Babel v. Roman Catholic Diocese of Burlington, No. S0274-05 Cncv (Katz, J., May 8, 2008)

STATE OF VERMONT
Chittenden County, ss.:

SUPERIOR COURT
Docket No. 274-05 CnCiv

BABEL

v.

ROMAN CATHOLIC
DIOCESE OF BURLINGTON

ENTRY
(Punitive Damages)

This is a negligent supervision case—plaintiff asserts he was harmed as a result of defendant Diocese's failure to supervise one of its priests, with the result that plaintiff was molested while an altar boy. Ordinarily, negligence does not suffice to justify an award of punitive damages. Bolsta v. Johnson, 2004 VT 19 ¶ 5, 176 Vt. 602 (mem.). Yet high courts in other states have approved punitive damage awards against dioceses, in cases involving negligent supervision of priests known to be molesters. E.g. Hutchinson v. Luddy, 870 A.2d 766 (Pa. 2005); Mrozka v. Archdiocese of St. Paul, 482 N.W.2d 806 (1992). So we must face the question of whether Vermont law would sanction such an award in a case such as this.

Two recent Vermont cases are critical. Bolsta v. Johnson holds that punitive damages are not available to the victim of a drunk driving

accident, who shows nothing more than that defendant drunk driver was negligent while under the influence, resulting in the accident and injury. 2004 VT 19 ¶¶ 7-9. Brueckner v. Norwich University, 169 Vt. 118 (1999), holds that the University which tolerated hazing of incoming students is not liable for punitive damages, despite negligent supervision of senior students in that hazing, which caused injury to plaintiff. Bolsta affirmed a refusal by the trial court to award punitive damages and Brueckner reversed a jury award of such damages, both cases because our court concluded that despite considerable evidence of negligence, there was no evidence of malice, a prerequisite for punitive damages. To understand the role of malice as a prerequisite for punitive damages, we will quote at length from Bolsta:

> Punitive damages are permitted upon evidence of malice, where the defendant's wrongdoing has been intentional and deliberate, and has the character of outrage frequently associated with crime. Actual malice may be shown by conduct manifesting personal ill will or insult or carried out under circumstances evincing insult or oppression, or conduct showing a reckless disregard to the rights of others. In any case, however, there must be some evidence of bad motive, as mere negligence or even recklessness are not sufficient to show malice and therefore do not justify the imposition of punitive damages.

2004 Vt. 19, ¶ 5 (internal quotations omitted.)

We start here, because this introduction to the issue starts to deal with the standard of "reckless disregard." This legal handhold is crucial here, because plaintiff does not assert that Diocesan officials, back in the 1970s, actually sought to injure young boys. Rather, plaintiff's claim is that such officials were reckless in disregarding the risk of molestation to young boys in the parishes. Plaintiff seeks to show that conduct of those officials was significantly more morally culpable than mere negligence and that it should properly be punished by the law.

Referring to drunk driver Johnson, Bolsta concluded that his "conduct does not evince more than a reckless disregard of the right of others. As we pointed out in Brueckner, allowing punitive damages solely on that basis presents the danger of a test which may be so flexible that it can become virtually unlimited in its application." Id. at ¶ 7 (internal quotations omitted).

So we find the opinion in Bolsta , restating longstanding Vermont law that malice may be shown by "conduct showing a reckless disregard to the rights of others," id. at ¶ 5, and also, rejecting an award of punitive damages solely on reckless disregard. Id. at ¶7. In Bolsta, presumably, drunk driver Johnson never intended to hurt anyone, he never intended to have an accident, he merely intended to drive himself somewhere at a time when he was under the influence. There is nothing in the opinion suggesting he ever knew or considered the probability of injuring plaintiff or anyone by so driving. In general, although we know that drunk driving is assuredly dangerous, culpable and worthy of punishment, in any given instance, there is a low risk of an accident occurring—it is not a probability. In Brueckner, the University knew that hazing would occur, that it was unpleasant, humiliating and disruptive to incoming freshmen. But as a longstanding and thereby long-tolerated phenomenon of military culture, nothing in the opinion suggests that University officials should have known of or expected anything more than evanescent harm. Although the facts in Brueckner suggest at least a simple assault having been committed upon plaintiff, that is not shown as something University officials should have expected. For having appointed a "cadre" to administer the hazing, the University was liable for negligence in supervising its appointees. The court rejected plaintiff's theory of holding the University liable for its "conscious choice to remain ignorant of hazing activities … its inaction and inattention to the issue of hazing on campus." 169 Vt. at 130. "[W]e are not prepared to hold that inaction or in attention of senior corporate officers constitutes malice sufficient to establish punitive damages liability." Id. at 130-31. Later on, the court notes that "indifference attributable to negligence is not malice." Id. at 132. Ultimately, that action or inaction "did not evince the degree of malice required under our cases." Id.

