and driving was impaired. Although the hosts knew that D had gotten drunk in the past and driven home, the court found that the hosts’ knowledge of D’s history of alcohol consumption and impaired driving was not enough. It was not “reasonably foreseeable” in this particular instance that he would be driving impaired and would pose a risk to other motorists.

The Court found that social hosts do not have a duty to act to monitor guests’ drinking or to prevent them from driving. The Court stated that consumption of alcohol and the assumption of the risks of impaired judgment linked to alcohol consumption are in most cases a personal choice and personal activity. The hosts did not do anything to implicate themselves or increase the risk that D would drive impaired and injure others. In this case

the hosts did not control the supply or service of alcohol or continue to serve D when he was visibly impaired.

The Court also found that there was also no evidence that anyone reasonably relied on the hosts to monitor guests' intake of alcohol or prevent intoxicated guests from driving. The Court distinguished the expectation put on social hosts from the expectation and reliance placed on commercial hosts who have the capacity to monitor what they are serving to an individual, are regulated by legislation, and are making profit off of selling drinks. These factors create a different relationship between bar owners/ bar servers and their patrons from that of social hosts and their guests. With this different relationship comes a duty to protect the public from individual's who become impaired on their premises and pose a threat once they leave the premises and get into their cars.

Discussion Issues:

- Do you think there should be a distinction between social and commercial hosts?
- Would the outcome have been different if it wasn't a BYOB party and the hosts had been serving alcohol to D all evening and were aware of how much he was drinking? If they had been making "shots" for D all evening and initiating drinking games? If it had been a house party where they were selling drinks?
- Would it have been different if D had been falling over on his way to the car and had not answered "no problem" to the question as to whether he was ok but still got in the car to drive?
- Do you think that bar tenders and bar owners should be responsible for the actions of their patrons after they leave the bar? What about if they have stopped serving someone and that person leaves and still causes a car accident?
- Is this an issue that should be dealt with by legislation or by the courts?

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***E.B. v. Order of the Oblates of Mary Immaculate in the Province of British Columbia*, [2005] 3 S.C.R. 45**

<http://scc.lexum.org/en/2005/2005scc60/2005scc60.html>

Employer operating residential school found not to be vicariously liable for sexual assault committed by an employee

From 1957 to 1962, E.B., a student, attended a residential school for First Nations children which was operated by the Oblates of Mary Immaculate (a religious order). The Oblates employed numerous staff at the school, including S. who worked as a baker, boat driver and general repair/odd-jobs person. S. also resided on the school grounds.

At the trial level, it was accepted that the employee S. had sexually assaulted E.B. These frequent and ongoing assaults had lasted from the time E.B. was 7 until 11 or 12 years of age. The assaults took place in S.'s living quarters (an upstairs room in a building on school grounds). E.B. did not inform anyone at the school of these assaults at the time.

With respect to the issue of whether the Oblates as the employer was vicariously liable for these actions of S., the trial judge considered the manner in which the Oblates operated or "operational characteristics" of the residential school (for example, children were separated from their families, employees lived in close proximity to children, and children were required to respect and obey school staff). The trial judge concluded that the manner in which the school operated materially enhanced the risk that sexual assaults would take place at this school. For these reasons, the trial judge found the Oblates vicariously liable for S.'s assault of E.B.

In its consideration of vicarious liability, the Court of Appeal, however, focused on the specific employment duties and responsibilities assigned by the Oblates to employee S., in order to determine whether there was enough of a connection between those job duties and S. committing the assaults. The Court of Appeal overturned the trial judge's decision finding that the trial judge's assessment of vicarious liability overemphasized the opportunity for employee misconduct created by the way the school was operated and minimized the connection between the employee's actual job and the assault. The Court of Appeal found that S. operated on the fringes of school life, and that there was not a strong connection between the jobs he was hired to do and the instances in which the abuse occurred. As such, his misconduct could

not have been anticipated by his employers and did not create a relationship where they could be held to be vicariously liable for the wrongs he committed.

