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## A Clean & Healthy Environment: The Barriers & Limitations of This Emerging Human Right

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**STUDENT-ON-STUDENT HARASSMENT:  
A NEW PARADIGM FOR CANADIAN  
HUMAN RIGHTS LEGISLATION**

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**ABSTRACT**

Canadian school boards have recently begun to find themselves in the position of respondent under human rights complaints filed for cases of student-on-student harassment. This has raised serious questions regarding the extent of school board liability for the acts of students. It is possible for the current human rights legislation in Nova Scotia, used as a model in this discussion, to have jurisdiction over peer harassment; however, the procedural and substantive obstacles that need to be overcome make it a far from satisfactory avenue for a victim to pursue.

The recent United States Supreme Court case of *Davis v. Monroe County Board of Education* has established that it is possible to ground such a complaint under the relevant American federal human rights legislation. If the reasoning in that case lends any guidance as to how a similar issue may be resolved in Canada, it is that there is not much that separates a human rights complaint from a civil action in negligence or breach of fiduciary duty. The effectiveness of human rights regimes in protecting victims of student-on-student harassment needs to be assessed in light of the increasing frequency of such incidents.

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## I. INTRODUCTION

The experiences of students in primary or secondary schools can vary enormously. Student interactions can range from some of the most enjoyable and enlightening aspects of one's youth, to devastating relations of persistent torment and abuse. Each school with a school body in the thousands can expect to have its share of bullies and victims. As a result, many students are singled out for a brand of treatment that exceeds acceptable schoolyard behaviour. Students subjected to teasing, malicious pranks, and physical and verbal abuse ought to be able to rely on school authorities to curb the intolerably cruel behaviour of other students.

The concept of "peer harassment" has been used to define behaviour in schools that crosses the boundary between appropriate and inappropriate teasing and conflict that may occur between students in a school. Those harassed may be targeted because of characteristics such as race, sex or sexual orientation that are protected by human rights legislation. However, peer harassment may also occur because a student is simply an outcast, or does not fit comfortably into the school community. In this paper, the terms "peer harassment" and "student-on-student harassment" will be used interchangeably, and will refer to harassment that so exceeds the norm that it creates an adverse learning environment.

An unprecedented human rights complaint has recently been filed in British Columbia that seeks to entrench the concept of peer harassment as an action under that province's human rights legislation. The complainant, Azmi Jubran, has lodged a complaint with the British Columbia Human Rights Commission against the North Vancouver School Board in an effort to hold it accountable for the harassment that he allegedly experienced while a high school student in the public school system.

Mr. Jubran alleges that he experienced persistent harassment at the hands of other students. Although Mr. Jubran has stated that he is not homosexual, he was branded as such by his peers. Consequently, he was persecuted through teasing, threats, and physical violence that escalated to the extent that at one point he was intentionally set on fire by a classmate in a classroom.<sup>1</sup> Thus, Mr. Jubran claims he was discrimi-

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<sup>1</sup> The hearing before the British Columbia Human Rights Tribunal commenced in September, 2000 with the opening allegations and testimony of the complainant. The respondent school board is scheduled to respond in January, 2001.

nated against on the prohibited ground of sexual orientation. Human rights commentators are watching this decision closely, since it will decide whether human rights legislation can be invoked to hold a school board liable for the discriminatory acts of its students.

This paper will examine student-on-student harassment in the context of Canadian legal principles, and determine whether such a complaint can, and should, be properly characterized as a recognizable human rights violation by the school board. I will also examine the liability of school boards in light of civil liability in tort law and common law fiduciary duties. The Nova Scotia *Human Rights Act*<sup>2</sup> will be used as the model human rights legislation for determining whether a school may be found liable for the acts of harassment by its students.<sup>3</sup>

Harassment based on sex and sexual orientation will be the focus of this paper, as these issues have received the most judicial and academic examination thus far. This, however, does not diminish the importance of other grounds of discrimination that arise in the school context; these grounds are implicitly included in the following elaboration on general principles of human rights protection. Recently, the United States Supreme Court decided that peer sexual harassment can constitute a valid action under commensurate anti-discrimination legislation in that country.<sup>4</sup> A strong dissent, however, has emphasized that bringing such complaints into the realm of statutory human rights protection is not a simple or straightforward exercise. I will therefore compare the two systems to assess and contrast principles underlying human rights legislation that are relevant to student-on-student harassment.

It will become apparent that allowing human rights legislation to have jurisdiction over peer harassment is indeed possible, but it is far from a perfect means of addressing such behaviour. Holding a school board responsible for the “discriminatory” actions of its students requires overcoming procedural hurdles within the *Act* and corollary case law, as well as applying a policy-driven approach to such a complaint. Ultimately, the *Act*, or any equivalent Canadian human rights legislation,

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<sup>2</sup> R.S.N.S., c. 214, s. 1, as am 1991 c. 12 [hereinafter the “*Act*”].

<sup>3</sup> Under s. 93, *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, Appendix II, No. 5, education falls under the provincial head of power. As such, provincial human rights legislation is appropriately applied to allegations of discrimination as they pertain to the provision of educational services.

<sup>4</sup> *Davis v. Monroe County Board of Education*, 119 S. Ct. 1661 (1999) [hereinafter *Davis*].

may only be able to remedy the type of egregious behaviour that would otherwise already be validly addressed by established principles of negligence or breach of fiduciary duty. This further poses the question whether student-on-student harassment should enter the arena of human rights legislation or stay within the boundaries of traditional civil liability.

## II. THE APPLICATION OF HUMAN RIGHTS LEGISLATION TO PEER HARASSMENT IN SCHOOLS

### 1. Peer Harassment as Discrimination

Student-on-student harassment may manifest itself in three distinct ways relevant to prohibited grounds of discrimination under human rights legislation. First, there is discrimination that results from sexual harassment, which is specifically defined in the *Act*.<sup>5</sup> Second, discrimination may arise from harassment based on any of the other prohibited grounds enumerated in the *Act*.<sup>6</sup> Third, there is harassment that cannot be pigeon-holed in a enumerated ground (thus does not lead to discrimination that can be remedied by the *Act*), yet which is nonetheless as damaging to the victim's ability to properly benefit from his or her learning environment. The implications of this paradox will be addressed later in this paper. It is necessary, however, to first address the operation of the *Act* as it relates to student harassment on enumerated grounds, as the potential for non-uniform application of the *Act* may exist depending on the basis of the harassing behaviour.

Section 5 of the *Act* prohibits discrimination based on specific enumerated grounds:

5. (1) No person shall in respect of
  - (a) the provision of or access to services or facilities;
  - ...
  - discriminate against an individual or class of individuals on account of
  - (h) age;

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<sup>5</sup> s. 5(2).

<sup>6</sup> s. 5(1).

- (i) race;
- (j) colour;
- (k) religion;
- (l) creed;
- (m) sex;
- (n) sexual orientation;
- (o) physical disability or mental disability;
- (p) an irrational fear of contracting an illness or disease;
- (q) ethnic, national or aboriginal origin;
- (r) family status;
- (s) marital status;
- (t) source of income;
- (u) political belief, affiliation or activity;
- (v) that individual's association with another individual or class of individuals having characteristics referred to in clauses (h) to (u).<sup>7</sup>

Canadian jurisprudence has established that education is a service or facility within the meaning of human rights legislation.<sup>8</sup> Thus, it will constitute a *prima facie* case of discrimination when a student's access to educational services or facilities is hindered or denied on a prohibited ground.

Less straightforward, however, is the extent to which harassment on an enumerated ground can constitute discrimination. As mentioned previously, "sexual harassment" enjoys extensive statutory protection in human rights legislation due to its ubiquity in society. The Supreme Court of Canada ruled decisively in *Janzen v. Platy Enterprises Ltd.*<sup>9</sup> that sexual harassment should be properly characterized as discrimination based on sex, making it considerably easier for a complainant to establish a *prima facie* case of discrimination than it is for harassment based on other enumerated grounds, for which such pronouncements have not been made. Consequently, human rights codes have codified

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<sup>7</sup> *Ibid.*

<sup>8</sup> *Peel Board of Education v. Ontario (Human Rights Commission)* (1990), 72 O.R. (2d) 593 (Div. Ct.).

