

# Claim Case Study:

## Vicarious Liability

### *Claim Case Study: John Doe (G.E.B. #113) v. Canada (Attorney General), 2019 NLSC 33*

#### **Background**

The Plaintiff was a member of his community Royal Canadian Air Cadet Squadron. The Plaintiff alleged that between the period of 1969 to 1971, while he was a member of the Squadron, he was sexually abused by a Cadet Officer. The Cadet Officer took the position that there was a consensual relationship with the Plaintiff, unrelated to his duties as a Cadet Officer.

The Plaintiff brought an action against the Defendant, the Attorney General of Canada. The Plaintiff did not bring an action specifically against the Cadet Officer. The Cadet Officer was brought into the action as a Third Party by the Defendant.

The Plaintiff alleged that the Cadet Officer was not adequately screened when he was accepted into a leadership position. The Plaintiff submitted that this, in combination with the Squadron's strict demand for obedience and respect for authority, gave the Cadet Officer an unfettered authority over the Plaintiff.

During trial, the Plaintiff testified that the first sexual encounter with the Cadet Officer took place in his barracks at the cadet camp during the summer. The Plaintiff never told anyone about the encounter. The Plaintiff also submitted that the Cadet Officer entered his barracks one more time that same summer, forcing him out of his bed and standing in his underwear, while the Cadet Officer lectured him about the importance of finishing his public speaking speech assignment.

The Cadet Officer denied the details surrounding the first encounter and testified that the first encounter took place outside of cadet camp. He testified that the encounter took place several months prior to cadet camp, in the basement of the Cadet Officer's mother's residence. The Cadet Officer also testified that he had little contact with the Plaintiff at

the cadet camp, as his role involved working with the senior cadets.

The Cadet Officer soon became a close family friend to the Plaintiff's father and would frequently visit their home. The Plaintiff and the Cadet Officer would also frequently spend time socializing together outside of the cadet's program.

The Cadet Officer admitted to several sexual encounters that took place outside of cadet camp and in his mother's residence. Once the Plaintiff left the cadets in late 1971, the Plaintiff testified that the sexual encounters continued, with the last incident occurring in 1973 when he was almost 18 years old. The court opined that the Cadet Officer took advantage of the Plaintiff for their own sexual enjoyment.

During the encounters, and after the last incident, the Plaintiff struggled with his academics and later left his long-term employment. The Plaintiff testified that he began seeing doctors and in or around 2000/2001, the Plaintiff and the Cadet Officer spoke, attempting to achieve some closure. Several years later, while watching a television talk-show discussing male sexual abuse, the Plaintiff broke down and told his family and doctor about the sexual abuse by the Cadet Officer.

Since the discussion in or around 2000/2001, the Plaintiff and the Cadet Officer did not have further contact. The Cadet Officer was made aware of the court proceedings by way of a phone call from the Attorney General's office.

#### **Issues:**

The Trial Judge was presented with the following issues to analyze:

1. Whether the Defendant, the Attorney General of Canada, was accountable to the Plaintiff in negligence, or,
2. Whether the Defendant, the Attorney General of Canada, was accountable as a result of vicarious liability.

## Case Law - Vicarious Liability

In the case *Bazley v. Curry*, [1999] 2 S.C.R. 534, the court set out a two-part test to assess vicarious liability. The two-part test includes:

1. Has the issue been conclusively settled by precedent?
2. If not, did the policy rationales support a finding of vicarious liability?

To reach a finding that the Defendant is vicariously liable, there must be a “strong connection” between the employment role and the wrongful act, as well as applying the important policy considerations. There are relevant factors outlined by the court to assess whether an employer created/materially contributed to the risk of an employee committing a wrong. Those factors include:

- (a) the opportunity that the enterprise afforded the employee to abuse his or her power,
- (b) the extent to which the wrongful act may have furthered the employer’s aims (and hence be more likely to have been committed by the employee),
- (c) the extent to which the wrongful act was related to friction, confrontation, or intimacy inherent in the employer’s enterprise,
- (d) the extent of power conferred on the employee in relation to the victim,
- (e) the vulnerability of potential victims to wrongful exercise of the employee’s power.

