COURT OF APPEAL FOR ONTARIO

CITATION: Cavanaugh v. Grenville Christian College, 2021 ONCA 755
DATE: 20211026
DOCKET: C68263

Juriansz, van Rensburg and Sossin JJ.A.

BETWEEN

Lisa Cavanaugh, Andrew Hale-Byrne, Richard van Dusen, Margaret Granger and Amanda Aylesworth the Executor for the Estate of Tim Blacklock

Plaintiffs (Respondents)

and

Grenville Christian College, The Incorporated Synod of the Diocese of Ontario, Donald Farnsworth and Betty Farnsworth for the Estate of Charles Farnsworth, Betty Farnsworth, Judy Hay the Executrix for the Estate of J. Alastair and Mary Haig

Defendants (Appellants)

Paul J. Pape and David G. Boghosian, for the appellants

Loretta Merritt and Sabrina Lombardi, for the respondents

Heard: May 4, 2021 by video conference

On appeal from the judgment of Justice Janet Leiper of the Superior Court of Justice, dated April 24, 2020, with reasons reported at 2020 ONSC 1133.

van Rensburg J.A.:

A. OVERVIEW

[1] This is an appeal of a judgment following a common issues trial in a class proceeding. The respondents are the representative plaintiffs in a class (the "Class") comprised of 1360[1] former boarding students who attended Grenville Christian College ("Grenville"), a private school in Brockville, Ontario, between 1973 and 1997 (the "Class Period"). They brought a class action against the school and its former headmasters alleging abusive practices, including corporal punishment, public humiliation, and other excessive discipline.

[2] The appellants admitted that a duty of care and fiduciary duties were owed to the Class, and specified on consent the content of such duties. The trial judge concluded that there were class-wide breaches of such duties throughout the Class Period, and she determined that punitive damages were appropriate.

[3] The appellants ask that the judgment below be set aside and the action dismissed, or alternatively, that the matter be returned to the Superior Court for trial before another judge.

[4] For the reasons that follow, I would dismiss the appeal.

[5] Irrespective of how the issues have been framed on appeal, the appellants are essentially attempting to relitigate matters that were determined against them

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[1] There were 1396 former boarding students in the class; 36 opted out.

at trial, after a thorough review by the trial judge of the evidence and the proper application of the relevant legal principles. The trial judge did not, as alleged on appeal, misapprehend or misapply the evidence of Dr. Rosemary Barnes, who testified as an expert witness for the respondents. Nor did she ignore the evidence of the appellants' witnesses. Contrary to the appellants' overarching theme on this appeal, this was not a case of individual negligence "writ large", where the trial judge found systemic negligence based only on abusive practices directed at individual students. In her extensive and thorough reasons the trial judge assessed the testimony of the witnesses called by both sides, as well as contemporaneous documents, which provided ample support for her findings of systemic negligence and breach of fiduciary duty on a class-wide basis during the Class Period. The trial judge applied the principles from *Whiten v. Pilot Insurance*, 2002 SCC 18, 58 O.R. (3d) 480 to conclude that punitive damages were warranted.

[6] I will begin by setting out briefly the background to the common issues trial. I will then provide a summary of the trial judge's reasons for judgment, followed by a description of the issues raised in this appeal, and my analysis and conclusions on each ground of appeal.

B. BACKGROUND TO THE COMMON ISSUES TRIAL

[7] The respondents commenced their proposed class proceeding against the appellants and other defendants in 2012. The action as against the Incorporated

Synod of the Diocese of Ontario was dismissed: *Cavanaugh v. Grenville Christian College*, 2012 ONSC 2995, affd 2013 ONCA 139, 360 D.L.R. (4th) 670. As against Betty Farnsworth and Mary Haig the action was discontinued: *Cavanaugh v. Grenville Christian College*, 2012 ONSC 2398.

[8] The Divisional Court, in a decision reported at 2014 ONSC 290, certified the action as a class proceeding and identified the common issues to be decided at trial as follows:

1. Did the defendants owe a duty of care to the plaintiffs?
2. Did the defendants breach the duty of care owed to the plaintiffs?
3. Did the defendants owe fiduciary obligations to the plaintiffs?
4. Did the defendants breach their fiduciary obligations to the plaintiffs?
5. Does the conduct of the defendants merit an award of punitive damages?

[9] The appellants admitted common issues 1 and 3 – that both a duty of care and a fiduciary duty were owed by each of the defendants to the Class. The parties agreed that the applicable duties were as follows:

> Duty of Care: Grenville[2] owed a duty of care to the plaintiffs and the Class Members to take reasonable steps to care for and ensure their safety and to protect them from actionable physical, psychological and/or emotional harm and provide them with a safe, secure learning environment.

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[2] It was acknowledged at trial that the reference to “Grenville Christian College” in the admitted duty of care and fiduciary duty included each of the appellants.

> Fiduciary Duty: Grenville owed a fiduciary duty to the plaintiffs and the Class Members to refrain from harmful acts involving disloyalty, bad faith or self-interest.

[10] The common issues trial, which lasted five weeks, addressed whether there had been a class-wide breach of such duties, and whether punitive damages were warranted.

[11] The respondents asserted that there was systemic negligence in the operation of Grenville, resulting in foreseeable harm to the Class members. They called evidence from twelve former students and three former Grenville staff members, as well as two expert witnesses, Dr. Paul Axelrod (on the applicable standard of care for educational and disciplinary practices for private schools in Ontario during the Class Period) and Dr. Barnes (on the abuse of children, institutional abuse, and the impacts of childhood abuse, maltreatment and trauma).