<sup>9</sup> [1989] 1 S.C.R. 1252 [hereinafter *Janzen*].

prohibitions of sexual harassment, such as section 1(2) of the *Act*, which states that “[n]o person shall sexually harass an individual.”<sup>10</sup>

Furthermore, “sexual harassment” has been specifically defined in the *Act*; however, this definition is broad enough to capture the full range of persecution that a complainant could typically experience. While the decision in *Janzen* left no doubt that sexual harassment constitutes discriminatory behaviour, the *Act* reinforces this in section 3(o):

s. 3(o) “sexual harassment” means

- (i) vexatious sexual conduct or a course of comment that is known or ought reasonably to be known as unwelcome,
- (ii) a sexual solicitation or advance made to an individual by another individual where the other individual is in a position to confer a benefit on, or deny a benefit to, the individual to whom the solicitation or advance is made, where the individual who makes the solicitation or advance knows or ought reasonably to know that it is unwelcome, or
- (iii) a reprisal or threat of reprisal against an individual for rejecting a sexual solicitation or advance.<sup>11</sup>

Considerable protection is offered to complainants under s. 3(o)(i), which proscribes a wide range of inappropriate behaviour. Thus, s.3(o)(i) could protect students from peer harassment, particularly in light of the broad and purposive interpretation typically accorded to human rights legislation. Although sections 3(o)(ii) and (iii) appear to primarily protect employees from sexual harassment in the workplace, such as *quid pro quo* sexual harassment, they may still apply to student-on-student harassment. Sexual harassment in schools manifests itself in a myriad of coercive ways, not the least of which is an offensive verbal invective dispensed by other students.<sup>12</sup> The “hostile” or “poisoned” environment created by the harassment hinders the victim’s ability to fully benefit from available services or opportunities. As a result of the broad statutory definition of “sexual harassment,” a complainant will have less difficulty establishing a *prima facie* case of discrimination, which is defined in section 4 of the *Act*:

<sup>10</sup> *Supra* note 2, section 5(2).

<sup>11</sup> *Supra* note 2, section 3(o).

<sup>12</sup> C. Richard, “Surviving Student to Student Harassment: Legal Remedies and Prevention Programmes” (1996) Dal. L.J. 169.

4. For the purpose of this Act, a person discriminates where the person makes a distinction, whether intentional or not, based on a characteristic, or perceived characteristic, referred to in clauses (h) to (v) of subsection (1) of Section 5 that has the effect of imposing burdens, obligations or disadvantages on an individual or a class of individuals not imposed upon others or which withholds or limits access to opportunities, benefits and advantages available to other individuals or classes of individuals in society.<sup>13</sup>

A clear definition of sexual harassment may not necessarily provide a quick and easy avenue for resolving a human rights complaint on those grounds. As the following discussion will demonstrate, it is not a simple task to find a school board liable for student-on-student harassment under the *Act*. It may be possible that it is the teacher – through his or her inaction or lack of appropriate response to the sexual harassment – who is guilty of discrimination under the *Act*, and not the harassing student. In such a case, the relevant discrimination would not be “sexual harassment” as defined in section 3(o), but rather discrimination based on sex through the unacceptable dismissiveness with which the victim’s fears and complaints were handled. Thus, establishing a human rights violation against a school board for peer sexual harassment, may necessitate an approach that is predicated on harassment based on sex, and not notions of defined “sexual harassment.”

The second type of harassment is based on grounds prohibited by the *Act*, other than sexual harassment. As there is no similar specific definition for harassment other than sexual harassment it will be necessary for a complainant to demonstrate that the harassment constitutes discrimination.

It could be argued that the statutory definition of “sexual harassment” implies that other types of harassment do not constitute *prima facie* discrimination. Further, it could be argued that the historic and almost universal subjugation of women justifies distinguishing between “sex” and the other enumerated factors in a discrimination analysis. However, the purposive approach taken in the interpretation of human rights legislation suggests that establishing hierarchies within the *Act’s* scope of protection is inherently antithetical to its underlying principles of equality.

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<sup>13</sup> *Supra* note 2, section 4.



Ultimately, the preferable approach is to recognize that harassment based on any of the prohibited grounds will not be tolerated, and the jurisprudence interpreting “sexual harassment” applies equally to the interpretation of “harassment” generally. Indeed, the *Canadian Human Rights Act*<sup>14</sup> affirms that all prohibited grounds of discrimination should be treated equally by recognizing harassment based on the other grounds. In particular, section 14 states:

14. (1) It is a discriminatory practice,
- (a) in the provision of goods, services, facilities or accommodation customarily available to the general public,
  - (b) in the provision of commercial premises or residential accommodation, or
  - (c) in matters related to employment,
- to harass an individual on a prohibited ground of discrimination.<sup>15</sup>

Harassment based on racial and sexual orientation should be treated as discriminatory activity equally with sexual harassment<sup>16</sup> due to its increasing prevalence and impact. A learning environment is no less hostile because a student is being harassed on one prohibited ground instead of another. As such, all “unwanted vexatious comments and conduct” premised on a prohibited ground ought to constitute harassment and a subsequent *prima facie case* of discrimination. The principle that no one prohibited ground should be granted supremacy over another will be reflected in the following sections, even though neither the *Act* nor the jurisprudence unequivocally supports this interpretation.

## **2. The Accountability of School Boards for the Acts of their Students in Peer Harassment**

Establishing a successful human rights complaint against a school board for the harassing actions of one student against another under the *Act* requires overcoming several technical obstacles. School boards, as corporations, can only act through their employees, officers and agents. Consequently, it is of no surprise that the discriminatory actions of an employee (such as a superintendent, principal or teacher) towards a

<sup>14</sup> R.S.C., 1985, c. H-6, s. 3.

<sup>15</sup> See *Canadian Human Rights Act*, *ibid.*, s. 14.

<sup>16</sup> B.J. Bowlby & J.W. Regan, *An Educator's Guide to Human Rights*. (Aurora: Aurora Professional Press, 1998) at 45.

student will be “deemed” to be the actions of the school board. This is specifically laid out in section 40 of the *Act*, which reads:

40. A prosecution for an offence under this Act may be brought against an employers’ organization, employees’ organization, professional association or business or trade association in the name of the organization or association, and for the purpose of any prosecution these are deemed to be corporations and any act or thing done or omitted by an officer or agent within the scope of the officer or agent’s authority to act on behalf of the organization or association is deemed to be an act or thing done or omitted by the organization or association.<sup>17</sup>

However, there is no equivalent legal provision that would deem the school board to be responsible for the acts of one student towards another. This makes it difficult to find the school board responsible for the conduct of its students under the *Act*. However, close scrutiny of the *Act* reveals three possible avenues by which this may be accomplished. The first, as mentioned previously, is to find a direct act of discrimination by an agent of the school board, such as a principal or teacher, and thereby hold the school board responsible under section 40 of the *Act*. The second is to hold the school board vicariously liable for the acts of the harassing students; this would impute a type of strict liability onto the school board. The third option is to find a possible middle ground between the first two approaches. A modified direct liability model would allow the school board a defence of due diligence in the event that it exercised every reasonable effort to avoid the discriminatory conduct of its agents.

Since a complaint of student-on-student harassment has never been heard by a Canadian human rights tribunal until the pending *Jubran* case, there is no guidance in the case law as to the possible success of such an action.

The conflict between various legal principles becomes apparent in the effort to hold school boards accountable. For instance, on the one hand, it is well established that school boards ought to, and in fact do, have a duty to provide a learning environment that is free from discrimination. Conversely, school authorities cannot monitor every student’s behaviour, and it is inherently unfair to hold someone accountable for something over which he or she has no control. Furthermore, the envi-

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<sup>17</sup> *Supra* note 2, s. 40.

ronment of the individuals involved should not be forgotten. Primary and secondary school students have, by virtue of their age, a diminished capacity to appreciate the consequences of their actions, and ascribing adult standards of “discrimination” to their conduct may not always be appropriate.

a. Direct Liability Theory

School boards are obliged to provide their students with a learning environment free from discrimination. A board that fails to discharge this duty will be liable for a statutory action for discrimination. The specific obligations of the school board include preventing, and ending, any harassment or discrimination to which any of its students are subjected, and of which it is made aware through its employees.<sup>18</sup> These duties derive from human rights legislation, as well as the statutory duties outlined in the *Act*. Bowlby posits that “once the conduct comes to the attention of a teacher, a responsibility to take action to stop the harassment will arise.”<sup>19</sup>

In such cases, any teachers that are aware of such damaging harassment, and who do not sufficiently address the issue, would be directly discriminating against the student by limiting the student’s access to educational opportunities. The discrimination would lie in the indifference and disrespect with which such complaints are treated, as this is reflective of an attitude that stereotypes and diminishes the significance of the victim’s situation.

The “person” responsible for the discrimination as stipulated in section 5 of the *Act* would be the teacher.<sup>20</sup> Finding the teacher to be the person referred to in section 5 requires a broad and purposive, though not unreasonable, interpretation of the term “person”. The term “person” as defined in the *Act* is not exhaustive, and certainly may include teachers:

3. (k) “person” *includes* employer, employers’ organization, employees’ organization, professional association, business or trade association, whether acting directly or indirectly, alone or with another, or by the interposition of another.<sup>21</sup> [Emphasis added]

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<sup>18</sup> *Supra* note 14 at 63.

<sup>19</sup> *Supra* note 14 at 64.

<sup>20</sup> *Supra* note 2.

<sup>21</sup> *Supra* note 2, s. 3 (k).

