

IN THE COURT OF APPEAL OF MANITOBA

Coram: Chief Justice Richard J. Chartier
Madam Justice Janice L. leMaistre
Madam Justice Karen I. Simonsen

BETWEEN:

<i>B. N.</i>	)	<i>K. L. Webb</i>
	)	<i>for the Appellant</i>
	)	<i>(via videoconference)</i>
<i>(Plaintiff) Respondent</i>)	
	)	<i>S. N. Rosenbaum</i>
	)	<i>for the Respondent</i>
<i>- and -</i>	)	<i>(via videoconference)</i>
)	
<i>THE ANGLICAN CHURCH OF CANADA</i>	)	<i>Appeal heard and</i>
<i>THE DIOCESE OF BRANDON</i>	)	<i>Decision pronounced:</i>
	)	<i>December 9, 2020</i>
)	
<i>(Defendant) Appellant</i>	)	<i>Written reasons:</i>
	)	<i>December 23, 2020</i>

COVID-19 NOTICE: As a result of the COVID-19 pandemic and pursuant to r 37.2 of the MB, *Court of Appeal Rules*, MR 555/88R, this appeal was heard remotely by videoconference.

On appeal from 2020 MBQB 2

LEMAISTRE JA (for the Court):

[1] The defendant appealed the trial judge’s finding that it was vicariously liable for two sexual assaults committed by Jack Hopper (Hopper) on the plaintiff while she was attending Sunday school at St. John’s Anglican Church. The defendant also appealed the amount of the damage award.

[2] After hearing the appeal, we dismissed it, with reasons to follow. These are our reasons.

Background

[3] Hopper arrived in the community of Grand Rapids in 1959 and became the minister of two Anglican churches in the Diocese of Brandon known as St. John's and St. James'. St. John's was located on what is now Misipawistik Cree Nation. St. James' was located on the other side of the Saskatchewan River in the townsite. Hopper conducted his first service in Grand Rapids on August 24, 1960 and his last service on July 28, 1963, after which he transferred out of the community. He died prior to the commencement of the litigation.

[4] In her re-amended statement of claim, the plaintiff alleged that Hopper sexually assaulted her on two occasions in St. John's after Sunday school when she was "about eight and a half years old or younger". On the first occasion, Hopper pinned the plaintiff to a wall, touched her genitals and digitally penetrated her vagina. On the second occasion, Hopper threw her to the ground and had sexual intercourse with her causing her to bleed. As a result of the sexual assaults, the plaintiff suffered severe emotional and psychological trauma.

The Trial

[5] The main issue at trial was whether Hopper committed the sexual assaults. The defendant's position was that Hopper was no longer in Grand Rapids when the plaintiff said she was sexually assaulted.

[6] The plaintiff testified that she was "[m]aybe around six, seven, eight" years old when she started going to Sunday school and that she was "maybe somewhere around eight" when she was sexually assaulted by

Hopper. She said that the first sexual assault happened sometime during the summer and the second happened in the winter, a few months after the first. The plaintiff did not recall how long Hopper stayed in Grand Rapids after the sexual assaults, but she agreed with the suggestion that it was at least a few years. She did not tell anyone about the sexual assaults until approximately the year 2000.

[7] In support of her claim, the plaintiff filed, by consent, a report prepared by Dr. David Kolton, a clinical psychologist. Dr. Kolton also gave expert testimony at trial about the mechanics of childhood memory and recall. He testified that “we don’t mark events that occur to us in our memories as dates or ages.” He explained that “age is . . . a reference point that we construct in our memory based on other aspects of our memory” by recalling “other markers of age” such as where we were living or what grade we were in at school. He also explained that the more “chaotic a child’s existence is, the less likely they are able to . . . reconstruct a very clear narrative about what happened.” He opined that the plaintiff’s childhood had markers of a chaotic existence including moving around a lot as a child and having an alcoholic father.

[8] On cross-examination, the defendant did not challenge the plaintiff’s evidence that she was sexually assaulted. Nor did it challenge Dr. Kolton’s expertise about the mechanics of childhood memory and recall. The crux of the defence asserted at trial was that Hopper could not have committed the sexual assaults because he was not in Grand Rapids when the plaintiff was eight years old. The plaintiff turned seven years old on July 2, 1963 and the evidence established that Hopper left Grand Rapids at the end of July or beginning of August of that year.

[9] The defendant submitted as evidence the vestry book from St. James'. The current bishop of the Diocese of Brandon explained that the clergy is required to record all church services in that church's vestry book, including the name of the officiant and the date of the service. He testified that the vestry book from St. John's was destroyed by fire. He explained that St. James' and St. John's were served by the same minister, and whoever did the service at one location in the morning, did the service at the other location in the afternoon. Therefore, the record from St. James' would accurately identify the minister who performed the services at St. John's and the date on which the services were performed. The vestry book indicated that Hopper performed his first service at St. James' on August 24, 1960 and his last service on July 28, 1963. A new minister began his service in Grand Rapids on August 4, 1963.

