FILLMORE RILEY
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In This Issue

FILLMORE RILEY

BARRISTERS, SOLICITORS AND TRADE-MARK AGENTS
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The Door Left Open: Intentional Wrongdoing and the Liability of Charitable Organizations

◆ *Anita L. Southall*

In two recent decisions, the Supreme Court of Canada both opened and closed the door to greater vicarious liability for organizations whose employees or volunteers commit intentional acts causing harm.

The result is a new set of principles, based largely on policy, for both charitable groups and those harmed, but which may be difficult to apply to differing factual circumstances, given the opposite outcomes in the two cases.

Traditionally, harmful acts carried out in the course of business by employees will render the employer liable vicariously. The theory is that the employer has the ability and the duty to control their employees and therefore should bear the burden of loss when the employee fails to meet the required standard of care and causes harm.

Intentional wrongdoing by employees, such as assault or theft, does not fit this traditional rationale because the employer hasn't authorized the wrongful act. The Court provided direction on this, within the context of intentional wrongful deeds carried out in non-profit enterprise.

In the case of *Bazley v. Curry*, the defendant Children's Foundation was a non-profit organization which operated residential facilities for the treatment of emotionally troubled children. The objective of the Foundation was to act as a 'substitute parent' with workers doing everything a parent would do including assisting with bathing and hygiene, and tucking in children at bedtime. A pedophile hired by the Foundation sexually abused one of the residents in his care.

The Supreme Court of Canada unanimously granted the plaintiff victim the right to pursue compensation against the Foundation. As between the charity which established the risk to the child by its works (no matter how noble and even how blameless the organization itself may be) and the victim, the victim is the only party without control. The court decided the most fair and just result was to allow the victim to seek compensation against the organization.

As a second critical step, the court held that this type of "no-fault" or "strict liability" for an intentional act is appropriate where the undertaking carried out by the organization creates or significantly enhances the risk of harm, and the wrongdoing amounts to a realization of the created or enhanced risk. The Court held that the Foundation, in carrying out its objective of putting the worker in the role of parent and requiring intimate personal care by the worker in looking after the vulnerable child, enhanced the risk of the misconduct which did occur. The Foundation was not spared responsibility even though it was a non-profit organization, the acts

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were criminal, went against the desired goals of the organization, and could never be seen to be the proper or even the negligent carrying out of the employee's actual duties.

In a second decision released at the same time by the Supreme Court, *Jacobi v. Griffiths*, the majority of the Supreme Court of Canada found that strict liability against a non-profit organization was not warranted where an intentional sexual assault had occurred, given the circumstances of that case. *Jacobi* sets out another perspective on the policy approach to strict liability against charities and non-profits and the need to rigorously consider the circumstances of each case.

In *Jacobi*, two individuals who were sexually assaulted as children sought compensation for injuries suffered at the hands of a program director for the defendant Vernon Boys' and Girls' Club. The Club's main intent was to guide and nurture troubled youth through activities carried on primarily on-site by and in the presence of the Club's employees and volunteers. All of the assaults except for one took place at the wrongdoer's home or at a non-Club related venue. He was encouraged to develop an intimate and caring relationship with all the children including the victims. He was to be a mentor, someone they could trust.

The majority decision considered the ramifications of charities and non-profits being met with increased liability through no actual fault of their own and shutting down as a result. Examining the various policy implications, the Court suggested non-profits and charities had a lesser potential to bear the burden of loss for this type of intentional wrongdoing than for-profit enterprises. The majority reviewed the principles in *Bazley* and applied them with serious rigour to the facts. The Court held that not all rapport encouraged and developed between adults and children would lead to liability for an organization such as the Boys' and Girls' Club, and that this situation wasn't comparable to *Bazley*. The wrongful acts here were conducted primarily off-site by the perpetrator, and the necessary connection did not exist between the organization's activities and programs as carried out by the employee and the risk of greater harm to the children. The majority ruled that there was no liability to the organization unless negligence was established.

With these decisions the Court has opened a door to greater potential recovery by victims without the need to prove negligence for intentional wrongful acts of its employees or volunteers. The court has also closed that door a bit to balance the goals of compensation and deterrence against the ability of non-profits and charities to shoulder the burden and continue to provide their much needed work in the Canadian community. Future cases will be subject to this difficult balancing act.

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The Parents' Maintenance Act

Another Concern For The "Sandwich Generation"?

◆ *Steven Z. Raber*

Much has been written over the years about the obligation of parents to support their children. By virtue of a provincial statute called *The Parents' Maintenance Act*, children may have an obligation to support their parents!