Thus if a teacher is a person who has discriminated through inaction, the school board would be held liable under the deeming provision in section 40 of the *Act*.<sup>22</sup>

Such an approach was taken in the United States Supreme Court case of *Davis v. Monroe County Board of Education*.<sup>23</sup> In that case, the school district was found liable under American anti-discrimination legislation for the inaction of the teachers and principal in response to repeated complaints about the sexually harassing behaviour of a specific student. The majority, finding the school district directly liable, held that it is not so much the acts of the offending student that are impugned as it is the failure of the school to adequately protect its students when alerted to a problem of harassment. This finding supports the principle that liability will be found where one fails to fulfill a duty to perform in a certain manner.

In its controversial 5-4 decision, the Supreme Court in *Davis* ruled that school districts can be held liable for the sexual harassment of one student by another, and that the approach to be taken is the same as when the harassment is done by a teacher or another district employee. The applicable American law is a piece of federal legislation under Title IX of the Education Amendments of 1972.<sup>24</sup> This legislation creates a statutory private right of action that may be brought by an individual against a school board. Title IX provides that:

[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.<sup>25</sup>

This legislation was enacted to fill the gap between Title VI<sup>26</sup> and Title VII<sup>27</sup> of the Civil Rights Act of 1964. Its purpose was to address

<sup>22</sup> *Supra* note 2.

<sup>23</sup> *Davis*, *supra* note 4.

<sup>24</sup> 86 Stat. 373, as amended, 20 U.S.C. § 1681 *et seq.*

<sup>25</sup> 20 U.S.C. § 1681(a).

<sup>26</sup> “No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.” 42 U.S.C § 2000d (1994).

<sup>27</sup> “It shall be an unlawful employment practice for an employer...to discriminate against any individual with respect to...compensation, terms, conditions, or privileges of employment, because of such individual’s...sex.” 42 U.S.C § 2000e-2(a)(1) (1994).

the historic exclusion of women from fields of education and employment, as well as discriminatory treatment within those fields.<sup>28</sup> It is important to note that even the combination of these pieces of human rights legislation does not address all of the prohibited grounds in the *Act*, such as sexual orientation. Although the following discussion of *Davis* necessarily addresses only discrimination based on sex, later discussion will relate its reasoning to the broader protections afforded by the *Act*.

In *Davis*, the petitioner was the mother of LaShonda Davis, a female grade five student who attended Hubbard Elementary School, a public school in Monroe County, Georgia. The school received federal funding and was thus subject to the requirements of Title IX. The petitioner alleged that the actions of one of her daughter's classmates amounted to prolonged sexual harassment, which her school failed to remedy despite repeated pleas for assistance. The accepted facts indicated that the victim's classmate, G.F., made repeated attempts to touch her breasts and genital area, made vulgar statements, and engaged in general behaviour that amounted to sexual harassment. This behaviour, which persisted over several months, culminated with G.F. pleading to a criminal charge of sexual battery as a result of his misconduct. The victim experienced considerable anxiety, an inability to concentrate at school, and a drop in her grades. Her father had found a suicide note that she had written.<sup>29</sup>

The issue before the court was an application for *certiorari*, based on the decision of the United States Court of Appeal for the Eleventh Circuit which held that student-on-student harassment was not a valid statement of claim under Title IX.<sup>30</sup> The majority of the United States Supreme Court reversed that decision and stated:

We consider here whether a private damages action may lie against the school board in cases of student-on-student harassment. We conclude that it may, but only where the federal funding recipient acts with deliberate indifference to known acts of harassment in its programs or activities. Moreover, we conclude that such an action will lie only for

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<sup>28</sup> M. Rich-Chappell, "Child's Play or Sex Discrimination?: School Liability for Peer Sexual Harassment Under Title IX" (1999) 3 J. Gender, Race & Justice 311 at 314.

<sup>29</sup> *Davis*, *supra* note 4 at 1667.

<sup>30</sup> *Davis v. Monroe County Board of Education et al.*, 120 F.3d 1390 (11th Cir. 1997).

harassment that is so severe, pervasive, and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit.<sup>31</sup>

This analysis boldly finds the source of the discrimination solely on the school district in the form of the “deliberate indifference” with which it responds to known acts of harassment. While this might be seen to diminish the overall culpability of the offending student, it reinforces the direct nature of the discriminatory actions, or inaction, of school authorities.

### *i. Control*

One of the key principles to arise from this case is that control over the behaviour of the student is a requirement. The court established a low threshold for invoking such liability; it stated clearly that, in order for a school to have sufficient control over the student to impose liability, the acts must take place on school grounds and the school must have a means of affecting student behaviour through discipline. The court stated:

Moreover, because the harassment must occur “under” “the operations of” a recipient, 20 U.S.C. §§ 1681(a), 1687, the harassment must take place in a context subject to the school district’s control. These factors combine to limit a recipient’s damages liability to circumstances wherein the recipient exercises *substantial control* over both the harasser and the context in which the known harassment occurs. Where, as here, the misconduct occurs during school hours and on school grounds, misconduct is taking place “under” an “operation” of the recipient. In these circumstances, the recipient retains substantial control over the context in which the harassment occurs. More importantly, in this setting, the Board exercises significant control over the harasser, for it has *disciplinary authority* over its students.<sup>32</sup> [Emphasis added]

Such a notion of control is not clearly specified in the *Act*, nor in any other provincial human rights legislation. However, it seems intuitively obvious that one needs to have control over the acts of another in order to be found to have discriminated through failure to correct those acts or effect change through such control. To suggest that someone *ought* to do

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<sup>31</sup> *Davis*, *supra* note 4 at 1666 (per O’Connor J.).

<sup>32</sup> *Davis*, *supra* note 4 at 1665.

something (a positive act of some sort), implies that that person *can* in fact do that act. In this context, a court should be able to find that a school board has discriminated (i.e. that it ought to have prevented the harassment, but did not) only if the school board had the authority to do so (i.e. that it could control the behaviour of the offender).

The authority to control the behaviour of the offender exists in Canadian law as a combination of duty and express statutory authority. The Nova Scotia *Education Act*<sup>33</sup> imposes duties on the school board to establish policies dealing with student discipline – along with duties on the teacher to uphold such disciplinary policies associated with student conduct – and on the students to abide by such policies. The relevant sections of the Education Act read as follows:

64. (2) A school board shall, in accordance with this Act and the regulations,

...

(r) establish a regional *student-discipline policy* consistent with the Provincial discipline policy established by the Minister;...

(t) establish a policy for the protection of students and employees from harassment and abuse;<sup>34</sup>

26. (1) It is the duty of a teacher in a public school to

...

(l) *maintain appropriate order and discipline in the school* or room in the teacher's charge and report to the principal or other person in charge of the school the conduct of any student who is persistently defiant or disobedient;<sup>35</sup>

24. (1) It is the duty of a student to

...

(c) contribute to an orderly and safe learning environment;

(d) respect the rights of others; and

(e) *comply with the discipline policies of the school* and the school board.<sup>36</sup>

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<sup>33</sup> S.N.S. 1995-96, c. 1, s. 1, as am. 1998, c. 18, s. 555 [hereinafter *Education Act*].

<sup>34</sup> See *Education Act*, *ibid.* section 64(2).

<sup>35</sup> *Supra* note 33, s. 26(1).

<sup>36</sup> *Supra* note 33, s. 24(1) [emphasis added].

The ability of school authorities to administer disciplinary authority is also vested in the *Education Act*. A student who is “persistently disobedient” or who conducts himself or herself in “a manner likely to affect injuriously the welfare or education of other students” may be removed from the class by the teacher<sup>37</sup> or suspended by the principal.<sup>38</sup> The suspension may last for no more than five days and it requires that the principal give notice and reasons for the suspension in writing to the student, the student’s teachers, the school board, and the student’s parents.<sup>39</sup> Furthermore, courts have found that “[t]here is a presumption of validity in favour of the action taken by the school and, unless the validity of the exercise of the power appears on the face of the act, the correctness of the action taken thereunder may be presumed unless and until the contrary is shown.”<sup>40</sup>

School boards in Nova Scotia have the duty and the authority to control the behaviour of their students through discipline. Thus, requiring that school authorities exert appropriate control over their students to prevent harassment is not an unreasonable demand in a claim of discrimination.

The dissent in *Davis*, clearly of the opinion that school districts would be unduly hampered by such onerous obligations, noted the limited control in practice that schools have over their students:

Most public schools do not screen or select students, and their power to discipline students is far from unfettered. Public schools are generally obligated by law to educate all students who live within defined geographic boundaries. Indeed, the Constitution of almost every State in the country guarantees the State’s students a free primary and secondary public education.<sup>41</sup>

The dissent further raised the concern that disciplinary authority must not violate the constitutional or legal rights of students. They recalled the previous United States Supreme Court decision of *Goss v. Lopez*,<sup>42</sup> which held due process requires at the very minimum, a student

<sup>37</sup> *Supra* note 33, s. 121.