[12] The appellants' position at trial was that, while Grenville was a strict school that treated certain individual students inappropriately by today's standards, the practices at the school were not in and of themselves abusive, and although there were isolated incidents of mistreatment of certain students ("one-offs"), there was no systemic breach of Grenville's obligations to the plaintiff Class. They called as witnesses ten former students and three former staff members of Grenville. They did not offer any expert evidence.

[13] The trial judge ruled in favour of the respondents. She concluded that systemic negligence on the part of the appellants was made out: that in the

operation of the school during the Class Period the appellants had breached the duty of care they owed to the Class members, and that they had also breached their fiduciary duty to the Class. She also held that punitive damages were appropriate.

C. THE TRIAL JUDGE'S REASONS

[14] The trial judge provided lengthy reasons in which she set out the issues to be determined, conducted a detailed review of the evidence, and made findings of fact with respect to the alleged incidents of abuse and the operation of Grenville.

[15] The first issue to be determined by the trial judge was whether the appellants had breached their duty of care to the students. She explained that this entailed a consideration of whether Grenville's operations, including its disciplinary policies and practices, fell below the standard of care and could reasonably have been foreseen to lead to the risk of harm in the form of emotional trauma to students: at para. 25. The trial judge noted that systemic negligence would depend on how the appellants ran the school, and did not require every member of the Class to have suffered the same or any of the abuse that was alleged: at paras. 27-28. In considering the first issue, the trial judge identified two questions: (a) What was the standard of care for boarding schools in Ontario during the Class Period?; and (b) Did the evidence establish that Grenville's practices and policies fell below the standard of care?: at para. 29.

[16] Before applying the evidence to these questions, the trial judge addressed the appellants' challenges to the credibility and reliability of certain witnesses called by the respondents (this was the main focus of the appellants' written submissions at the close of the trial). She observed that there were many areas of agreement among the plaintiff and defence witnesses, and that the areas of disagreement fell into areas of individual experience, perception, atmosphere and details of what was said and done to individual students: at para. 32. She also noted that, for each type of disciplinary response, whether corporal punishment, individual correction sessions or discipline work assignments, multiple witnesses for both sides confirmed that the impugned techniques were used during the Class Period: at para. 34.

[17] After considering certain matters of general application to the question of credibility (such as the role of demeanour and the effect of a failure to complain on a witness's credibility), the trial judge assessed the evidence of the respondents' lay witnesses with detailed reference to the appellants' specific arguments about their credibility and reliability, and the defence evidence to the contrary, and she made findings of fact based on the evidence she accepted: at paras. 32-134. Among those findings were that students "on discipline" were taken out of class and routinely assigned demeaning tasks; that students were often woken up with late night accusations of wrongdoing with or without foundation, yelled at and made to run or to pray; that there were frequent public assemblies at which individual

students were shamed by staff and other students for real or perceived transgressions of rules, as well as private “light sessions” requiring students to confess to wrongdoing; that there were incidents of excessive “paddling”; and that school administrators used gendered, derogatory terms to refer to girls.

[18] The trial judge returned to the first question: What was the standard of care for boarding students in Ontario during the Class Period? She provided a brief overview of Dr. Axelrod’s opinion evidence: at paras. 135-44. He described the new standards which were in place throughout the Class Period, which began with the 1968 *Report of the Provincial Committee on Aims and Objectives in the Schools of Ontario* (the “Hall-Dennis report”). In a 1969 letter to all schools in Ontario, the Ministry of Education set out its position on such standards, which included: abolishing all corporal and other degrading forms of punishment; creating engaging learning environments; emphasizing teaching in an atmosphere of respect and trust; and describing the expectation that teachers serve as guides, advisers and facilitators, rather than authoritarian leaders. Although corporal punishment was still lawful, the Hall-Dennis report called for its abolition, and it was banned at most private schools in Ontario by 1980. Where schools used corporal punishment, they developed protocols for its administration and documented its use.

[19] The trial judge then turned to how Grenville operated as an institution. She considered the evidence of its practices and whether they fell below the standard

of care, and whether the evidence established systemic negligence by Grenville in relation to the Class: at para. 145.

[20] The trial judge described the history of Grenville, including its founding in 1969 as Berean Christian School, its eventual adoption of the ideas and practices of a charismatic religious sect called the “Community of Jesus” (“COJ”), and how the doctrine and practices of the COJ informed the school’s new philosophy when the school changed its name to Grenville Christian College in 1974. The trial judge described the school’s structure, and the submission of the school’s staff to public correction for their various sins, including regular “light sessions”. She noted the significant level of involvement between the staff and boarding students, including weekend visits to staff homes for “family nights”, when students were encouraged to refer to the staff members as “mom” and “dad”: at paras. 146-90.

[21] The trial judge described how students could be disciplined for a variety of offences: for breaches of various written and unwritten rules, including rules precluding contact between boys and girls. She accepted evidence that denigrating terms such as “whores” and “bitches in heat” were used by the administrators to refer to girls and women, that there was an active policing of girls’ bodies, mannerisms and clothing, and that there were demeaning epithets and actions toward male students who were believed to be homosexual: at paras. 207, 222 and 233.

[22] The trial judge accepted Dr. Axelrod's evidence that, in its operational philosophy, Grenville was unlike other educational institutions in Ontario at the time: at para. 244. Referring to a 1981 Grenville publication "How Do We Here at Grenville Nurture Christian Values?", Dr. Axelrod described the values expressed in the document as "harsh", "categorical" and "unusual". He concluded that Grenville's philosophy, as expressed in the 1981 document, was repressive: at paras. 246-49.