The Act provides that a son or daughter is liable to support dependant parents if the son or daughter has sufficient means to provide for the parent. A dependant parent is one who, by reason of age, disease, or infirmity, is unable to maintain himself or herself without assistance.

Three categories of persons can make an application to court for an order under this statute. First, the government may do so in the case of a parent who is in need or is a patient or resident in a hospital, home for the aged or similar facility. Second, the governing body of a hospital, retirement home, psychiatric facility or other similar facility may seek maintenance for the parent. Third, any municipality in which the parent resides may make an application.

The court may summon one or more children of the parent to court to determine what contributions should be made to support the dependant parent, having regard to the ability and obligations of the children. The maximum amount that may be ordered for the support of a parent may not exceed $20.00 per week.

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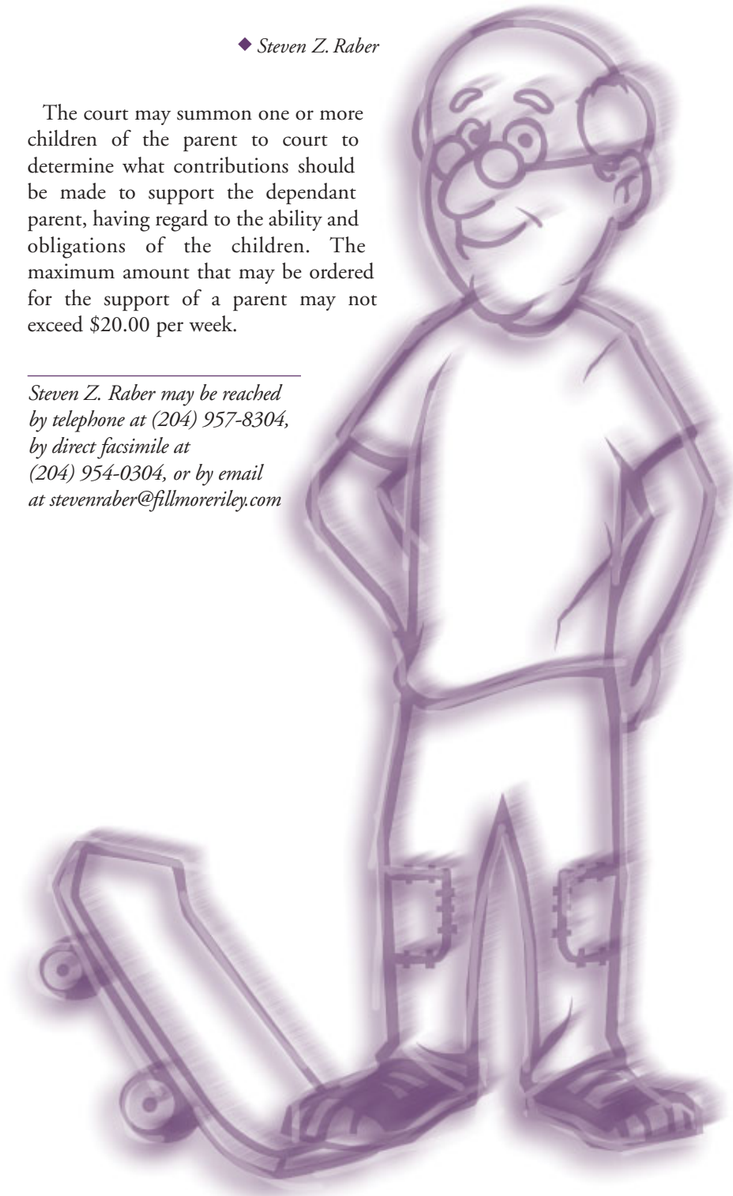
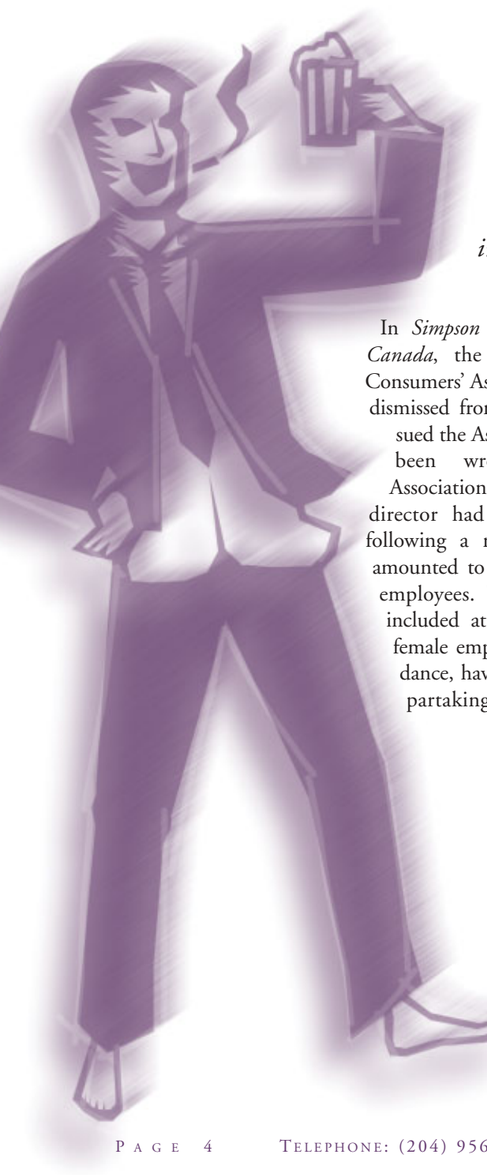