<sup>38</sup> *Supra* note 33, s. 122.

<sup>39</sup> *Supra* note 33, s. 123(1).

<sup>40</sup> *Lutes v. Board of Education of Prairie View School Division No. 74* (1992), 101 Sask. R. 232 (Q.B.) at 237 per Barclay J. [hereinafter *Lutes*].

<sup>41</sup> *Davis*, *supra* note 4 at 1681.

<sup>42</sup> 95 S. Ct. 729 (1975).



facing suspension must be given some kind of notice and hearing.<sup>43</sup> Furthermore, it was noted that there was a potential conflict between the alleged Title IX requirements to discipline students engaged in discriminatory behaviour and provisions under other anti-discrimination legislation that protect students with behaviour disorder disabilities from inappropriate disciplinary action.<sup>44</sup>

While the dissent may appear to suggest that school authorities lack the power to control their students through discipline, the main thrust of its opposition more accurately acknowledges the practical difficulties in exerting valid authority to control students. As Kennedy J. states:

The practical obstacles schools encounter in ensuring that thousands of immature students conform to acceptable norms may be even more significant than the legal obstacles. School districts cannot exercise the same measure of control over thousands of students that they do over a few hundred employees. The limited resources of our schools must be conserved for basic educational services. Some schools lack the resources even to deal with serious problems of violence and are already overwhelmed with disciplinary problems of all kinds.<sup>45</sup>

This perspective is troubling because it fails to recognize that “basic educational services” are meaningless if a student cannot have full access to and use of them as a result of the egregious conduct of other students. As the *Jubran* case has revealed, violence is inextricably linked to harassment since the condemnation and cessation of the initial verbal harassment may reduce the later problems of physical violence referred to by Kennedy J.

In discharging the duty to protect students from discrimination due to “deliberate indifference” to peer harassment, the majority in *Davis* set a remarkably low standard, premised on the school’s intent to act on a complaint instead of the actual result of the school’s action. The court noted:

We stress that our conclusion here – that recipients may be liable for their deliberate indifference to known acts of peer sexual harassment – does not mean that recipients can avoid liability only by purging their schools of actionable peer harassment or that administrators must engage in particular disciplinary action. We thus disagree with the

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<sup>43</sup> *Davis*, *supra* note 4 at 1682.

<sup>44</sup> *Davis*, *supra* note 4.

<sup>45</sup> *Davis*, *supra* note 4.

respondent's contention that, if Title IX provides a cause of action for student-on-student harassment, "nothing short of expulsion of every student accused of misconduct involving sexual overtones would protect school systems from liability or damages..."

School administrators will continue to enjoy the flexibility they require so long as funding recipients are deemed "deliberately indifferent" to acts of student-on-student harassment only where the recipient's response to harassment or lack thereof is clearly unreasonable in light of the known circumstances... *[T]he recipient must merely respond to known peer harassment in a manner that is not clearly unreasonable. This is not a mere "reasonableness" standard, as the dissent assumes...* In an appropriate case, there is no reason why courts, on a motion to dismiss, for summary judgment, or for a directed verdict, could not identify a response as not "clearly unreasonable" as a matter of law.<sup>46</sup> [Emphasis added]

Thus, the majority has apparently decided that it is possible for peer sexual harassment that deprives an individual of her right to an education to continue so long as the school has not acted in a "clearly unreasonable" manner in attempting to curb it; focusing more on intentions than results-based approach. While this may be an acceptable approach in American jurisprudence, it certainly is not so in Canada. It is submitted that the majority in *Davis*, in attempting to strike a balance between demanding that schools fulfill their obligations to their students on the one hand, and respecting the rights of offending students to be free from disproportionate discipline on the other, excessively favours the latter. This low threshold is at odds with the true purposes of Title IX.

The Supreme Court of Canada in *Robichaud v. Canada (Treasury Board)* stated that the purpose of human rights legislation "is remedial. Its aim is to identify and eliminate discrimination."<sup>47</sup> Under the *Act*, or any other human rights legislation, a Canadian school should discharge its duty if it successfully eliminates harassing behaviour, and not merely if it acts in a manner that is not "clearly unreasonable" in an attempt to do so.

The majority in *Davis*, similar to the dissent, also noted the limitations a school may face in attempting to curb the behaviour of its

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<sup>46</sup> *Davis*, *supra* note 4 at 1673-1674.

<sup>47</sup> [1987] 2 S.C.R. 84 at 92.

students. They noted that “it would be entirely reasonable for a school to refrain from a form of disciplinary action that would expose it to constitutional or statutory claims.”<sup>48</sup> Such claims, at least in the Nova Scotia context, include a student’s rights to freedom of expression<sup>49</sup> and assembly,<sup>50</sup> as well as statutory rights to an education. While a *Charter* analysis is beyond the scope of this paper, it should be noted that harassment has never been justified as a legitimate form of expression, nor should it be. Basic liberties will always be infringed when a student is disciplined in school for the inappropriate comments he or she makes, or for being associated with the activities of certain crowds or gangs. However, deference should be, and typically is, granted to school authorities in meting out discipline, and, for better or worse, *Charter* claims by students challenging discipline meet with little success.<sup>51</sup> In the case of harassment, this is likely for the better.

## ii. Denial of Educational Opportunities

Title IX and the Nova Scotia *Act* are similar since both prohibit the denial or limitation of access to the benefits of educational services. The special status of “sexual harassment” in Canadian jurisprudence facilitates a *prima facie* finding of discrimination. As discussed earlier, harassment based on other grounds ought to be treated equally. However, because student-on-student harassment is a new claim under Canadian human rights legislation, a complainant may indeed have to prove a denial of services despite findings of *prima facie* discrimination when harassment has occurred. Such was the case in *Davis*, where the court noted that while sexual harassment is an established form of discrimination for Title IX purposes, it was “constrained to conclude that student-on-student sexual harassment, if sufficiently severe, can likewise rise to the level of discrimination actionable under the statute.”<sup>52</sup>

The majority establishes an unusually high standard in order to demonstrate that a student has been deprived of the benefits of an educational program as a result of peer harassment. They note:

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<sup>48</sup> *Davis*, *supra* note 4 at 1674.

<sup>49</sup> *Canadian Charter of Rights and Freedoms*, s. 2(b), Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (U.K.)*, 1982, c.11 [hereinafter *Charter*].

<sup>50</sup> *Ibid.* s. 2(d).

<sup>51</sup> *Lutes*, *supra* note 40.

<sup>52</sup> *Davis*, *supra* note 4 at 1674.

The most obvious example of student-on-student sexual harassment capable of triggering a damages claim would thus involve the overt, physical deprivation of access to school resources. Consider, for example, a case in which male students physically threaten female students every day, successfully preventing the female students from using a particular resource – an athletic field or a computer lab, for instance... It is not necessary, however, to show physical exclusion to demonstrate that students have been deprived by the actions of another student or students of an educational opportunity on the basis of sex. Rather, a plaintiff must establish sexual harassment of students that is so severe, pervasive, and objectively offensive, and that so undermines and detracts from the victim's educational experience, that the victim-students are effectively denied equal access to an institution's resources and opportunities.<sup>53</sup>

The court noted that while a decline in grades is indicative of a potential link between the harassment and the denial of educational benefits, it is the totality of the circumstances that should be examined, including the persistence of the harassment and the extent of the inaction of school authorities.<sup>54</sup> It is difficult to set a definitive threshold above which harassment transforms from an interference with one's dignity that can be addressed by informal school discipline, into an intolerable violation of human rights that results in discrimination and invites the sanctions of anti-discrimination legislation. The majority's case-by-case analysis recognizes the inherent difficulty of such a determination. This is the most appropriate way to approach a statute that focuses on the effects of discrimination, and it is the approach that should be adopted by Canadian courts when these issues arise.

In sum, the majority decision in *Davis* has adopted a test for *direct discrimination* on the part of school authorities that depends largely on the school's ability to exert control over the conduct of its students. Despite the flaws in the "not clearly unreasonable" threshold test of the exercise of disciplinary authority, this approach is true to principles that prefer to lay blame directly rather than blame via indirect mechanisms of vicarious liability. Here, the decision is not that the student has discriminated, rather it is that the school has discriminated because its authorities are deliberately indifferent to the plight of a victimized member of its

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<sup>53</sup> *Davis*, *supra* note 4 at 1675.

<sup>54</sup> *Davis*, *supra* note 4 at 1676.

student body. The effect of such treatment must be an outright deprivation of equal access to educational opportunities, which is a high standard indeed. As the majority in *Davis* succinctly stated:

We disagree with the respondent's assertion, however, that petitioner seeks to hold the Board liable for G.F.'s actions instead of its own. Here, petitioner attempts to hold the Board liable for its *own* decision to remain idle on the face of known student-on-student harassment in its schools.