[10] The defendant also submitted a document which, the bishop explained, was a type of registry. This document indicated that Hopper was in Grand Rapids from 1959 to 1963.

The Trial Judge's Reasons

[11] In his reasons, the trial judge acknowledged that the plaintiff bore the onus of proving the allegations on a balance of probabilities. He recognised that it is not unusual for victims of sexual assault to delay reporting due to the traumatic nature of the events. He took into account that the plaintiff was an adult recalling events that occurred when she was a young child and reviewed the applicable law for assessing her credibility in these circumstances. He also considered Dr. Kolton's testimony that children often

reconstruct their age at the time of events by correlating the events to other experiences in their lives.

[12] The trial judge concluded, that the sexual assaults “related by the [p]laintiff could not have occurred when she was eight years of age as Hopper was not the [minister] at St. John’s by that time” (at para 17). He also concluded that the plaintiff’s age at the time of the sexual assaults is not a detail he would expect “a child of tender years would consider important” (*ibid*). He was satisfied the evidence established that Hopper was the minister at St. John’s “for an extended period when the [p]laintiff was a young girl attending Sunday school” (*ibid*).

[13] With that context, the trial judge considered the testimony of the plaintiff. He recognised that there were inconsistencies in her testimony. However, despite the inconsistencies, the trial judge accepted the plaintiff’s evidence that she was sexually assaulted on two occasions at St. John’s while she was attending Sunday school and that Hopper was the perpetrator.

Issues on Appeal

[14] On appeal, the defendant argues that the trial judge failed to properly consider the inconsistencies in the plaintiff’s evidence and misconstrued the totality of the evidence, leading him to wrongly conclude that Hopper committed the sexual assaults. It also argues that the trial judge misapplied the doctrine of vicarious liability and erred in awarding damages in the amount of \$125,000. The defendant contends that, by finding that Hopper committed the sexual assaults as alleged by the plaintiff, the trial judge effectively expanded the doctrine of vicarious liability, making allegations of this nature impossible to defend, particularly when the alleged perpetrator has died.

Standard of Review

[15] The issues on appeal raise issues of fact and mixed fact and law. Questions of fact (including inferences drawn from the evidence) are reviewed only for palpable and overriding error. Absent an extricable error in principle, findings of mixed fact and law are also reviewable only for palpable and overriding error (see *Housen v Nikolaisen*, 2002 SCC 33, at paras 10, 36; and *FH v McDougall*, 2008 SCC 53 at paras 55, 70).

[16] In *Salomon v Matte-Thompson*, 2019 SCC 14, Gascon J explained “palpable and overriding error” in the following manner (at para 33):

Where the deferential standard of palpable and overriding error applies, an appellate court can intervene only if there is an obvious error in the trial decision that is determinative of the outcome of the case (*Benhaim* [*Benhaim v St-Germain*, 2016 SCC 48], at para. 38, quoting *South Yukon Forest Corp. v. R.*, 2012 FCA 165, 4 B.L.R. (5th) 31, at para. 46; see also *H.L. v. Canada (Attorney General)*, 2005 SCC 25, [2005] 1 S.C.R. 401, at paras. 56 and 69-70). Morissette J.A. explained this metaphorically as follows in *J.G. v. Nadeau*, 2016 QCCA 167, at para. 77 (CanLII): [TRANSLATION] “. . . a palpable and overriding error is in the nature not of a needle in a haystack, but of a beam in the eye. And it is impossible to confuse these last two notions” (quoted in *Benhaim*, at para. 39). The fact that an alternative factual finding could be reached based on a different ascription of weight does not mean that a palpable and overriding error has been made (*Nelson (City) v. Mowatt*, 2017 SCC 8, [2017] 1 S.C.R. 138, at para. 38).

[17] A trial judge’s assessment of damages is entitled to deference and will not be interfered with unless the judge has made an error in law or principle, misapprehended the evidence, failed to consider relevant factors, considered irrelevant factors or made an award that is wholly erroneous (see *Dansereau v The City of Winnipeg*, 2014 MBCA 18 at para 6; *Lantin et al v*

Seven Oaks General Hospital, 2018 MBCA 57 at paras 18-19; and *Nash v Nash*, 2019 MBCA 31 at para 34).

Analysis

[18] The main issue on appeal is whether the trial judge committed palpable and overriding error in concluding that Hopper sexually assaulted the plaintiff. The other issues were not vigorously argued at the appeal hearing, and counsel for the defendant conceded that, if this ground failed, the remaining grounds of appeal must also fail, given the applicable standards of review.