[23] The trial judge also accepted the expert evidence of Dr. Barnes with respect to conduct that would constitute abuse. Dr. Barnes testified about the risks inherent in "total institutions", where children live apart from their families for extended periods of time and where: (a) rules govern almost all aspects of daily life; (b) students have little to say about how these rules are administered; (c) there are arbitrary or unpredictable orders, rather than established policy; and (d) appeals or protests are inhibited. The trial judge accepted Dr. Barnes' evidence that Grenville operated as a "total institution" and about the risk of "disconnection, degradation or powerlessness" experienced by children in the care of such institutions: at paras. 250-59.

[24] The trial judge then turned to consider whether Grenville was systemically negligent because of its practices. She referred to the evidence from staff and students spanning the entire Class Period about the practices at issue and the fact that the attitudes, practices and philosophies that were the genesis of these

disciplinary methods were described in school writings and records. In each case the trial judge identified aspects of the particular practices that breached the standard of care and she concluded that the practices and harms were systemic. These included:

i) being “on discipline”, when students were taken out of class for days or weeks at a time, not permitted to wear their school uniforms, and assigned work or disciplinary activities. The disciplinary methods included enforced isolation from peers, silence and in some cases excessively lengthy, degrading, painful or dangerous forms of work duties: at paras. 262-76;

ii) corporal punishment, such as paddling – there was excessive use of the paddle (as to number of strokes and causing injury and prolonged pain) and arbitrariness in its administration – as well as other forms of physical contact (slapping, pushing or dragging a child) that constituted assault: at paras. 277-95;

iii) all-school assemblies and correction sessions – a routine practice known as “light sessions”, where students were publicly humiliated by staff and other students as a form of discipline that according to Dr. Axelrod was “unheard of in other educational venues”: at paras. 296-309;

iv) taking students to the boiler room to show them furnace flames while telling them they would go to hell if they did not behave: at paras. 310-12;

v) sexualized abuse, such as requiring sexual confessions, demeaning female students as “sluts”, “whores”, “Jezebels”, “bitches in heat”, and vilifying homosexuality: at paras. 313-27.

[25] The trial judge explained in each case the harm that was caused by the practice and how the practice was systemic. Putting students “on discipline” was a systemic practice that was used to enforce rules, expectations and norms across the student body, and was a practice created and applied by the headmasters. There was no written policy or protocol and the punishments were arbitrarily meted out: at para. 276. The use of physicality and the paddle was embedded in Grenville’s operational policy: at para. 295. The “light sessions” were admitted by the appellants to be harmful to the individual students, however the trial judge accepted Dr. Barnes’ opinion evidence that harm can be experienced by both those on the receiving end of the attention and those encouraged to participate, “thus violating their own moral codes and shaming their peers”: at para. 307. Exposing children to the “flames of hell” was a form of abuse known as “terrorizing”: at para. 312. With respect to “sexualized abuse”, the trial judge rejected the argument that harm from the use of epithets against women was not foreseeable; instead, she accepted the uncontradicted expert evidence that Grenville’s practices posed a real risk of emotional harm concerning the sexuality of boys and girls. The standards throughout the Class Period recognized theories of child and

adolescent development which the administration at Grenville explicitly rejected: at para. 318.

[26] The trial judge then addressed and rejected the defence argument that Grenville did not fall below the standard of care because a credible body of former students believed they had thrived as a result of their education at the school. She noted first that the evidence of what life at Grenville was like was remarkably consistent among the plaintiff and defendant witnesses, and as described in school writings and records. The fact that different students had different reactions to their experiences at Grenville, and some avoided various disciplinary measures was consistent with Dr. Barnes' evidence about "resiliency factors", which can mitigate the impact of abuse. The trial judge also accepted evidence that some students may have had the benefit of additional protective factors relative to their family's contributions and status. She noted that the appellants would only be liable according to the percentage of students who established actual harm at the next stage of the proceedings: at paras. 328-38.

[27] The trial judge rejected the defence submission that the analysis should proceed with the question of the school atmosphere, which "could allow the analysis to drift into the direction of purely subjective experience". She stated at para 335:

> I have focused instead on the more objectively measurable evidence of Grenville's institutional methods

> and routines, its norms and expectations, and how it enforced those norms and expectations as a way of understanding whether it breached the standard of care and its duties to its students.

[28] The trial judge accepted that the appellants had breached their fiduciary obligations to the Class through their harmful disciplinary practices and the failure to have any policies or procedures in place to investigate abuse of students. She referred to the uncontradicted expert evidence that Grenville's practices of enforcing its rules were abusive, caused harm to students and placed the student body at risk: at paras. 346-56.

[29] Finally, the trial judge concluded that punitive damages were appropriate. There had been a 24-year course of conduct which amounted to a marked departure from the educational standards in Ontario. Grenville had knowingly created an abusive, authoritarian and rigid culture which exploited and controlled developing adolescents who were placed in its care, and in doing so, caused harm to some students and exposed others to the risk of harm. The trial judge concluded that punitive damages were warranted, although Grenville was no longer in existence, because the policy aims of denunciation and general deterrence went beyond sending a specific message to the administration of the particular school. The question of the quantum of punitive damages would be determined at the next stage of the litigation: at paras. 357-69.

D. ISSUES ON APPEAL

[30] This appeal focuses largely on the trial judge's conclusion that the appellants engaged in systemic negligence – in particular, the appellants challenge her findings with respect to their breaches of the standard of care.

[31] A trial judge's conclusion that a defendant breached the standard of care is a finding of mixed fact and law, which, absent an extricable legal error, is subject to review for palpable and overriding error on appeal: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at para. 37. A misapprehension of the evidence would justify appellate intervention where it is obvious and goes to the very core of the outcome of the case: *Carmichael v. GlaxoSmithKline Inc.*, 2020 ONCA 447, 151 O.R. (3d) 609, at para. 125.