#### b. Vicarious Liability of School Boards for the Acts of their Students

Another approach to remedying peer harassment treats the conduct of the offending student as inherently discriminatory and then holds the school board vicariously liable for that behaviour on policy grounds. It should be noted that this form of vicarious liability differs from holding the school board liable for its agent's acts (i.e. teachers and principals), which is a recognized aspect of corporate and human rights law (see its codification in section 40 of the *Act*).

A type of strict liability is imposed on the school board for the acts of its students. Liability is strict in that it attaches automatically once the act takes place. Traditional vicarious liability is a concept of tort law used principally to hold employers accountable for the tortious acts of their employees. Vicarious liability is not founded in agency theory, for in most cases the employer would surely not approve of the tortious acts of its employees. Instead it relies on principles of deterrence and the provision of just remedies, as well as on the policy grounds that an employer is in the best position to absorb the costs of vigilance over its employees into the general expense of doing business.<sup>55</sup> In *Robichaud*, the Supreme Court of Canada noted that tortious vicarious liability is an inappropriate means for holding employers responsible for the discriminatory behaviour of their employees pursuant to human rights legislation. Rather, the court favoured a policy-based approach grounded in the notion that in order for remedies to successfully eliminate discrimination, they must be directed against the employer. The Court noted that "only an employer can remedy undesirable effects; only an employer can provide the most important remedy – a healthy work environment."<sup>56</sup>

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<sup>55</sup> *Bazley v. Curry*, [1999] 2 S.C.R. 534.

<sup>56</sup> *Robichaud*, *supra* note 47 at 94.

It may therefore be possible, as in *Robichaud*, to found school board liability on policy based vicarious liability. However, certain distinctions must be pointed out. *Robichaud* was concerned with an employment relationship and the interpretation of the phrase “in the course of employment” as it pertained to discrimination in the *Canadian Human Rights Act*.<sup>57</sup> LaForest J. stated that “it is unnecessary to attach any sort of label to this type of liability; it is purely statutory.”<sup>58</sup> As such, applying vicarious liability to hold schools responsible for the acts of their students would require a broad interpretation of *Robichaud*. No similar statutory liability provision in the Nova Scotia *Act* imputes liability onto the school board. Commentators have suggested that such an approach is indeed possible.<sup>59</sup> In her article, Richard suggests that the harassing student can be likened to a harassing co-employee, and thus section 40 of the *Act* may be invoked to hold the school board vicariously, and therefore strictly, liable for the acts of the offending student.<sup>60</sup> However this requires imputing an employment or agency relationship between the school board and the student. However, it may be too much of a stretch in logic to find that a student is an employee or an “officer or agent” acting “on behalf of” the school board, as is required in section 40 of the *Act*.<sup>61</sup>

Indeed, even the majority in *Davis* specifically ruled out an agency relationship between the student and the school district in the application of Title IX. This decision accepted the argument raised by the school district that the wording of Title IX, which requires the discrimination to be “under any education program”<sup>62</sup> effectively meant that discrimination must be carried out by an agent of the education providers. The school district argued that if an agency relationship were required, then it would not be liable because there was no such relationship between it and its students. For this reason, the majority ruled that for the discrimination to take place “under” the operations of the federal recipient, it is sufficient that the harassment “take place in a context

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<sup>57</sup> *Supra* note 14.

<sup>58</sup> *Robichaud*, *supra* note 47 at 95.

<sup>59</sup> *Supra* note 12.

<sup>60</sup> *Supra* note 12 at 180.

<sup>61</sup> *Supra* note 2, s. 40.

<sup>62</sup> *Supra* note 24.

subject to the school district's control," and not necessarily be committed by one of its agents.<sup>63</sup>

The dissent in *Davis*, however, believed that to find the school district in violation of its federal funding agreement under Title IX, the harasser must be an agent (i.e. teacher) of the school district. It noted:

The agency relation between the school and teacher is thus a necessary, but not sufficient, condition of school liability. Where the heightened requirements for attribution are met, the teacher's actions are treated as the grant recipient's actions. In those circumstances, then, the teacher sexual harassment is "under" the operations of the school.

I am aware of no basis in law or fact, however, for attributing the acts of a student to a school and, indeed, the majority does not argue that the school acts through its students...Discrimination by one student against another therefore cannot be "under" the school's program or activity as required by Title IX.<sup>64</sup>

Deemed liability in s. 40 of the *Act* specifically requires an agency relationship. It is submitted that the majority and the dissent in *Davis* were both correct in deciding that students are not agents of school boards. Thus, in the context of the *Act* and other human rights legislation, a provision which requires agency; such as section 40, cannot be invoked to hold a school board liable. For instance, the successful prosecution of an employer or employee organization under the *Canadian Human Rights Act* requires that "an officer or agent" must have committed the discrimination.<sup>65</sup> However, if human rights legislation does not require agency, then the majority decision in *Davis* suggests that a court may be invited to broadly interpret the student's harassment as falling under the school's control.

A different approach to the application of the principle of strict liability is that taken by the Supreme Court of Canada in *Ross v. New Brunswick School District No. 15*.<sup>66</sup> In that case, the off-duty conduct of a teacher who publicly promoted anti-Semitic beliefs, was found to have

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<sup>63</sup> *Davis*, *supra* note 23 at 1672.

<sup>64</sup> *Davis*, *supra* note 23 at XX.

<sup>65</sup> *Supra* note 14, s. 60(3). See also Ontario *Human Rights Code*, R.S.O. 1990, c. H.19, s. 45 (1) for a similar provision requiring that the impugned act "be done *in the course of his or her employment by an officer, official, employee or agent* of a corporation, trade union, trade or occupational association, unincorporated association or employers' organization."

<sup>66</sup> [1996] 1 S.C.R. 825 [hereinafter *Ross*].

created a “poisoned” learning environment, not only for the Jewish students in the school, but for all students. The poisoned environment<sup>67</sup> may arise as a result of harassment. This environment is one in which the conduct and/or persistence of the harasser demeans, humiliates or upsets its target, such that the environment becomes psychologically and/or emotionally intolerable to the victim. A “modified objective” test is used to determine whether an environment is poisoned. The adjudicator must determine whether a reasonable person, in the position of the victim, would perceive the circumstances as giving rise to a psychologically or emotionally negative environment.<sup>68</sup> The Court in *Ross* found that the school board itself discriminated against the students through its failure to proactively address the controversy,<sup>69</sup> since any acquiescence or initial failure to address such harassment is seen as acceptance or condonation of such behaviour by the school board.

One of the contributing factors to the creation of the poisoned environment in *Ross* was the fact that teachers are in “a position of influence and trust over their students and must be seen to be impartial and tolerant.”<sup>70</sup> This relationship does not exist in the interactions between students. Since a failure to act can create liability in school boards, it is therefore conceivable to impose a positive obligation on schools to adopt a policy to promote equality where it is reasonably foreseeable that unequal treatment will exist in the school environment. In *Ross*, the Supreme Court agreed with the Board of Inquiry that school authorities have an obligation “to work towards the creation of an environment in which students of all backgrounds will feel welcomed and equal.... A school board has a duty to maintain a positive school environment for all persons served by it and it must be ever vigilant of anything that might interfere with this duty.”<sup>71</sup>

The primary obstacle in applying the reasoning in *Ross* to a situation of peer harassment lies in persuading a human rights tribunal that the actions of one student toward another are as capable of creating a poisoned environment as are the discriminating actions of a teacher.

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<sup>67</sup> Known in American jurisprudence as a “hostile environment.”

<sup>68</sup> *Supra* note 16 at 51-52.

<sup>69</sup> *Supra* note 16 at 22.

<sup>70</sup> *Supra* note 66 at 886.

<sup>71</sup> *Supra* note 66 at 861.



Ross makes it very clear that the position of the teacher as a role model is in part responsible for his or her influence on the learning environment. Even the majority in *Davis* recognized that the behaviour of students in the primary and secondary school settings is not comparable to the conduct expected of a teacher, or other adult, when it stated that:

Courts, moreover, must bear in mind that schools are unlike the adult workplace and that 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. Damages are not available for simple acts of teasing and name-calling among school children, however, even where these comments target differences in gender. Rather, in the context of student-on-student harassment, damages are available only where the behaviour is so severe, pervasive, and objectively offensive that it denies its victims the equal access to education that Title IX is designed to protect.<sup>72</sup>

If the interpretation of the majority in *Davis* were applied, a higher threshold for the finding of a hostile or poisoned environment in a school would exist, as compared to that required in *Ross*. Not surprisingly, the dissent in *Davis* disagrees with the categorization of student harassment as “discrimination.” They note that the actions of young school children are simply not sophisticated enough to be classified as discrimination, and that the law recognizes that children are not fully accountable for their actions because they lack the capacity to exercise mature judgment.<sup>73</sup> Consequently, analogies to the hostile environment created by sexual harassment in the workplace are inappropriate to the school setting. The dissent states:

No one contests that much of this “dizzying array of immature or uncontrollable behaviors by students,”... is inappropriate, even “objectively offensive” at times... and that parents and schools have a moral and ethical responsibility to help students learn to interact with their peers in an appropriate manner. It is doubtless the case, moreover, that much of this inappropriate behavior is directed toward members of the opposite sex, as children in the throes of adolescence struggle to express their emerging sexual identities.