A majority of the Supreme Court of Canada supported the Court of Appeal's reasoning. The Court confirmed that in order to find the employer vicariously liable, there had to be a strong connection between what the employer was asking the employee to do (the employee's role) and the wrongful conduct which took place. This required evidence that the school had created features of S.'s employment relationship which contributed to the ability of S. to carry out the assault. The court explained that applying the trial judge's expansive approach to vicarious liability would open the school up to liability for misconduct of all of its employees, no matter how disconnected their wrongdoings might be from any power or status tied to their jobs, and in situations where employees were not given any position of authority or access to intimacy with students by their employers. The court noted that this is an area which should more properly be addressed in the area of direct liability not vicarious liability.

The Court went on to clarify that if an employer operates in conditions that present a "mere opportunity" for an employee to commit a wrong, this is not enough to attract vicarious liability. In this case, despite the loose structure of the school, S.'s position at the school did not give him the authority nor require him to have regular or meaningful contact with students. Upholding the decision of the Court of Appeal, the Supreme Court concluded that while the employment relationship in this case may have provided S. with the opportunity to commit the wrongful acts, his assigned role in relation to the students fell short of creating an employer/employee relationship which could lead to vicarious liability in this instance.

Justice Abella in her dissenting opinion expressed a different view. On her reasoning, one must look at the enterprise as a whole to determine whether the specific features of the enterprise and of the employment relationship created or materially enhanced the risk that the tort or misconduct would occur. Justice Abella found that the link between the opportunity for misconduct provided by the employment situation and S.'s misconduct was particularly strong. She noted that S. was given living quarters in the middle of the school property, and was permitted to form relationships with vulnerable children who perceived him to be in a position of authority. At trial, the court heard evidence that S. had responsibility for helping the religious staff with all school-related tasks, including supervising children on a daily basis and assigning chores to them. In this case, Justice Abella determined that this relationship was critical to finding that the residential school, as an enterprise, and through the authority it provided to S., materially enhanced the risk of misconduct and should be vicariously liable for S.'s assault of E.B.

Discussion Issues:

- Can you think of any instances when an employer should be responsible for misconduct committed by an employee? Why should the employer be responsible in those instances? When do you think an employer should not be responsible for the acts of their employees?
- How significant was the employee S.'s job description in this case? Why was it important for the court to know about S.'s job duties and responsibilities?
- Would it have made a difference to the liability of the school if the employee S. was required to teach the students baking or maintenance/repairs skills as part of his job? Why or why not?
- Is there anything the employers could have done to prevent the abuse that the student E.B. experienced?
- What does this case tell you about the importance of supervision of employees by employers?
- This is a case where the employees were in a workplace where there were vulnerable children present – First Nations students who had been separated from their families. Do you think that employers like residential schools or children's hospitals have different responsibilities in hiring and supervising employees than other employers? Why or why not?
- Should the same principles of vicarious liability apply to for-profit and non-profit employers?

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***R. v. Labaye*, [2005] 3 S.C.R. 728**

<http://scc.lexum.org/en/2005/2005scc80/2005scc80.html>

Operating a common bawdy house is found not to constitute criminal indecency in this circumstance, but the court creates a new test for determining what constitutes criminal indecency.

Mr. Labaye operated a member's-only club where people could meet each other to participate in group sex. All members were consenting adults who were well aware of the activities of the club. All prospective members were interviewed prior to membership fees being accepted. Group sex was permitted only on the third floor "apartment" which was locked with a numeric keypad and marked "priveé". Members of the club were supplied with the appropriate numeric code and permitted access to the apartment.

At the trial level, the accused was charged and convicted with keeping a common bawdy-house for the practice of acts of indecency under s. 210(1) of the *Criminal Code*. The trial judge found that the accused's "apartment" fell within the meaning of "public place", as defined in s. 197(1) of the *Criminal Code*. The trial judge found that social harm took place as a result of the sexual exchanges occurring in the presence of other members of the club. The trial judge concluded that the conduct at issue was indecent under the *Criminal Code* because it was degrading and dehumanizing, was calculated to induce anti-social behaviour in its disregard for moral values, and raised the risk of sexually transmitted diseases. The Court of Appeal upheld the findings of the trial judge and the issue was appealed to the Supreme Court of Canada.