[19] The defendant relies on the plaintiff's testimony that she was eight years old when Hopper sexually assaulted her and that he remained in Grand Rapids for some time after the sexual assaults, as well as the evidence that he left Grand Rapids shortly after the plaintiff's seventh birthday. The defendant asserts that this evidence directly contradicted the plaintiff's testimony that Hopper committed the sexual assaults. The defendant argues that the trial judge disregarded this contradictory evidence and failed to address other inconsistencies in the plaintiff's testimony.

[20] In our view, the trial judge demonstrated that he was alive to the inconsistencies and, despite the inconsistencies, he concluded that the plaintiff was credible. Moreover, he was entitled to accept parts of the witnesses' testimony and reject other aspects of it.

[21] When assessing the plaintiff's testimony, the trial judge appropriately instructed himself on the law regarding adults relating events from childhood, as explained in *R v W (R)*, [1992] 2 SCR 122 (at pp 133-34):

...

... Since children may experience the world differently from adults, it is hardly surprising that details important to adults, like time and place, may be missing from their recollection. Wilson J. recognized this in *R. v. B. (G.)*, [1990] 2 S.C.R. 30, at pp. 54-55, when, in referring to submissions regarding the court of appeal judge's treatment of the evidence of the complainant, she said that

... While children may not be able to recount precise details and communicate the when and where of an event with exactitude, this does not mean that they have misconceived what happened to them and who did it. ...

...

... In general, where an adult is testifying as to events which occurred when she was a child, her credibility should be assessed according to criteria applicable to her as an adult witness. Yet with regard to her evidence pertaining to events which occurred in childhood, the presence of inconsistencies, particularly as to peripheral matters such as time and location, should be considered in the context of the age of the witness at the time of the events to which she is testifying.

[22] In this case, the trial judge considered the inconsistencies in the plaintiff's testimony. He accepted some of the plaintiff's evidence, including that Hopper taught Sunday school at St. John's, that she was sexually assaulted and that Hopper was the perpetrator of the sexual assaults. He also accepted her description of the layout of the church.

[23] The plaintiff's testimony demonstrates that she was not confident about her age at the time of the sexual assaults or how long Hopper remained in Grand Rapids afterwards. When asked how old she was when she was sexually assaulted by Hopper, the plaintiff responded, "I don't know, maybe somewhere around eight." On cross-examination, when asked whether she

was certain that she was eight years old when she was sexually assaulted, she replied, “Somewhere around there, yes.” She said that she remembered how old she was because the sexual assaults happened when she lived “in the north side of the reserve.” However, she also said that she moved around a lot and she was never asked about when she moved or where else she lived.

[24] The plaintiff initially denied remembering how long Hopper stayed in Grand Rapids after the sexual assaults but, when it was put to her that she told Dr. Kolton that it was three years, she said, “Well, it was some time, yes.” She also agreed with the suggestion that it was at least a few years.

[25] In contrast to her evidence on these points, the plaintiff was clear and unshaken about how and where she was sexually assaulted, as well as who committed the sexual assaults.

[26] In our view, the trial judge considered the totality of the evidence when assessing the impact of the inconsistencies in the plaintiff’s evidence on “questions of credibility and reliability pertaining to the core issue in the case” (*McDougall* at para 58). His reasons are responsive to the evidence called, the issues raised and the submissions made by the parties and his findings are supported by the record. We see no palpable and overriding error warranting appellate intervention.

[27] The defendant properly conceded that the trial judge applied the correct law on the issue of vicarious liability. However, the defendant asserts that the trial judge erred when he applied the law to the facts of this case by expanding the doctrine to cases in which the evidence of the victims does not support the allegations made and there is no corroboration. There is no requirement for corroboration (see *McDougall* at paras 80-81) and, in light of

our conclusion that the trial judge did not err in his finding that the evidence met the necessary standard of proof, this ground necessarily fails.

[28] Regarding the damages awarded by the trial judge, we are not persuaded that he failed to take into account the totality of the evidence regarding the effect of the sexual assaults on the plaintiff or that he otherwise erred in awarding damages in the amount of \$125,000.

[29] We do not agree with the defendant's assertion that upholding the trial judge's decision will result in an increase in the number of similar claims against the defendant. This case is unique in many ways. On cross-examination, the defendant did not seriously challenge the plaintiff's assertion that she was sexually assaulted, that Hopper was the minister at the time and that Hopper was the person who sexually assaulted her. Her memory of Hopper and whether it might have been someone else was also not seriously tested.

[30] In our view, the evidence supporting the plaintiff's claim had its difficulties. However, the defendant has failed to demonstrate palpable and overriding error warranting appellate intervention.

[31] In the result, the appeal was dismissed with costs.

“leMaistre JA”

“Chartier CJM”

“Simonsen JA”