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<sup>72</sup> *Davis*, *supra* note 4 at 1675.

<sup>73</sup> *Davis*, *supra* note 4 at 1685.

It is a far different question, however, whether it is either proper or useful to label this immature, childish behavior gender discrimination.

[S]chools are not workplaces and students are not adults. The norms of the adult workplace that have defined hostile environment sexual harassment...are not easily translated into peer relationships in schools, where teenage romantic relationships are a part of everyday life. Analogies to Title IX teacher sexual harassment of students are similarly flawed. A teacher's sexual overtures toward a student are always inappropriate; a teenager's romantic overtures to a classmate (even when persistent and unwelcome) are an inescapable part of adolescence.<sup>74</sup>

It is interesting that both the majority and the dissent seem to agree that there ought to be a separate standard applied to students than that applied to adults in determining the existence of either direct discrimination or hostile environment discrimination. While it is easy to see the logic behind assigning a different standard for children than for adults, the reasoning behind such difference is disturbing. The dissent excused typically inappropriate conduct among students on the basis that children going through puberty are expected to act in a sexually excited manner that may lead to conduct that would be inexcusable among adults. Such a perspective is easy to accept in *Davis* because the victim and offender were both under ten years of age. However, students in high schools may be as old as eighteen or nineteen, and as adults in the eyes of the law their conduct is much more difficult to excuse.

One must wonder whether such a forgiving view would be taken if Title IX allowed for an action against discrimination based on racial harassment. Simple childish immaturity would likely be insufficient to dismiss harassment based on racial grounds and the "boys will be boys" excuse promoted in *Davis* would not apply. In the context of the *Act*, it may be possible, or even appropriate, to apply a different standard to the conduct of students than that which was applied to Ross in determining whether certain actions created a poisoned environment. However, fairness dictates that it would nevertheless have to be a standard that can be uniformly applied in cases of sexual, racial, and all other forms of harassment.

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<sup>74</sup> *Davis*, *supra* note 4 at 1686.

In sum, there are several obstacles to overcome in attempting to hold a school board vicariously liable for the harassing acts of its students. First, there is no mechanism in the *Act* that allows this to happen directly. Section 40 imputes a requirement of agency which cannot be established between a school board and its students. A strict reading of section 40 reveals that its drafting was influenced by the *Robichaud* decision so as to encompass a myriad of organizations whose actions should be deemed to be those of their agents when they discriminate. The reasoning in *Robichaud* cannot be stretched to find liability in the student-school board paradigm. Richard posits that the student-school board relationship should be broadly and purposefully interpreted in order to create an employment or agency type of relationship, however; this approach is clearly beyond the vicarious liability relationships contemplated by section 40.

The more successful approach would be to argue, as in *Ross*, that the school board committed *direct discrimination* by creating a “poisoned learning environment” through their inaction in the face of knowledge, or imputed knowledge, of harassment. In *Ross*, Malcolm Ross’ discriminatory actions, despite having taken place outside the school, came under considerable scrutiny because of his position as a teacher and the fiduciary duties associated with that role. However, fiduciary relationships do not exist between students, and as the court in *Davis* has indicated, it would be inappropriate to treat primary or secondary school student interactions as similar to the adult or employment relationships that can produce hostile environment discrimination. While the United States Supreme Court was too quick to excuse the actions of many offending students as simply being par for the adolescent course, their underlying statement that students should not be treated as adults has some merit and may be a barrier to establishing a poisoned environment.

The differential impact of harassment on students may force jurists to develop an alternative test for determining whether a poisoned environment exists. If the “modified objective” test is applied without regard for the diminished capacity of the offending students, and it is based solely on the perceptions of a reasonable person in the position of the victim, then this form of “poisoned environment” direct discrimination may in fact be even more effective in holding the school board liable than the form of direct discrimination earlier described. However, if the current test is modified to account for the obvious concessions made for

students who have a diminished capacity to appreciate the consequences of their actions by virtue of their age, then the result may be diminished success in imputing direct liability onto the school board. If such a decision is necessary, it is submitted that a court should preserve the “modified objective” test as it is, and not change the focus of human rights protection from the victim to the harasser. Ultimately, the “poisoned environment” results from the approval and condonation by school authorities, and so an “adult” standard must eventually be applied.

### c. The Modified Middle Ground

The final test that may be applied to find a school board liable for the actions of its harassing students adopts the direct liability approach of *Davis* (“deliberate indifference”) or *Ross* (“poisoned environment”) and also allows a defence of due diligence to the school board. This is a modified direct liability model.

The rationale behind allowing a due diligence defence was described in *Davis*, where the majority recognized the impossibility of removing absolutely all harassment from large student bodies. While ideally the purpose of human rights legislation is the elimination of discrimination, and thus may be seen as an effects-based approach, some regard has to be given to the practical difficulties in completely eradicating such problems. An organization that uses its best efforts, or efforts that are not merely *de minimus*, ought not to be unfairly prosecuted for a violation of human rights. This then expands the direct liability test to consider the parties’ intentions.

In fact, the majority in *Davis* may already have incorporated a due diligence defence into its test for discrimination by imposing a “not clearly unreasonable” standard on the actions taken by school authorities in response to harassment claims by its students.

The use of due diligence as a defence is not unusual in Canadian human rights analyses. In *Robichaud*, LaForest J. held that:

an employer who responds quickly and effectively to a complaint by instituting a scheme to remedy and prevent recurrence will not be liable to the same extent, if at all, as an employer who fails to adopt such steps. These matters, however, go to remedial consequences, not liability.<sup>75</sup>

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<sup>75</sup> *Robichaud*, *supra* note 47 at 96.

Furthermore, the *Canadian Human Rights Act* provides a defence of due diligence to employers that applies to the determination of liability, which would serve to preempt the action entirely. Section 65(2) reads:

65. (2) An act or omission shall not, by virtue of subsection (1), be deemed to be an act or omission committed by a person, association or organization if it is established that the person, association or organization did not consent to the commission of the act or omission and exercised all due diligence to prevent the act or omission from being committed and, subsequently, to mitigate or avoid the effect thereof.<sup>76</sup>

The Nova Scotia *Act* does not provide a statutory due diligence defence. However, if a human rights action based on peer harassment were allowed to proceed in Nova Scotia, then it is likely that the due diligence defence in *Robichaud* would at least apply to remedies and thus mitigate the consequences once liability has been established. Such a defence would in fact be more relevant to the school scenario than in the employment context, because a school board has less control over its students than it does over its employees.

The school board could raise existing effective and preventive anti-discrimination policies as a strong defence. Furthermore, they should treat complaints of harassment on prohibited grounds with the seriousness and expedience that they deserve. Ultimately however, as was the case in *Davis*, the poor judgment, or plain indifference, on the part of individual teachers will prove difficult for a school board to control, even with the most proactive policies in place. Nevertheless, the strong educative and consciousness-raising value of anti-discrimination policies coupled with the existence of a due diligence defence provides an incentive for school boards to implement policies and procedures that seek to prevent harassment before it begins and address it properly when it does arise. Such a defence should not be regarded as an easy way of escaping liability, but rather as a means of promoting a more effective anti-discrimination policy in schools. As such, any action that allows a school to be held liable for the acts of its harassing students under human rights legislation should also afford a due diligence defence for both liability and remedies.

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<sup>76</sup> *Supra* note 14, s. 65(2).

### III. PEER HARASSMENT AND CIVIL LIABILITY

In the absence of a human rights complaint, victims of harassment may rely on tort law. The tort of negligence is the most germane to the type of harassment that a student is likely to experience, as exemplified by the experiences of Azim Jubran and LaShonda Davis. The victim may have a good claim against both the harasser (for instance for the nominate torts of assault, battery and intentional infliction of mental suffering, to name a few) and the school board for failure to provide a safe learning environment.

There are two possible approaches to finding a school liable in tort for the actions of its students. One is to find the harassing student liable in tort, and then to find the school vicariously liable for the harassing student's actions, essentially imposing strict liability on the school board for the actions of its students.<sup>77</sup> However, as discussed above, vicarious liability is generally confined to the employer-employee relationship. Further, the control exercised by school authorities over students is very different from that exercised by employers over employees, particularly with respect to powers of dismissal. As such, this approach will not likely attach liability to the school board.

Direct negligence is a preferable avenue, both on a theoretical and practical level, for a victim of peer harassment to seek redress from the school board. A party is liable for negligence when he or she fails to take reasonable steps to prevent foreseeable harm occurring to a party to whom she owes a duty.<sup>78</sup> Negligence better describes the duties owed to students in the care of a school than does the circuitous and more policy-driven approach found in vicarious liability. As such, a victim of harassment, such as Azim Jubran or LaShonda Davis, ought to be able to hold his or her school accountable for their mistreatment at the hands of other students resulting from the nonfeasance or misfeasance of school authorities.