[32] The appellants advance two broad submissions. First, they say that the trial judge erred in her use of Dr. Barnes' evidence to conclude that there had been a breach of the standard of care. Although they allege specific problems with the trial judge's reliance on Dr. Barnes' evidence, the thrust of their argument is that Dr. Barnes' evidence did not speak to what constituted "abuse" during the Class Period. As such, the trial judge ought not to have relied on Dr. Barnes' opinion evidence to conclude that certain aspects of Grenville's operations could reasonably have been foreseen to lead to the risk of harm in the form of emotional trauma to students.

[33] Second, the appellants argue that the trial judge erred in rejecting the defence evidence about Grenville's operations. While she reviewed the respondents' evidence in detail, commenting on the credibility and reliability of each of their witnesses, she did not undertake the same review of the appellants' evidence. The appellants say that, had their evidence been considered, the trial judge would have concluded that there were only isolated breaches of the standard of care owed to individual students, and there was no systemic negligence.

[34] In their factum, the appellants also assert that the trial judge erred in her conclusions that they breached their fiduciary duty and that punitive damages were warranted.

E. ANALYSIS

Issue One: Did the Trial Judge Err in Her Use of Dr. Barnes' Evidence?

[35] The appellants contend that the trial judge erred in her use of Dr. Barnes' evidence to conclude that they engaged in systemic negligence because: (1) Dr. Barnes relied on concepts of abuse and the "total institution" concept, which they say are modern constructs that were not recognized during the Class Period; and (2) Dr. Barnes did not apply her own definition of "emotional harm" when she testified about certain practices being abusive and harmful. After briefly describing the role of Dr. Barnes' evidence at trial, I will address each of these arguments in turn.

(1) The Role of Dr. Barnes' Evidence at Trial

[36] There were two components to the standard of care evidence. Dr. Axelrod, who is an academic with extensive experience researching, writing, and teaching in the fields of educational history and policy in Ontario, was specifically qualified at trial as the respondents' "standard of care" expert. He testified about educational philosophies and practices in Ontario public and private schools during the Class Period. His opinion was that many of the practices that were alleged to have been in place at Grenville during the Class Period were inconsistent with the practices in public and private schools elsewhere in Ontario, including government-mandated expectations, and fell below the standard of care. The appellants do not challenge the trial judge's reliance on Dr. Axelrod's evidence.

[37] Dr. Barnes was qualified at trial, without objection by the appellants, as an expert in psychology, and in particular the abuse of children, including institutional abuse and the impacts of childhood abuse, maltreatment and trauma. She provided evidence about the harms that could be caused by various practices. Apart from certain practices that were alleged to have physically harmed students, it was alleged that the impugned disciplinary practices caused emotional or psychological harm.

[38] While Dr. Axelrod provided his opinion about practices that breached the standard of care, Dr. Barnes' evidence was also relevant to the breach of the

standard of care analysis. She spoke to the issue of harm: to what extent would each of the impugned practices that fell below the standard of care have caused actual or anticipated harm to Grenville students? Her evidence was directed to whether the impugned practices were abusive, and whether they entailed a risk of harm to individual students who were at the receiving end of the various forms of discipline and to the Class as a whole.

[39] The duty of care admitted to have been owed by the appellants to the respondents and the Class members included “to take reasonable steps to protect them from actionable physical, psychological and/or emotional harm…”. Although in this appeal the parties do not agree about the role of foreseeability of harm in the standard of care analysis generally, I accept that it was relevant for the trial judge in this case to determine whether the impugned practices at Grenville could lead to emotional harm. Hence, the trial judge’s characterization of the respondents’ claim was that “Grenville’s operations, including discipline policies and practices, fell below the standard of care and could reasonably have been foreseen to lead to the risk of harm in the form of emotional trauma to students”: at para. 25.

[40] As such, Dr. Barnes’ evidence drew the link between the conduct that was alleged to have been inconsistent with educational and disciplinary practices at the time, and the actual or potential harmful effect of such conduct on Class members.

(2) Dr. Barnes' Use of 2016 and 2020 Documents

[41] The appellants' first argument is that the trial judge accepted Dr. Barnes' evidence about concepts of abuse and "total institutions" that were based on documents published long after the Class Period had ended. They say that the trial judge misconstrued Dr. Barnes' evidence and overlooked the fact that she was testifying about modern concepts of abuse and harm. The appellants go so far as to argue that there was no evidence of foreseeable emotional harm during the Class Period.

[42] I will deal first with Dr. Barnes' reference to a document, prepared by the Ontario Association of Children's Aid Societies in 2016, entitled "The Ontario Child Welfare Eligibility Spectrum" (the "2016 Manual"). Noting that the 2016 Manual had been revised many times over the years, Dr. Barnes said that the document was helpful in providing "definitions of various forms of maltreatment and also in terms of… evaluating the seriousness of incidents of maltreatment or patterns of maltreatment".

[43] Contrary to the appellants' argument, the fact that Dr. Barnes referred to various categories of child abuse – including spurning, terrorizing, isolating and exploiting – using terminology that was employed in the 2016 Manual, did not mean that these were new concepts of abuse and harm that were unknown during the Class Period. There was nothing in Dr. Barnes' evidence to suggest that the

categories of abuse and the emotional and psychological harm that were identified in the 2016 Manual came into being only at that time. To the contrary, the document simply provided a helpful resource for Dr. Barnes in identifying certain types of abusive conduct.