## Findings

The Plaintiff alleges that the Defendant did not adequately screen the Cadet Officer, that the program encouraged outside outings, and challenged the supervision and training of the Cadet Officer by the Defendant.

Section 44 of the *National Defence Act*, R.S.C. 1952, c. 184 and section 43 of the *National Defence Act*, R.S.C. 1970, c. N-4, outline the legislative provisions relating to establishing cadet organizations. There were also standing orders in force at the time of the alleged abuse. These orders were the Canadian Forces Administration Orders (CFAO). Applicable to the Cadet Officer, CFAO 49-6 was addressed to cadet instructors and included the “Responsibilities of the Training Officer”. These responsibilities included developing a training plan in accordance with the established training directives and maintaining and updating the training records.

A Lieutenant from the Government of Canada and the Department of National Defence provided evidence that the Cadet Officer’s role would have been primarily dealing with senior cadets and that he would have had minimal interaction with the junior cadets.

The Lieutenant also testified that there was nothing in the Cadet Officer’s file that raised a “red flag” to prevent appointing him as an officer. The court highlighted that there was no evidence presented to suggest the Cadet Officer was known as a person with “bad character”, and no evidence that anyone in the cadet organization knew about the sexual abuse.

The court also found that the Cadet Officer provided orders to senior cadets, and that the Plaintiff was not ordered by the Cadet officer during cadet meetings. The only evidence from the Plaintiff that the Cadet Officer gave him orders was during the incident where the Cadet Officer lectured him about the public speaking assignment.

The court found that the evidence failed to prove that the Defendant did not have adequate screening measures in place and found that the Cadet Officer’s file did not raise any red flags and there was no criminal record. The court opined that any additional screening would not have changed the outcome of the Cadet Officer being accepted into a leadership role. There was also no evidence that there were any disciplinary actions during his time with the cadet organization.

The court concluded that the evidence presented was not sufficient to find the Defendant was vicariously liable. The court highlighted that the cadet organization did not require and did not promote outside social interactions with the Plaintiff, and that the sexual abuse was not related to the Cadet Officer’s role, was outside the scope of his duties, and was not related to any enhanced opportunity/power relationship.

The court also found that the Defendant was not liable in negligence. To meet this test, the Plaintiff must prove that a duty of care existed and that there was a breach of that duty which resulted in damages. The court considered the standards occurring in the late 1960s and early 1970s, which are lower standards when compared to today. Ultimately, the court found that the screening, training, and supervision which were in place during the relevant time, did not breach the standard of care of a reasonable and prudent parent.

## The Appeal

The Plaintiff appealed the Trial Judge's decision, arguing that the Judge's analysis of vicarious liability intermingled negligence considerations and ultimately caused the Judge to reach a wrong result.

The Appeal was dismissed, noting that despite intermingling of negligence factors into the vicarious liability analysis, the Judge did consider established legal principles. The Judge assessed the connection between the Cadet Officer's duties and his wrongful actions, ultimately concluding that the Defendant should not be held vicariously liable. The tasks assigned to the Cadet Officer did not significantly increase the risk of his misconduct, nor did they provide an enhanced opportunity for wrongdoing. Finally, despite the Cadet Officer's authority over the Plaintiff, it was limited to developing instructional programs for cadets. The incidents occurred after hours and were unrelated to the Cadet Officer's role and location as an instructor. The Trial Judge's decision aligned with legal standards governing vicarious liability.

## Takeaways

- To reach a finding that the Defendant is vicariously liable, there must be a "strong connection" between the employment role and the wrongful act,
- The courts have outlined relevant factors to assess whether an employer created/materially contributed to the risk of an employee committing a wrong,
- The court will consider the duty of care standards that were applicable at the time of the alleged abuse.