A plaintiff must establish three elements to successfully claim negligence: a duty of care, a breach of the standard of care, and damage or injury that results from that breach.<sup>79</sup>

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<sup>77</sup>G.L. Fridman, *The Law of Torts in Canada*, Vol. 2. (Toronto: Carswell, 1990) at 313.

<sup>78</sup> A.W. MacKay & G.M. Dickinson, *Beyond the "Careful Parent": Tort Liability in Education*. (Toronto: Emond Montgomery, 1998) at 3-6.

<sup>79</sup> *Ibid.* at 3.

## 1. Duty of Care:

It is generally accepted in law that educators owe a duty of care. This duty is defined by common law, statutes, regulations and school policies.<sup>80</sup> Teachers and school authorities have a close relationship with their students, as they are responsible for their care and control. In fact, school authorities are considered to be acting *in loco parentis*.<sup>81</sup>

Schools have a statutory obligation to provide a safe learning environment for the children under their care. This duty is enshrined in the Nova Scotia *Education Act* in the enumerated responsibilities of teachers, principals and school boards.<sup>82</sup> Teachers have a further duty to encourage and uphold relationships between students that are devoid of harassment based on prohibited grounds. Relevant sections of the *Education Act* read as follows:

26. (1) It is the duty of a teacher in a public school to...

(k) take all reasonable steps necessary to create and maintain an orderly and safe learning environment;

...

(m) maintain an attitude of concern for the dignity and welfare of each student and encourage in each student an attitude of concern for the dignity and welfare of others and a respect for religion, morality, truth, justice, love of country, humanity, equality, industry, temperance and all other virtues.<sup>83</sup>

This duty of care also manifests itself in the form of fiduciary obligations, violation of which can found an independently recognized cause of action.<sup>84</sup> Justice LaForest notes that there “is little doubt...that the teacher-student relationship is a fiduciary one,” and this principle was adopted by the Supreme Court of Canada in *Ross*.<sup>85</sup> Teachers are in a position of confidence and trust with respect to their student, and have

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<sup>80</sup> *Ibid.* at 5.

<sup>81</sup> A.F. Brown & M.A. Zucker, *Education Law*, 2<sup>nd</sup> Ed. (Scarborough, Ont.: Carswell, 1998) at 64.

<sup>82</sup> *Supra* note 33, ss. 26(1)(k), 38(2)(e), and 64(2)(f).

<sup>83</sup> *Supra* note 33, s. 26(1).

<sup>84</sup> *Frame v. Smith*, [1987] 2 S.C.R. 99; *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574.

<sup>85</sup> G.V. LaForest, “Off-Duty Conduct and the Fiduciary Obligations of Teachers” (1997) 8 *Educ. & L.J.* 119 at 128.

an obligation to act in the students' best interests<sup>86</sup> both on and off-duty.<sup>87</sup>

## 2. Standard of care:

A school board's standard of care to avoid liability in negligence was defined by the Supreme Court of Canada in *Myers v. Peel County (Board of Education)*, where McIntyre J stated that:

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 or prudent parent*... It is not, however, a standard which can be applied in the same manner and to the same extent in every case. Its application will vary from case to case and will depend upon the number of students being supervised at any given time, the nature of the exercise or activity in progress, the age and degree of skill and training which the students may have received in connection with such activity, the nature and condition of the equipment in use at the time, the competency and capacity of the students involved, and a host of other matters which may be widely varied but which, in a given case, may affect the application of the prudent-parent standard to the conduct of the school authority in the circumstances.<sup>88</sup> [Emphasis added]

The Supreme Court of Canada has also noted that the standard of care will be modified depending on the nature of the activities in which the students are engaged and the expertise required to instruct the students.<sup>89</sup> However, a modified standard would not apply to a typical teacher in the normal course of his or her duty to uphold an environment free from student-on-student harassment.

The British Columbia Supreme Court had occasion to lend further clarification to this test in the case of younger children and noted:

What is to be expected of a "reasonable parent"? Our Court of Appeal has just said in *LaPlante v. LaPlante*, [1995] B.C.J. No. 1303... at p. 7:

"A parent, or other person responsible for small children, has, of course, a duty to take reasonable care not to expose them to unreason-

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<sup>86</sup> *Ibid.* at 120.

<sup>87</sup> *Supra* note 85 at 127.

<sup>88</sup> (1981), 123 D.L.R. (3d) 1 (S.C.C.) at 10.

<sup>89</sup> *McKay v. Board of Govan School Unit No. 29 of Saskatchewan* (1968), 68 D.L.R. (2d) 519 (S.C.C.).



able risk of foreseeable harm. The test to be applied in determining whether that duty has been discharged is an 'objective' one in the sense that the parent is expected to do, or not to do, that which, according to community standards of the time, the ordinary reasonably careful parent would do, or not do, in the same circumstances. But the test is 'subjective' to the extent that the reasonable parent must be put in the position in which the defendant found himself or herself, and given only that knowledge which the defendant parent had... [Counsel for the defendant] says that 'error of judgment' alone will not amount to negligence. That must, of course, be right, in the sense that there may be several courses of conduct any of which a reasonably careful parent might follow in a given situation, and it will be enough to answer a claim in negligence that the course adopted by the defendant parent was one of those which the reasonable careful parent might have taken, even though events may, of course, have shown the choice to have been unfortunate."<sup>90</sup>

The net effect of this reasoning is that there is considerable discretion afforded to parents, or those *in loco parentis*, that may amount to something akin to a due diligence defence as outlined earlier in the discussion of human rights jurisprudence.

### 3. Damages

There must be a proximate causal link between the negligence of the school and legally recognized harm or damages that are suffered by the student. Establishing damages may prove to be the most difficult part of a student plaintiff's action. Where physical violence has resulted from a failure of school authorities to intervene, there is a clearly recognized legal injury. On the other hand, the loss of educational opportunities or psychological harm is a less quantifiable and demonstrable injury. However, human rights legislation may offer better protection than the common law against being deprived of an acceptable educational experience.

Several cases have indicated that it may be difficult to prove damages in the absence of both a recognized tort and head of damage. In *Gould v. Regina (East) School Division No. 77*, the court upheld the Supreme Court of Canada's earlier decision<sup>91</sup> that there is no tort of

<sup>90</sup> *Yasinowski (Guardian ad litem) v. Gaudry*, [1995] B.C.J. No. 1513 (DRS 95-15695), ¶ 58.

<sup>91</sup> *Her Majesty The Queen in Right of Canada v. Saskatchewan Wheat Pool*, [1983] 1 S.C.R. 205.

breach of statute. Thus, a teacher cannot be held negligent for failing to fulfill his or her duties under a relevant *Education Act* in the absence of a tort on which to ground the action. In *Gould*, the statement of claim was struck down for failure to show a cause of action. It was noted that the stress, anxiety, and disruption in the plaintiff's life would be better framed as a claim of intentional infliction of mental suffering or nervous shock if actual harm had occurred.<sup>92</sup>

In light of this, it is apparent that mere verbal harassment from a student may not represent sufficient harm to the victim to impose tortious liability on a harasser, let alone support a claim of negligence against the school.

In the absence or failure of a human rights action for peer harassment, an action in negligence is the best recourse a victim may have. The main difference between these two actions lies in the higher threshold of damages required in negligence than in a human rights claim. Tort law will require an actionable harm, whereas human rights law will seek to promote equality and end discriminatory activity, whether or not the activity is a recognized tort.

#### IV. THE PROPRIETY OF CREATING A HUMAN RIGHTS ACTION FOR PEER HARASSMENT

The pending *Jubran* case raises the question of whether the creation of a human rights action benefits the complainant more than an alternative approach. As Feldthusen observes, there are several drawbacks to pursuing a claim through human rights legislation.<sup>93</sup> He notes that under current provincial and federal human rights schemes, complainants tend not to have access to a hearing as of right. Complaints are typically screened, and decisions about proceeding on a registered complaint are based on factors that may not be relevant to the merits of the complaint. Furthermore, if the complaint proceeds to a Board of Inquiry, then the complainant has little control over the case. Moreover, he notes that

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<sup>92</sup> *Gaudry*, *supra* note 90 at 156.

<sup>93</sup> B. Feldthusen, "Relationship-Based Liability" in W.S. Wright & R.B. McNicol, eds., *The 1996 Isaac Pitblado Lectures: The Expanding Frontiers of Liability and Responsibility* (Manitoba: 1996) 116.

damage awards in human rights proceedings are “notoriously low,” due, in part, to statutory limits.<sup>94</sup> Since the possibility of damages acts as an incentive to the school board to act quickly and effectively to stem any behaviour that may constitute harassment, it may be counter-productive to pursue claims outside of tort. Furthermore, the damage awards available may not sufficiently reflect the harm done to the young victim of peer harassment who requires therapy or other treatment. However, it may be difficult to establish the existence of damages in tort based merely on the vexatious and harassing behaviour of another student. Nevertheless, one of the main benefits of human rights legislation is its accessibility, particularly to those with limited resources.