The Supreme Court of Canada focused its decision on the issue of whether the concept of 'indecency' is a moral determination or an issue of harm. The majority favoured an objective harm-based test that could be used to define 'indecency' in criminal law, rejecting the traditional subjective standard of community morality and tolerance. In other words, the Court adopted a test for proving indecent criminal conduct which required the Crown to prove beyond a reasonable doubt that two requirements have been met.

First, that the conduct causes harm that is contrary to society's norms by:

- (a) confronting members of the public with conduct that significantly interferes with the public's autonomy and liberty,
- (b) predisposing others to anti-social behaviour, or

- (c) physically or psychologically harming the person(s) involved in the conduct.

Secondly, the Crown must prove that the harm caused is incompatible with the proper functioning of society.

The accused was acquitted by a 7-2 majority ruling. The Court articulated that a harm-based analysis of conduct alleged to be indecent, rather than judicial interpretation of community standards of tolerance, must be used in these cases to meet the goal of protecting members of society, without prioritizing a particular view of morality.

The dissenting judgment disagreed with the creation of a harm-based test as the determinative factor in establishing the minimum level of tolerance for indecency. The dissenting judgment argued that a harm-based test does not allow for the contextual factors of the case to be considered. The Dissent pointed out that in cases where no concrete harm can be proven, such as pornography or bestiality, the harm-based test would not be sufficient. Simply because harm is not inflicted should not necessarily make an activity legal, as it still may offend the public's standard of tolerance. Moreover, the dissenting voices in the Court argued that the public and commercial aspects of the sexual practices in this case make them indecent even if there was no harm. The dissent maintained that questions of 'indecency' should be regulated according to community standards, rather than harm, or the standards of the individuals involved. The adoption of a harm-based test is a significant shift in the purpose of the criminalization of indecency that eliminates the government's ability to regulate conduct that offends the majority of the public.

Discussion Issues:

- Should 'indecency' in the criminal law be measured by the severity of harm or by public morality?
- Is the criminal law part of regulating/enforcing community morality?
- Should the criminal law extend beyond protecting against harm to promote a particular social conscience or regulation?
- How should society determine the standards of community tolerance or morality?
- Is there a consensus of opinion on what makes an act indecent?
- What is the judge's role in deciding questions of morality or tolerance?
- What role should the personal experiences of the judge, or the personal morals of the judge, police and lawyers play when deciding how to deal with conduct such as consensual, safe group sex?
- How does this case reflect a shift in the role of the court when deciding question on indecency? (refer to Little Sisters case on community standards)
- What authority or factors would you rely on to support your decision on a question of indecency?

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***R. v. Boulanger*, [2006] 2 S.C.R. 49**

<http://scc.lexum.org/en/2006/2006scc32/2006scc32.html>

Public officer did not breach trust by asking for an additional report on his daughter's car accident.

Following a car accident involving his daughter, Boulanger, a Director of Public Security, asked the officer in charge of the case to prepare a second, more complete accident report. This more comprehensive report led to the conclusion that Boulanger's daughter was not at fault. As a result she did not have to pay the \$250 insurance deductible.

Boulanger was charged with *breach of trust by a public officer* under s.122 of the *Criminal Code*. This charge arises when a public official has acted in connection with his/her official duties but for personal benefit instead of public good. Those acting as public officers are held to higher standards and broader liability than private persons. They can face up to 5 years imprisonment for this offence.

At the trial level, Boulanger was convicted on the basis that he had used his office to obtain personal benefit. The conviction was then appealed and upheld by a majority at the Court of Appeal. The Supreme Court of Canada allowed the appeal and Boulanger was acquitted. When the court finds that an accused is not-guilty, that person is "acquitted" and can go free without any criminal record.