[44] Nor did Dr. Barnes limit herself to the descriptions in the 2016 Manual when she gave her opinion evidence. She offered her own explanations for “spurning” and “terrorizing”, as well as “sexualized abuse”, and she explained how different types of abusive conduct could lead to emotional harm. She testified that many of the Class members experienced physical and emotional abuse, including spurning, terrorizing, isolating or exploiting, that left these individuals at risk of developing psychological difficulties. Dr. Barnes provided her opinion about the harmful effects of the impugned disciplinary practices on Class members who were the targets of the practices, and those who were exposed to them.

[45] The appellants acknowledge that there was nothing wrong with Dr. Barnes’ use of a 2016 document to describe abuse and emotional harm arising from the impugned practices during the Class Period. They say however, that under cross-examination Dr. Barnes admitted that the standard of abuse was different during the Class Period and that she did not know what the standard was at that time. That left the trial judge with “no evidence” about what would constitute abuse and emotional harm during the Class Period. The appellants rely on the following passage:

Q. Now, if I could take you to page 26 of your report. Under item three, Overview of Abuses…[a]nd in the first sentence under that heading you write:

> In outlining the ways in which [Grenville] staff subjected class members to abuse, I use the categories and definitions developed by the Ontario Association of Children's Aid Societies.

A. Yes.

Q. And you cite from their 2016 manual.

A. Yes.

Q. Eligibility Spectrum.

A. Yes.

Q. And I suggest that you used the criteria in the Children's Aid Society document so that you would have an objective basis for evaluating whether there had been abuse taking place at Grenville.

A. Yes.

Q. So, that it wouldn't be resorting to your own, or anyone else's, subjective views of what constitutes abuse.

A. Well, I'd have their – yes, I'd have their guidelines to – to use in terms of looking at individual instances.

Q. And that's one of the reasons you used their guidelines so that it wouldn't just be some subjective impression of what abuse entails.

A. Yes.

Q. Now if you can – can I have Exhibit 15 put to the witness? This is a 2016 publication.

A. Yes.

Q. It reflects the values and ideals and notions of abuse as of 2016.

A. The most current ideas, yes.

Q. And if we can go to page 125 of Exhibit 15, it says, History of the Eligibility Spectrum.

A. Yes.

Q. (Reading):

> The Ontario Child Welfare Eligibility Spectrum, originally called the Intervention Spectrum, was first developed by Mary Ballantyne and George Leck of Simcoe CAS in 1991 with early and ongoing support from Margaret Morrison of Halton CAS. Original construction of the spectrum incorporated some of the Magura and Moses 1986 Child Wellbeing Scales categories and descriptors which have since been considerably modified.

And then the last sentence of this paragraph says, “In 1995…a major revision of the spectrum occurred”...

Q. I’m suggesting that we are dealing here in this case with notions of abuse that occurred 40 – 20, 30 or even 40 years ago, right?

A. In some --- in some cases, yes, possibly.

Q. And I’m suggesting to you that notions of what constitutes abuse, particularly psychological or emotional abuse, have evolved considerably in those 20 or 30 or 40 years, up till 2016 when these guidelines were issued?

A. I guess the ideas have evolved.

Q. And you have not indicated anywhere in your report whether these 2016 guidelines reflect the values with respect to abuse that existed in the 70s or 80s, have you?

A. I haven’t tried to make a determination in the report about that.

[46] The appellants contend that this passage reflects an admission by Dr. Barnes that what constituted abuse was different during the Class Period from what she had described, and that she did not know what the standard for abuse was during the Class Period. From that, they argue that there was no evidence from which the trial judge could have determined that the risk of emotional harm arising from the various impugned practices at Grenville was reasonably foreseeable.

[47] I disagree. The trial judge did not misinterpret or misapply Dr. Barnes' evidence in concluding that the impugned practices at Grenville during the Class Period resulted in foreseeable emotional harm to students. And, as I will explain, there was considerable other evidence to support the trial judge's conclusion that there was foreseeable emotional harm.

[48] First, Dr. Barnes did not admit that the concept of what constituted harm to children was in fact different during the Class Period from what was set out in the 2016 Manual. While she was asked some questions in relation to corporal punishment and sexualized abuse, to suggest that some aspects of these impugned practices might not have caused harm, there was nothing in Dr. Barnes' evidence to suggest that the various types of emotional harm she described as resulting from the impugned disciplinary practices at Grenville would not have been foreseeable to the appellants during the Class Period.

[49] At its highest, the passage from Dr. Barnes' cross-examination acknowledges that notions of what constitutes abuse have evolved over time. How such notions evolved, and whether a school administrator's understanding of abuse may have differed in any material way during the Class Period was not pursued. There was no further exploration of this issue in a way that might have assisted the appellants in the argument they are now making. Counsel did not, for example, put earlier versions of the 2016 Manual to Dr. Barnes to suggest, as is argued on appeal, that concepts like "spurning" were unknown during the Class Period. The appellants did not put forward their own expert evidence to support the point that they ask this court to now accept – that the forms of emotional abuse about which Dr. Barnes testified did not in fact constitute abuse during the Class Period.

[50] Nor was there anything else in the evidence that suggested that the actual and anticipated emotional and psychological harms about which Dr. Barnes testified – resulting from excessive, public, humiliating and degrading disciplinary practices – would not have been recognized by a reasonable school administrator during the Class Period. The evidence was to the contrary. It supported the conclusion that during the Class Period the appellants knew or ought to have known that the impugned practices could lead to emotional harm.