A further problem with establishing an action grounded in human rights legislation is that it may not protect all victims of student-on-student harassment. This is a reflection of the arbitrary nature of harassment and bullying in schools. A student may be a victim of harassment for belonging to a different socio-economic group, for being short, overweight, unattractive, or for merely not quite fitting in. MacKay suggests that the *Canada Human Rights Act*, and several other provincial human rights acts, ought to include “social condition” as a prohibited ground of discrimination. While a similar ground currently exists in the *Nova Scotia Act* in the form of “source of income,”<sup>95</sup> it is more relevant to protection from a denial of accommodations than to protection from a hostile educational environment. “Social condition” may eventually be a prohibited ground of discrimination under the *Act*, which may broaden the protections that could be afforded by human rights legislation.

The common law in Canada holds that there cannot be a civil tort action for a recognized human rights claim. In *Seneca College of Applied Arts and Technology v. Bhadauria*,<sup>96</sup> the Supreme Court of Canada held that the Ontario *Human Rights Code* precluded not only “any civil action based directly upon a breach [of the Code] but it also excludes any common law action based on an invocation of the public policy expressed in the Code.” In *Bhadauria*, the recognition of a new intentional tort of discrimination was rejected.

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<sup>94</sup> *Ibid.* at 126-7.

<sup>95</sup> *Supra* note 2, section 5(1)(t).

<sup>96</sup> [1981] 2 S.C.R. 181, 124 D.L.R. (3d) 193 at 195 [hereinafter *Bhadauria*].

However, *Bhadauria* did not address whether the recognition of a human rights challenge would also foreclose a civil action in negligence brought by a victim of discrimination. If a statutory human rights action is recognized for peer harassment, the paradoxical situation could arise where a victim of harassment based on prohibited grounds would be required to file a complaint under the *Act*, whereas a victim of non-discriminatory harassment would only have a cause of action in negligence, both for a fundamentally identical complaint. The decision in *Bhadauria* may need to be revisited, since the recognition of a broad tort of discrimination predicated not only on historical disadvantage, but also on mental distress and loss of self-esteem and dignity, may offer remedies to a wide range of victims, while overcoming the barriers associated with a human rights complaint.

However, none of the current models of human rights legislation in Canada, even with the potential inclusion of social condition, would have protected Eric Harris and Dylan Klebold from the barrage of bullying that they received at the hands of their schoolmates.<sup>97</sup> Both of these male students were heterosexual and members of white, upper class society. While the harassment they experienced rivaled that of Azmi Jubran and LaShonda Davis, they would not have been protected under human rights legislation in the United States or Canada.

A significant failing of human rights legislation in the context of peer harassment is that it fails to protect victims from the prolonged acts of arbitrary malicious torment and disrespect that are common among students. The result is a logically inconsistent system of protection, under either tort or human rights law based on the type of harassment, victim's characteristics and choice of epithets used by the offending student.

The question of whether to expand anti-discrimination legislation to include the outcast student speaks to the very purpose of human rights law. If it is designed to protect the vulnerable, then it would seem

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<sup>97</sup> On April 20, 1999, Eric Harris and Dylan Klebold shot and killed a teacher and 12 students at Columbine High School in Littleton, Colorado. Shortly thereafter, they both committed suicide. It was later revealed that the motivation for their actions lay, in part, on the fact that they were labeled as outcasts and "geeks" by their peers, and were consequently the subjects of constant torment and bullying. See online: Rocky Mountain News, "Columbine: Hope from Heartbreak" <<http://www.rockymountainnews.com/drmn/columbine/>> (date accessed: 26 August 2001).

intuitive that it should operate to protect all victims of peer harassment. However, it is also understandable that human rights law should stay within its mandate of protecting those who suffer from historical disadvantage based on immutable and irrelevant characteristics, and not stray too far to protect others out of sympathy. In fact, for this very reason, Justice LaForest, in discussing proposed changes to the *Canadian Human Rights Act*, discourages extending the protections of human rights law to include “personal harassment, that is, harassment unrelated to the grounds of discrimination covered by the Act.”<sup>98</sup>

The inclusion of peer harassment in human rights protection schemes would also lead to the dilemma, highlighted by the dissent in *Davis*, that many school children do not have the capacity to appreciate the discriminatory effect of their teasing and taunting on an enumerated ground. Over-zealous protection of victims may place a heavy burden on school boards that may ultimately result in a chilling effect on students’ activities in school playgrounds. There is already considerable criticism of the zeal with which zero tolerance rules governing student interactions have been applied in schools.<sup>99</sup> One certainly does not wish to stifle the social and intellectual growth of children by excessively monitoring and scrutinizing their behaviour.

In response to this concern, the dissent in *Davis* is of the opinion that it would be better to exclude the most offensive student harassment rather than be excessively pedantic in attempting to label certain conduct as discrimination.

The majority seems oblivious to the fact that almost every child, at some point, has trouble in school because he or she is being teased by his or her peers. The girl who wants to skip recess because she is teased by boys is no different from the overweight child who skips gym class because the other children tease her about her size in the locker room; or the child who risks flunking out because he refuses to wear glasses to avoid the taunts of “four eyes”; or the child who refuses to go to

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<sup>98</sup> G.V. La Forest, chair, *Promoting Equality: A New Vision*. (Ottawa: Canadian Human Rights Review Panel, 2000) at 146.

<sup>99</sup> Known colloquially as the “kiss that shook the nation”, a six-year old first grader in Lexington, North Carolina was suspended for one day after he kissed a female schoolmate on the cheek. Allegedly the kiss was consensual. See E.K. Quesada, “Innocent Kiss or Potential Legal Nightmare: Peer Sexual Harassment and the Standard for School Liability Under Title IX” (1998) 83 Cornell L. Rev. 1014.

school because the bully calls him a “scaredy-cat” at recess. Most children respond to teasing in ways that detract from their ability to learn. The majority’s test for actionable harassment will, as a result, sweep in almost all innocuous conduct it acknowledges is part of school life.<sup>100</sup>

Contrary to what the dissent states, much of this conduct is not “innocuous,” for it perpetuates the stereotypes and historical disadvantage that human rights legislation is intended to eliminate. While any vicious harassment of peers should not be tolerated in schools, human rights legislation dictates that there is something more offensive about harassment based on sex, race, sexual orientation, or any other enumerated ground than harassment of a different nature. As such, it is not paradoxical to have a dual system reflecting discrimination on different grounds.

## V. CONCLUSION

The purpose of human rights legislation is to condemn and prevent discriminatory behaviour. In the case of student-on-student harassment, this can be accomplished best by focusing more on the school authorities than on the students themselves. For such liability to be effective, it must be direct and not through constructing artificial vicarious liability. It is not the acts of the students that are inherently discriminatory; rather, the discrimination lies in the failure of the school authorities to stop, correct, or curb harassing behaviour. Each student must be afforded protection from harassment based on an enumerated ground. Otherwise, the message sent to both the harassers and victims is that it is acceptable for people to be ridiculed or demeaned on the basis of one of these grounds. In order to influence behaviour and thought, it is appropriate to subject school authorities’ actions or inaction to anti-discrimination legislation. By sending a message to children that excessive teasing or harassment on these grounds is inappropriate, and by holding school authorities accountable to human rights regimes, the goal of condemning attitudes of discrimination in all people, especially the young and impressionable, will have been successfully satisfied.

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<sup>100</sup> *Davis, supra* note 4 at 1688.

Exclusion from the protections of human rights legislation will no doubt be of little consolation to the overweight child, or the bespectacled child, or the social outcast. However, notwithstanding her suffering, the cause of here torment simply does not fit into an anti-discrimination regime. Fortunately, there are alternatives in tort and breach of fiduciary duty. This bifurcated system may seem incongruous to someone who regards any student-on-student harassment as reprehensible and worthy of legal protection; however, the underlying rationale is sound.

One can argue that if a human rights action were to be recognized in Canada with the same standard for direct liability as in *Davis*, then all that would be accomplished would be to move a negligence action into the administrative realm of a human rights tribunal. Given the anti-discrimination goals of the *Act*, it would seem intuitive that establishing a human rights complaint should not be as onerous as a claim of negligence. To be effective, human rights legislation should offer more than merely an expedient, statutory claim in negligence. Demonstrating that a denial of access to educational services has occurred should not be on par with a tort of battery or intentional infliction of mental suffering, as appears to have been done in *Davis*. Instead, it should recognize the fragility of young victims and the ease with which a learning environment can become poisoned to the extent of exclusion. Ultimately, if the door to human rights legislation is to be opened for student-on-student harassment, then it should be opened wide enough to make it worth entering.