In reviewing the case, the Supreme Court revisited the necessary elements for establishing that a breach of trust by a public official has occurred. It affirmed that the Crown must prove beyond a reasonable doubt that:

- 1) The accused is an official;
- 2) The accused was acting in connection with the duties of his or her office;
- 3) The accused breached the standard of responsibility and conduct demanded of him or her by the nature of the office;
- 4) The accused's conduct was a serious and marked departure from the expected standards of an individual in the accused's position of public trust; and
- 5) The accused acted with the intention to use his or her public office for a purpose other than the public good, such as, a dishonest, corrupt or unfairly biased purpose.

The Supreme Court found that in this case the Crown had successfully proven that Boulanger was an official who, by asking a subordinate officer to prepare a second report, was acting in connection with the duties of his office. The Crown had also proven that Boulanger was pursuing a personal interest contrary to the *Code of ethics of Quebec police officers*, which requires him to perform his duties “disinterestedly”. The Court however concluded that while his performance of duties in an “interested” manner may be enough for him to face disciplinary action under the *Code of ethics*, his actions were not necessarily at a level of seriousness to establish a breach of trust by a public official under the *Criminal Code*.

In its decision, the Court highlighted that there was a reasonable doubt as to whether Boulanger had the “mens rea” or mental intent necessary for a conviction under s. 122 of the *Criminal Code*. The officer’s report was found to be accurate, and Boulanger did not intend to use the supplementary report to mislead the insurance company. Although he knew he would benefit from the report, this was not enough to establish a “culpable state of mind” (mens rea). Boulanger’s intention was to have the officer make a second, more complete report, and not to have the officer skew the report in one way or the other for personal gain.

In addition, the Supreme Court found that the “actus reus” portion of the offence (the criminal activity or prohibited conduct) had not been proven. While the proper course of conduct would have been for Boulanger to have had his insurance company communicate directly with the officer, his actions did not represent a marked departure from the course of action he should have taken as a public official whose job is to ensure that reports are thorough and accurate. Rather, Boulanger’s conduct was simply an error in judgment. In view of these facts and circumstances, the Supreme Court found that the actions of the accused were not serious enough to establish the “actus reus” of this offence and he was acquitted.

Discussion Issues:

- Why was Boulanger convicted of breach of trust at the trial level?
- Explain why the Supreme Court of Canada felt that the elements of the crime – actus reus (the criminal conduct or prohibited activity)+ mens rea (mental intent, culpable state of mind) – were not proven beyond a reasonable doubt in this case.
- In the past it was not necessary to prove intent in order to establish that a public officer had breached the public’s trust. Criminal law has evolved to a point where dishonesty and adverse mental element must now be established to find someone guilty of this crime. Should the fact that the official has received a personal benefit be enough, or is this a good change in the law that now we have to consider dishonesty as an element of the crime?
- Should public officials be held to higher standards of behaviour than ordinary citizens? Why or why not?
- Can you think of an instance where a public official would be acting in breach of the public’s trust? What sort of punishment is appropriate when a public official has breached the public’s trust?

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***R. v. B.W.P.; R. v. B.V.N.*, [2006] 1 S.C.R. 941**

<http://scc.lexum.org/en/2006/2006scc27/2006scc27.html>

General deterrence is found not to be a sentencing factor under the YCJA.

This decision deals with two appeals; one from the Manitoba Court of Appeal and the other from the British Columbia Court of Appeal. The cases were heard together because they both asked the Court to consider the same issue and interpret the same section of the Youth Criminal Justice Act.

B.W.P., a Manitoba youth, killed a man during a fight and pled guilty to manslaughter. After reviewing the relevant provisions of the *Youth Criminal Justice Act*, the sentencing judge held that *general deterrence* was no longer a principle of sentencing under the new *YCJA* regime and therefore was not something to be taken into consideration in determining an appropriate sentence. *General deterrence* refers to when an offender is given a more severe punishment in order to deter or dissuade others from engaging in criminal activity. General deterrence is a legal principle of adult sentencing that was also a recognized principle under the *Young Offender Act* (the legislation that existed before the *YCJA*).