[51] Dr. Axelrod's evidence outlined the Ontario government's position calling for the abolition of "all corporal and other degrading forms of punishment" and the new

educational atmosphere being one of respect and trust. Indeed, Dr. Axelrod testified that Grenville engaged in disciplinary and informal teaching practices during the Class Period that were abusive and at odds with the standards practiced in public and private schools in Ontario at that time. He explained that it was a time when there was increasing attention to human rights, children's rights and child abuse, and that Grenville's disciplinary practices arose from unusual and highly anachronistic values that "made a virtue out of pain and suffering" and led to the harmful treatment of students over many years. In concluding that Grenville administrators did not meet the standard of care during the Class Period Dr. Axelrod stated that responsible teachers and administrators in other private and public schools at the time would not have permitted such extreme practices and would have called to account any staff responsible for such treatment.

[52] The standards about which Dr. Axelrod testified were not curriculum standards, but rather pedagogical standards directed toward avoiding harm to children. I accept the respondents' submission that it was obvious during the Class Period, just as it is now, that excessive corporal punishment, practices that on their face were degrading and demeaning, and demanding total submission and obedience, would be harmful to students.

[53] As the respondents point out, there was evidence that Grenville's administrators were aware that their impugned practices put students at risk of harm. As the trial judge noted at paras. 48 and 49 of her reasons, feedback in the

form of a survey sent to some parents in 1987 included comments that humiliating students in all-school assemblies was “appalling” and that the “honour code”, where students were expected to inform on one another was “simply horrific” and “[had] to be stopped”. The trial judge concluded at para. 367, that Grenville knew about the parental disapproval of these practices which did not change until Charles Farnsworth (a founder and former headmaster) had retired. In describing the history of Grenville, she noted at para. 169 that Al Haig (another founder and former headmaster), had acknowledged in tape recordings filed at the trial that Grenville “philosophy [ran] counter to the accepted philosophy of the day”.

[54] In *Rumley v. British Columbia*, 2001 SCC 69, [2001] 3 S.C.R. 184, the Supreme Court recognized that, in a class proceeding involving allegations of systemic negligence, the standard of care may vary over the relevant time period such that the court may have to provide a nuanced answer to the common question of standard of care: at para. 32. In the present case however, the trial judge concluded that the impugned practices constituted a breach of the standard of care throughout the Class Period. Except in relation to corporal punishment and teachings about sexuality, there was no suggestion by the appellants at trial that the standard of care had changed during the Class Period in any way that might affect the trial judge’s determination of whether a practice that constituted a breach of the standard of care to the Class at one point during the Class Period would not have constituted a breach at an earlier stage. While the subject of changing

perceptions of emotional harm was broached to some extent in Dr. Barnes' cross-examination (in the passage set out above), there was no admission that the conduct which constituted abuse and the emotional harm about which she testified would not have been recognized as such at any point during the Class Period. Nor was there any other evidence at trial to support what is argued on appeal – that the abuse about which Dr. Barnes testified would not have constituted abuse during the Class Period.

[55] Finally, I note that the argument made here – that there was "no evidence" that emotional harm would have been reasonably foreseeable during the Class Period because standards of abuse and harm had changed – was not advanced in oral and written closing submissions at trial. With respect to three types of conduct that the appellants' trial counsel acknowledged were "concerning": the public light sessions, the corporal punishment or "paddling" and the denigrating comments about young girls, he invited the trial judge to consider whether they gave rise to a reasonable risk of mental injury. He did not suggest that anything turned on changing concepts of what constituted abuse or harm. Rather, he submitted that, while embarrassment and discomfort would have been experienced by students singled out during light sessions, other students would not have been harmed, and that epithets about women, while "deplorable" and "inappropriate" would not foreseeably have caused mental harm. The trial judge

addressed and rejected these specific arguments at paras. 307-9 and 317-21 of her reasons.

[56] The appellants' written submissions at trial focused on the credibility and reliability of the evidence of the respondents' witnesses, as to whether and how frequently the alleged acts took place and whether they amounted to systemic negligence or were "one-off" reactions to individual circumstances. While there were challenges to Dr. Barnes' opinion evidence, they did not include any allegation that she had relied on standards of abuse or emotional harm that were unknown during the Class Period. As the appellants' counsel correctly observed in argument on appeal, "nobody addressed" changes in the standard of what constituted abuse at trial.

[57] Accordingly, I would reject the appellants' argument that the trial judge erred in relying on Dr. Barnes' evidence about abuse and emotional harm because she was testifying about 2016 concepts, or that there was "no evidence" of foreseeable emotional or psychological harm during the Class Period.

[58] The appellants make a similar argument about another aspect of Dr. Barnes' evidence that was referred to and accepted by the trial judge: the characterization of Grenville as a "total institution". They contend that the trial judge erred in finding a breach of the duty of care based on Dr. Barnes' characterization of Grenville as a "total institution", a description that was used in a 2000 Law Commission of

Canada Report entitled *Restoring Dignity: Responding to Child Abuse in Canadian Institutions.*[3] The appellants say that because the concept only came into being in 2000, there was no evidence that they ought to have known during the Class Period that they were running a "total institution", and that they were placing the students at risk of harm as a result.

[59] This point can be addressed briefly.

[60] Contrary to the appellants' argument, the trial judge did not conclude that there was systemic negligence because the appellants were running a "total institution". Rather, this was a label used by Dr. Barnes to describe an institution that has certain features. Although she acknowledged that Grenville differed in certain respects from residential schools, Dr. Barnes offered the opinion that Grenville operated as a "total institution" because it had these features, which could lead to conditions of disconnection, degradation and powerlessness, thereby posing the risk of emotional harm. The important point made by Dr. Barnes was that children in a total institution are vulnerable to emotional harm by their caregivers because they are away from their parents and dependent on school administrators for all aspects of their care.