Fillmore Riley Report

Sexual Harassment Outside The Workplace

◆ *Jean-Marc Ruest*



A recent decision of the Ontario Court of Appeal has potentially increased the exposure of employers to claims of sexual harassment.

In *Simpson v. Consumers' Association of Canada*, the executive director of the Consumers' Association of Canada had been dismissed from his employment and then sued the Association alleging that he had been wrongfully dismissed. The Association argued that the executive director had been dismissed for cause following a number of incidents which amounted to sexual harassment of female employees. The incidents in question included attending a strip club with a female employee and paying for a table dance, having an affair with a secretary, partaking in nude bathing with employees following a business meeting held at his cottage and again in a hotel room hot tub while attending a conference with employees.

The trial judge concluded that the executive director's conduct did not constitute sexual harassment since the incidents had occurred outside the workplace, after work hours and among adults who appeared to consent to the conduct at the time it took place. He also commented on the fact that the Association did not have in place a sexual harassment policy that prohibited such conduct. The trial judge therefore found that the plaintiff had been wrongfully dismissed and awarded him damages equivalent to 18 months of pay in lieu of notice.

The Ontario Court of Appeal disagreed with the trial judge's findings and held that the Association had just cause to terminate the executive director's employment. The Court commented that the fact that the incidents occurred outside the office and after business meetings does not mean that they were outside the workplace and therefore outside the employment context. The conduct took place during events that the employees perceived to be job-related and therefore occurred in the workplace. The Court also addressed the trial judge's conclusion that the executive director's conduct amounted to "consensual conduct among friends." The Court stated that the fact that the employees may appear to have consented to the executive director's impugned conduct is not conclusive because of the power imbalance in the relationship between an employee and a supervisor and the consequences that the employee may perceive to result if he or she objects to the supervisor's behaviour.

The Ontario Court of Appeal's extension of the workplace to job-related social functions should cause employers to pay closer attention to the conduct of their employees, in particular those in supervisory positions, at such events. Prudent employers would be well advised to review their existing office policies to ensure that they specifically address conduct between employees outside the office and should also provide education to their employees pertaining to the nature and extent of workplace sexual harassment.

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What's NEW in Provincial Legislation

In the past year, the Legislature of Manitoba passed *The Enhanced Debt Collection (Various Acts Amended) Act* ("the Act"). This new piece of legislation amends several acts, specifically *The Executions Act, The Garnishment Act* and *The Summary Convictions Act*, that generally deal with the collection of outstanding money. This new legislation deals specifically with the collection, priority and default of payments made to the Government as a result of a recognizance order, a restitution order or a fine for the contravention of an Act or regulation of Manitoba, or the Criminal Code of Canada.

The Executions Act is amended to allow for the priority of recognizance orders, restitution and fines over another writ of execution. Practically speaking, this means that a writ of execution issued to enforce a recognizance order, a restitution order or an order imposing a fine has priority of claim over what is seized or realized under any other writ of execution.

In addition, *The Garnishment Act* is amended to allow for the payment of higher priority notices of garnishment first when there are multiple orders in effect. The Act provides that the garnishee must first comply with the higher priority payment request before remitting any amount into the court to comply with a lower priority garnishment order. The Act also states that, if the garnishment orders are of equal priority, the garnishee must comply with the order that was served first before remitting amounts owing under the second order.