The sentencing judge also found (contrary to the Crown's argument), that s. 42(2)(o) of the *YCJA* allowed the Court discretion in determining the length of the custody and supervision portions of a manslaughter sentence. The judge sentenced B.W.P. to a 15 month custody and supervision order which required him to serve one day in open custody and the rest under conditional supervision in the community. The Manitoba Court of Appeal upheld this decision.

In the second case, B.V.N., a youth from British Columbia, pled guilty to aggravated assault causing bodily harm. He was sentenced to nine-months of closed custody and a supervision order. Both the sentencing judge and British Columbia Court of Appeal concluded that general deterrence was a factor, although a minor one, in determining the appropriate sentence under the *YCJA*. The Court of Appeal noted that the use of general deterrence by the sentencing judge did not increase the sentence B.V.N. would have received otherwise.

Both cases were appealed to the Supreme Court of Canada. The Supreme Court of Canada heard them together because they dealt with the same issue and the Court addressed two questions. First, whether general deterrence is a sentencing factor under the *YCJA* and second

whether, under sub-section 42(2)(o) of the *YCJA*, a sentencing judge must impose a particular sentence in cases of manslaughter that requires a youth to spend a certain minimum amount of the time in custody.

On the first issue, the Supreme Court of Canada unanimously agreed with the Manitoba Court that general deterrence is not a principle of sentencing under the *YCJA*. The Court noted that the *YCJA* introduced a new, more detailed and regulated sentencing regime, which is a complete code for sentencing young persons.

The Court considered what Parliament's intention was when it decided to leave general deterrence out of the *YCJA*. The Court found that this was likely done deliberately, with the goal of requiring judges to focus on the particular circumstances of the individual before the courts rather than on the deterrence of others when making appropriate sentencing decisions. The Court noted that by excluding the idea of general deterrence from the text of the *YCJA*, parliament has decided to promote the long-term protection of the public by addressing the behaviour of the particular young person before the courts, and rehabilitating and reintegrating that person into society while holding that person accountable through meaningful punishment related to the specific harm done.

On the second question, the Court was asked to interpret s. 42(2)(o) of the *YCJA* in order to determine whether sentencing judges have discretion when deciding the custody and supervision portions of sentences attached to manslaughter, attempted murder and aggravated sexual assault.

In the B.W.P. Manitoba case, the Crown had argued that s. 42(2)(o) had to be read in tandem with s. 42(2)(n) which would require the sentencing judge to impose that two thirds of a young person's manslaughter sentence would be served in custody. The Supreme Court of Canada found that the sentencing judge and the Manitoba Court of Appeal decisions were the correct approach rather than the argument put forth by the Crown. The Court found that s.42(2)(o) makes no restriction on what part of a sentence has to be spent in a custodial setting allowing the judge discretion in deciding a sentence in this area. The Court noted that s.42(2)(o) states maximum custody and supervision order, but doesn't state minimum custody or supervision orders leaving this up to the sentencing judge.

In the first case, since the sentencing judge had not applied the principle of general deterrence and was correct in applying discretion when deciding the length of the youth's custody, the punishment was not reviewed by the Supreme Court. In the second case, although the British Columbia Court of Appeal had incorrectly applied the idea of general deterrence in sentencing, this only played a minor role in the sentence which was given out and the young person had already served his sentence at the time this appeal was being heard so the Supreme Court did not review this sentence either.

Discussion Issues:

- In its reading of the *YCJA* and decision about what Parliament intended, the Supreme Court looked at the fact that there was no reference to general deterrence in the *YCJA*. It concluded that this omission meant Parliament didn't want general deterrence to be a factor in sentencing decisions. Do you think this was the right interpretation of the *YCJA*? Were there other things the Court should have considered in interpreting the *YCJA*?
- What challenges do you think the Court has when trying to interpret what parliament intended? If the Court has a different understanding than what parliament intended what happens then?
- What is the difference between specific and general deterrence?
- Do you think that general deterrence works? Are there situations when it should be used? Should it never be a factor?
- Why do you think the Court is ok with general deterrence being a factor in sentencing for adult offenders but not for young offenders? Do you agree or disagree?