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[3] This report, that was Exhibit 16 at trial, addresses institutions that were operated, funded or sponsored by government, including residential schools for Indigenous children, schools for the deaf and blind, training schools, long-term mental health care facilities and sanitoria.

[61] I see nothing wrong with the trial judge's acceptance of the characterization of Grenville as a "total institution". Nor is there merit to the assertion that because the term may not have been in use during the Class Period (there is in fact no evidence that this is the case[4]), the appellants could not have known they were operating a "total institution" and therefore harm was not foreseeable. The trial judge found that all four elements of "total institutions" described by Dr. Barnes existed at Grenville for boarding students. The conclusion that Grenville operated as a "total institution" did not lead directly to the conclusion that systemic negligence was established, nor did the trial judge reason that the appellants ought to have foreseen that they were running a total institution. Rather, as the trial judge stated, the risk that children in the care of total institutions may find themselves subject to "disconnection, degradation or powerlessness" formed part of her analysis in determining whether the boarding students during the Class Period were treated in a way that fell below the standard of care for students at that time: at para. 259.

(3) Dr. Barnes' Definition of "Emotional Harm"

[62] In her cross-examination Dr. Barnes described emotional harm arising from "spurning", "terrorizing", "isolating" or "exploiting" as resulting from "a repeated

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[4] The Law Commission of Canada report suggests that the term "total institution" was in use before the Class Period. See p. 22, quoting from a 1961 publication by E. Goffman.

pattern of caregiver behaviour toward an individual child or an extreme incident." Counsel pointed out that this was different from her expert report, which referred to "extreme incidents", in the plural. He asked Dr. Barnes to agree that there had to be repeated incidents for emotional harm to occur. She reiterated her evidence that a single extreme incident that encouraged a child to believe that "he or she was worthless, flawed, unloved, unwanted, endangered or [of] value only in meeting needs of others" could also constitute emotional abuse.

[63] The appellants argue that the trial judge overlooked the fact that Dr. Barnes "changed her evidence" and did not apply her own definition of abuse, that required more than one "extreme incident". The appellants assert that while there were isolated incidents of abusive discipline involving individual students, repeated incidents of abuse directed toward a single student, such as "spurning", were required before there could be emotional harm. They say that the trial judge did not take into account the inconsistency in the expert's own evidence and that, based on this misunderstanding about a "single incident' constituting abuse, the trial judge reasoned that abuse to one child was abuse to the Class.

[64] I disagree. Whether or not there was an inconsistency with what she had written before, Dr. Barnes' evidence was clear: a single extreme incident of spurning, terrorizing, isolating or exploiting could lead to emotional harm. And what Dr. Barnes did not say – nor did the trial judge reason in this way – was that a single incident involving one student being spurned, terrorized, isolated or

exploited, constituted class-wide abuse. Rather, the trial judge repeatedly referred to the distinction between individual harm and risk to the Class from systemic practices. She carefully determined whether each of the impugned practices was systemic and resulted in systemic harm.

[65] The appellants admitted that they owed a duty of care to the Class members to take reasonable steps, among other things, to protect them from actionable physical, psychological or emotional harm. The trial judge concluded that the appellants were systemically negligent in the operation of Grenville. She identified practices that she found were in breach of the standards of the day and were harmful. The trial judge considered whether, as the appellants argued at trial, the harms had been “one-offs”, that is isolated incidents of excessive discipline that were responsive to individual student conduct. She concluded instead that the practices, which were part of the “culture” of the school, aligned with its philosophy and embedded in its operational policies to enforce its norms, rules and expectations, were systemic. Grenville lacked policies or controls to ensure that students would not suffer harm. The harms flowed from the Class members’ exposure to discipline that was imposed arbitrarily or excessively, even if not all Class members were singled out for punishment. All of the Class members were subject to Grenville’s disciplinary practices during the Class Period. This is the basis on which the trial judge found that there was systemic negligence. She did not reason that harm to a single student constituted harm to the Class.

[66] For these reasons, I would reject the appellants' assertion that the trial judge failed to appreciate a contradiction in Dr. Barnes' evidence, or that she concluded that systemic negligence was made out based on emotional abuse to individual Class members.

Issue Two: The Treatment of the Defence Evidence

[67] The appellants submit that, in finding a class-wide breach of duty, the trial judge failed to wrestle with the appellants' evidence, that Grenville was a harsh and strict religious environment, but not an abusive one. They say that the trial judge made a palpable and overriding error when she overlooked the defence evidence, and failed to assess the credibility of the defence witnesses.

[68] The appellants also contend that the trial judge simply dismissed the defence evidence by relying on Dr. Barnes' opinion about resiliency, when in fact the appellants' witnesses described a fundamentally different school than what was described by the respondents' witnesses. There was another explanation for differential effects on different students: that whatever abuse may have occurred did not rise to the level of actual actionable harm. The appellants assert that the trial judge made no findings against the appellants' witnesses' credibility or reliability, but she nonetheless ignored their evidence.

[69] I disagree.

[70] This ground of appeal seeks to impugn the trial judge's findings of fact, findings that were made on the basis of her consideration of the evidence of all of the witnesses and the documentary evidence. The trial judge did not ignore the defence evidence, even though there was no section in her reasons dealing with the defence evidence that corresponded with her detailed review of the respondents' lay witness evidence.