The Act goes on to provide that besides maintenance orders, an order issued to enforce a forfeited recognizance order, a restitution order or an order imposing a fine are to be given priority over any other order of garnishment. In enforcing a high priority garnishment order, the Act provides that a collection officer may garnish money that is held jointly by the judgment debtor and any other person. The Act presumes that, for the purposes of the garnishment order, the money is the property of the judgment debtor. It is important to note that the Act includes a mechanism whereby a judgment debtor or a person who holds funds jointly with the debtor may apply to a court to have his or her interests determined.

Another notable amendment to *The Garnishment Act* is that service of a garnishment order on a judgment debtor's employer now binds all wages that become due and payable from the employer to the judgment debtor for the following year, subject to the exemptions allowed in *The Garnishment Act*. Previously, such garnishment orders only bound wages for the month following the effective date of the garnishment order.

The final amendment made by the Act is to *The Summary Convictions Act*. If a person fails to comply with a forfeited recognizance order, a restitution order or an order imposing a fine, a certificate reflecting the amount remaining unpaid may be filed with the Court of Queen's Bench. Once this certificate is filed, it is deemed to be a judgment of that court for the purpose of enforcement.

In brief, the purpose of the Act is to allow the Government priority in collecting money owed as the result of a forfeited recognizance order, a restitution order or an order imposing a fine. In effect, the Act will greatly impact the rights of those persons trying to collect money owed to them by a judgment debtor because the Government will be given priority of claim over what is seized or realized as a result of another writ of execution or garnishment order. Therefore, when a forfeited recognizance or restitution order is involved, an ordinary judgment creditor will be required to take a back seat to the Government in terms of priority of collection.

Three New Associates

Announcing

The partners of Fillmore Riley are pleased to announce the admission of three new associates to the firm effective June 24, 2002.

Shauna M. Braz graduated from The University of Winnipeg with her Bachelor of Science in 1998 and from The University of Manitoba with her Bachelor of Laws in 2001. After completing her articles at Fillmore Riley, she was admitted to the Manitoba Bar on June 20, 2002. Shauna practices primarily in the areas of corporate and commercial law and she may be reached at (204) 953-7801 or by e-mail at sbraz@fillmoreriley.com.

Paul K. Grower graduated from the University of Winnipeg with his Bachelor of Arts Honours (Gold Medal) in 1998 and from the University of Manitoba with his Bachelor of Laws in 2001. After completing his articles at Fillmore Riley, he was admitted to the Manitoba Bar on June 20, 2002. Paul practices primarily in the areas of civil, commercial and tax litigation and he may be reached at (204) 957-8369 or by e-mail at pgrower@fillmoreriley.com.

Edward M. Hermann graduated from the University of Manitoba with his Bachelor of Arts in 1997 and his Bachelor of Laws in 2001. After completing his articles at Fillmore Riley, he was admitted to the Manitoba Bar on June 20, 2002. Ed practices primarily in the areas of corporate commercial law and intellectual property law and he may be reached at (204) 953-7800 or by e-mail at ehermann@fillmoreriley.com.

FILLMORE RILEY NEWS

Randy McNicol and **David Kroft** were elected as benchers of the Law Society of Manitoba.

Anita Southall presented two seminars on directors' liability through the Volunteer Centre of Winnipeg, and to a professional association.

Members of Fillmore Riley's Tax Group gave a presentation to the Winnipeg chapter of Young Entrepreneurs' Organization on the subject of "The Use Of Trusts To Reduce Your Business And Personal Income Taxes."

Glen Peters has been reappointed as the honorary solicitor for The Arthritis Society (Manitoba Division). Glen is a past chairman of the Manitoba Division and member of the National Board of the Society.

Tony Fletcher was a panelist at a seminar entitled "Vicarious Liability and Institutional Sexual Abuse Claims" hosted by the Insurance Institute of Manitoba.

Norman Yusim provided a lecture to the Manitoba Bar Association on "Appellate Advocacy for Family Law Lawyers." Norman also attended a conference in Toronto on "Family Law and Practice: Latest Legal Developments and Practical Strategies in Formulating and Winning Your Case."

Steven Raber participated in the Law Society of Manitoba's Bar Admission course as an oral examiner in ethics.

Fillmore Riley would like to welcome the four new students who are participating in the Fillmore Riley Articling Program for 2002-2003. They are **Kelly Beattie, Glenn Jones, Christine Klassen** and **Kerri Tymchuk.**

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