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Young v. Bella, [2006] 1 S.C.R. 108

<http://scc.lexum.org/en/2006/2006scc3/2006scc3.html>

A university student is suspected to be a child abuser. Teacher and university are found liable for reporting without having reasonable cause.

Young, a social work student at Memorial University, submitted a term paper that included a case study as an appendix. The case study was a personal confession of a woman who had sexually abused children. She did not footnote the source of the personal confession in her paper and her professor, Bella, speculated that the case study was Young's own personal account and a "cry for help". In fact, Young had taken the case study from a textbook which was listed in the bibliography of her paper. Bella also suspected that Young had plagiarized the paper.

Bella took her concerns and suspicions about Young being a child abuser to the Director of the Social Work Department at the University. The Director did not ask Young for an explanation, and instead sent a "suspected ill-treatment" report to the Child Protection Services (CPS). Three of Young's university professors discussed the possibility of her being a suspected child abuser without ever raising this issue with her. The RCMP was also informed, in addition to at least ten social workers in several communities, many who knew Young through her summer employment.

More than two years after the initial report Young was contacted by a CPS worker. When confronted about the personal account by the CPS worker, Young showed the worker the textbook. Young sued her professors and the University. She claimed negligence and damages based on the fact that their actions had negatively affected her reputation, her ability to complete her education, and had reduced her income-earning capacity.

At the trial level, a jury found that the professors and the University had been negligent and destroyed Young's career prospects. Young was awarded damages. The University and professors then appealed. A majority of the Court of Appeal set aside the damages award by the Trial Court. The Court of Appeal concluded that Young had no case against her professors or the University because they were protected by s.38(6) of the *Child Welfare Act*. This section of the *Child Welfare Act* protects informants reporting on ill-treatment of children as long as they are not making the report maliciously or without reasonable cause.

Young appealed to the Supreme Court of Canada. The Supreme Court held that the trial judgment should be restored. The Court found that the *Child Welfare Act* does require those who have a statutory duty (such as teachers) to report cases where a child has been or may be in danger of sexual abuse, but that the informant must have “reasonable cause” for making a report. In this case, the Court found that the university professors acted on speculation and conjecture instead of “reasonable cause” in making their report. To establish reasonable cause, the professors would have had to show that they had information that the CPS “reasonably ought to have been asked to look into.” The Court found that the case study on its own was not information that a child was in danger or in need of protection from the student and there was nothing in the case study that tied the experiences directly to the student in such a way that warranted reporting to the CPS.

The Supreme Court confirmed that university professors do owe a duty of care to their students, and a standard of care which requires that professors take the necessary care to get their facts straight before taking a potential career-ending action. The Court found that both professors should have asked Young for an explanation as they both would have known that making a report with the Director’s name on it to the CPS would have serious consequences for Young and would likely cause her name to be placed on a Child Abuse Registry.

In discussing damages, the Supreme Court noted that there was a causal connection between the professors’ and University’s breach of their duty to this student and the losses sustained and that the damages she suffered were foreseeable. The damages awarded by the Trial Court were found to be proportionate and reasonable in light of the harm Young had suffered.

Discussion Issues:

- What sort of liability can come out of teacher/student relationships?
- How much information is enough information for a teacher to report child abuse without being sued in a school context?
- What happens to teachers who don’t report abuse that is later discovered?
- Should teachers have a statutory duty to report potential or suspected child abuse?
- How do we balance a teacher’s duty to report with the duty of care they owe to their students?
- What other types of professions have a duty to report child abuse and should they have this duty?
- Should other kinds of professions also be added to the list?
- How will this case impact on reporting of suspected child abuse?