[71] The trial judge made specific findings about the credibility and reliability of the evidence of the respondents' witnesses because she was invited to do so – this was a major prong of the defence submissions at trial. As the appellants' trial counsel submitted, the common issues, which were questions of mixed fact and law, were "99 percent fact". In their written arguments, the appellants conducted a detailed review of the evidence of the respondents' lay witnesses, urging the trial judge to reject such evidence as exaggerated, biased and for other reasons. The trial judge reviewed these challenges in her reasons, and explained what evidence she accepted and why. By contrast, the respondents did not impugn the credibility and reliability of the appellants' witnesses.

[72] The trial judge did not, as alleged by the appellants, ignore the defence evidence in concluding that Grenville's practices were abusive and harmful. She referred to evidence of individual defence witnesses throughout her reasons – including in her review of the credibility and reliability of the respondents'

witnesses: see, for example, paras. 44, 56, 58, 80, 89, 198, 203, 231, 281 and 284.

[73] The trial judge noted however, that much of the evidence of the appellants' witnesses about practices at the school was consistent with that of the respondents' witnesses. She stated that "for each type of disciplinary response, multiple witnesses for both the plaintiffs and the defendants confirmed that these techniques were used during the Class Period": at para. 34, and that, although they characterized their own experiences at Grenville differently, "[i]n many respects, the witnesses for all parties testified consistently about the operations of Grenville": at para. 31. The trial judge reasonably concluded, that "the evidence of what life at Grenville was like was remarkably consistent among the plaintiff and defendant witnesses": at para. 329.

[74] The trial judge observed that "[t]he areas of disagreement [between the lay witnesses for each side] fell into areas of individual experience, perception, atmosphere, and details of what was said and done to individual students": at para. 32. She rejected, as she was entitled to, the defence submission that because their individual witnesses did not find certain practices to be abusive, that they could not lead to emotional harm. The issue was not, as the appellants continue to assert on appeal, whether there was a unanimous perception of abuse by all Class members. The trial judge reasonably accepted that the differing responses described by former students could be explained by the expert evidence

about the resiliency of individual students and the fact that different people can experience the same milieu in different ways: at paras. 331-34, 336. She also reasonably accepted that the differential application of the impugned practices occurred as a result of some students figuring out how to avoid certain forms of discipline or having the benefit of additional protective factors relative to their family's contributions and status: at paras. 329, 337.

[75] Ultimately, after considering all of the evidence, including the testimony of the defence witnesses, the trial judge made findings of fact about what went on at Grenville, and she determined that certain practices fell below the standard of care and constituted systemic negligence in relation to the entire Class.

[76] Before concluding this part of the reasons, I must address a submission that permeated the appellants' arguments on appeal: that this was an individual abuse trial "writ large", and that the trial judge, in finding systemic negligence, simply ascribed the individual experiences described by the respondents' witnesses to the entire Class.

[77] There is nothing in the trial judge's reasons to support this contention. To the contrary, the trial judge's focus was on how the school was run, and the disciplinary and other practices that were used in its operation. Of necessity, the evidence of the witnesses focused on what they as individuals had experienced and observed. However, there is nothing to suggest that the trial judge took the

individual experiences of some Class members and extrapolated them to the broader Class in order to find systemic negligence.

[78] A focus of the defence submissions at trial was that, to the extent that there were excesses in discipline, such as excessive paddling and putting students on “discipline”, this occurred in response to individual transgressions. The defence asserted that the only systemic practice was the “light sessions”, but that this and other disciplinary practices, while humiliating to individual students, did not give rise to emotional or psychological harm to the Class. The trial judge made it clear throughout her reasons that she understood that she had to determine whether there was systemic negligence, and that she appreciated what this meant. She repeatedly emphasized that she had to determine whether each of the practices that was alleged to be in breach of the standard of care caused harm to the Class as a whole – in other words, whether they were systemic, or, as alleged by the appellants, “one-offs” that were distressing and potentially harmful only to those who were directly subjected to the practices: see, for example, paras. 9, 28, 308, 327, 338 and 341. The trial judge recognized that systemic negligence involved an assessment of how the school was run – its practices and the extent to which the practices created a risk of harm. Individual claims of harm and differences in impact on members of the Class were for the individual issues stage, if necessary: see paras. 28, 39, 276, 294, 308, 327 and 341.

Other Issues

[79] In their factum the appellants briefly raised two other issues, which were not addressed in oral argument: that the trial judge erred in finding that the appellants breached their fiduciary duty to the Class, and in concluding that punitive damages were warranted.

[80] It is sufficient to say that I see no reversible error in the trial judge's conclusions on these issues.

[81] The appellants admitted that they owed a fiduciary duty to their former students. After canvassing the relevant legal principles, the trial judge concluded on the basis of the record before her that the appellants had breached their fiduciary duty to the Class members by "imposing [their] idiosyncratic lifestyle" on them, beyond the limits of reasonable parental discipline. The trial judge focused specifically on Grenville's failure to have in place any policies or checks on the enforcement of its disciplinary practices, resulting in arbitrary and abusive rule enforcement that placed students at risk of harm to their healthy development: at paras. 352-54. These conclusions were open to the trial judge on the evidence. The passages from the evidence pinpointed in the appellants' factum do not undermine the trial judge's conclusions in this regard.

[82] In awarding punitive damages, the trial judge identified and applied the relevant principles from *Whiten*. The appellants submit only that the trial judge's

finding of a “class-wide marked departure from the standard of care” was tainted by the errors in her systemic negligence analysis. Having found no error in the systemic negligence analysis, I conclude that this ground of appeal cannot succeed.

F. DISPOSITION

[83] For these reasons I would dismiss the appeal, with costs to the respondents fixed at the amount agreed between the parties: $75,000, inclusive of disbursements and HST.

Released: October 26, 2021 RGT

K. van Rhijgga

I agree RGT

I agree. Sossin J.A.