Carefully reviewing Brueckner and Bolsta, we conclude two things. First, the particular facts in each case failed to persuade the court, as a matter of law, that the level of malice necessary to support punitive damages had been reached. Second, we note that neither case actually renounces "reckless disregard" as a permissible foundation for awarding such damages. It remains quoted and remains quoted as sufficient standing alone.

We recall, at this point, that other high courts have specifically approved an award of punitive damages, for negligent supervision of priests known to be child molesters. And we have in mind that reckless disregard, short of deliberate ill will aimed at victims, explicitly remains a part of our

caselaw. In the present case we have facts analogous to those in the previously cited Pennsylvania and Minnesota cases. Hutchinson, 870 A.2d 766 (Pa. 2005); Mrozka, 482 N.W.2d 806 (1992). Plaintiff here has presented evidence that this errant priest had an almost ten-year history of molesting young boys, in his role as priest. This Diocese had notice of that problem. It knew that he was no longer an acceptable priest in the Diocese of Fort Wayne-Evansville. It knew that a Fort Wayne Monsignor wrote a letter of recommendation which is anything but, it is virtually bursting with what is missing. It knew that the priest originally haled from Massachusetts and must have been doing something between graduation from seminary and commencing priestly duties in Fort Wayne, but that its records were silent on the obvious gap in the history of a troublesome young priest. Nevertheless, the priest was taken on. This Diocese was told by Fort Wayne not to assign the priest to be alone in a parish. At that point, the evidence of actual supervision is actually noteworthy for its total absence. There is no evidence that the parish priest in Rutland was told to carefully monitor Father Paquette, or warn the parents of youngsters, or specifically warn the priest, or engage in any other supervisory efforts. The priest molested young boys and the Diocese heard about it. At that point, the priest was transferred to the Montpelier parish. Again, an absence of evidence of supervision. Again, molestation of young boys. Again, a transfer, this time to plaintiff's parish in Burlington. Here, plaintiff and others are molested. Plaintiff's evidence can also be read to suggest that defendant's concern, throughout, was the avoidance of "scandal," a word of possibly special meaning—bringing the Church into ill repute. Plaintiff suggests his evidence shows that concern for the boys was absent throughout. This, of course, is a filtered review of the evidence, considering only that evidence which is favorable to plaintiff's position. This review is not acceptance of that evidence by the court; its evaluation, acceptance or rejection is for the jury. But reviewing the evidence favorably to its proponent is what the court must always do in evaluating whether it makes out a case sufficient for jury consideration. So viewing the evidence, we must conclude that it is quite comparable to what has been determined sufficient to support punitive damages in Pennsylvania and Minnesota.

Considering this problem, we have in mind that the phrase "reckless disregard" almost invites casual analysis. The words are words of ordinary English. They really provide jurors with little aid in ascertaining the significant marginal showing, beyond mere negligence, which Brueckner and Bolsta so obviously require. Recognizing the substantially greater

showing required by these recent cases, for malice, which is the necessary foundation for punitive damages, we have looked for aid in secondary sources. We conclude that the resolution for this conundrum is found in the American Law Institute's Restatement of the Law Torts: Liability for Physical Harm (Third), Proposed Final Draft No. 1 (2005). There, the concept of "recklessness" is fleshed out in a way often absent, although perhaps groped for, in the caselaw:

> § 2. Recklessness
> A person acts recklessly in engaging in conduct if:
> (a) the person knows of the risk of harm created by the conduct or knows facts that make the risk obvious to another in the person's situation, and
> (b) the precaution that would eliminate or reduce the risk involves burdens that are so slight relative to the magnitude of the risk as to render the person's failure to adopt the precaution a demonstration of the person's indifference to the risk.

The Restatement directly connects this concept to eligibility for punitive damages in what would otherwise be a negligence cause of action. Id., comment *b*. This definition requires that defendant either have knowledge of the danger or knowledge of facts that would make the danger obvious to anyone in defendant's situation. Id., comment *c*. This breaking-down of recklessness into its constituent parts gives dimension and heft and therefore meaning to a phrase and concept which might otherwise be a mere inarticulate matter of degree. This last problem is what we discern as the shortcoming of evidence in Brueckner and Bolsta.

We expect to submit the issue of punitive damages to the jury here, with instructions realizing the expanded Restatement conception of recklessness.

Dated at Burlington, Vermont, May ___, 2008.

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M. I. Katz, Judge