

1996 CarswellBC 1714, 27 B.C.L.R. (3d) 13, 33 C.C.L.T. (2d) 240, [1996] B.C.W.L.D. 2176

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Fairchels (Guardian ad litem of) v. West Vancouver School District No.45

Jayeson Fairchels by his Guardian ad Litem Karmel Fairchels and the said Karmel Fairchels (Plaintiffs) and Board of School Trustees, School District No. 45 (West Vancouver), Douglas Player, John Calder, George Stewart, Bob Overgaard, Peter LeFaivre, Gordon DeVito, Ron Knight and Mrs. Pereira (Defendants)

British Columbia Supreme Court

Curtis J.

Heard: April 29-May 1, May 16, 1996

Judgment: July 24, 1996

Docket: Vancouver C927415

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Counsel: Karmel Fairchels for himself and Jayeson Fairchels.

James G. Yardley, for defendants.

Subject: Public; Torts

Education law — Pupils — Miscellaneous issues.

Education law — Pupils — Miscellaneous issues — School policy allowing students and parents to review exam results but not to have copies — Parent suing for damages for failure to provide copy — Trial judge finding school not obliged to provide copy — School Act, S.B.C. 1989, c. 61, s. 9(1).

Torts — Malicious prosecution and false imprisonment — Elements of cause of action — Malicious arrest.

Torts — Malicious prosecution and false imprisonment — Elements of cause of action — Malicious arrest — Mother in dispute with school — Mother observing son's classes without notifying school — Principal calling police — Officer arresting mother for trespass after her refusal to leave — Mother suing for wrongful arrest — Trial judge finding no malice in arrest and dismissing action.

The infant plaintiff was a student at the defendant secondary school. He wrote examinations in one of his courses that were not returned to him. His mother formed the opinion that the examinations should have been returned to him. The school administration explained that certain examinations were not returned in order that the integrity of the test bank used in the course would not be compromised by circulation of the examinations

amongst the students. However, the child and his mother were invited to review the examinations in the presence of his teacher or a school official. That explanation and invitation were unsatisfactory to the mother. She picketed the school. At one point, an incident occurred in which the mother entered one of her child's classrooms unannounced. The school principal called the police for assistance. At the police officer's direction, the principal touched the mother on the arm and asked her to leave. She declined to do so. The police officer then asked her to discuss the matter outside. The mother again declined to do so. The police officer arrested her for assault by trespass. The charges were later dropped. The mother sued, on behalf of herself and the child, for damages for, among other things, withholding the examinations and wrongful arrest.

Held:

Action dismissed.

While parents are entitled to copies of "student records", such records do not include copies of examinations. There is a genuine policy reason for giving schools discretion as to whether to return examinations. Matters of educational policy are best determined by professional educators, not the courts. No damage to the child had been shown and no legal right to receive copies of examinations had been demonstrated. The arrest of the mother by the police officer was proper and lawful. She had committed the offence of assault by trespass by resisting the attempt of the principal to remove her. It was apparent to the police officer in attendance that the offence by the mother would continue if he did not arrest her. There was no evidence that the arrest was the result of malice.

Cases considered:

R. v. Jones, 69 N.R. 241, [1986] 6 W.W.R. 577, 47 Alta. L.R. (2d) 97, 73 A.R. 133, [1986] 2 S.C.R. 284, 28 C.C.C. (3d) 513, 31 D.L.R. (4th) 569, 25 C.R.R. 63 — *considered*

State v. Shaver, 294 N.W. 2d 883 (N.D. S.C., 1980) — *considered*

Statutes considered:

Criminal Code, R.S.C. 1985, c. C-46

s. 41 *considered*

s. 495(1)(b) *considered*

s. 495(2)(d) *considered*

s. 495(2)(e) *considered*

s. 495(3) *considered*

School Act, S.B.C. 1989, c. 61

s. 9(1) [re-en. 1993, c. 6, s. 3] *considered*

Action for damages for wrongful arrest and failure to release exams.

Curtis J.:

1 Jayeson Fairchels and his mother Karmel Fairchels claim damages against the West Vancouver School Board and Peter Lefaiivre arising out of incidents which occurred in 1992 while Jayeson was a grade 11 student in Sentinel Secondary School where Peter Lefaiivre was the Principal. The action against the other defendants was dismissed before trial. Karmel Fairchels began the action as Jayeson's guardian ad litem. Jayeson filed a notice of coming of age and adoption of proceedings April 27, 1995 having attained the age of 19 on October 29, 1994.

2 Karmel Fairchels has acted for herself and her son throughout the proceedings. Damages are claimed for withholding Jayeson's graded quizzes, tests and exams for three years, wrongful arrest and detention of Karmel Fairchels, harassment of Jayeson by school officials, and defamation of Karmel Fairchels' character by Mr. Lefaiivre.

3 In March of 1992 Jayeson was taking a computer studies course taught by Mr. Barry Rector. On the 23rd of that month Mrs. Fairchels went to Mr. Rector's class to observe it. She did not notify Mr. Rector or the school that she was coming, but simply went in unannounced before the class started and sat down. It was her practice to observe each of her son's classes each year, and to do so in this manner so that she would see how the children were taught when the teachers did not have advance notice of her intention to observe. The school had signs stating that all visitors must report to the office. Mrs. Fairchels knew of the sign but decided it did not apply to her because she was a parent. The policy of the school was that parents were welcome to observe classes at any time, but were to arrange to do it through the office.

4 During the class Mr. Rector was teaching, Mrs. Fairchels requested the return of her son's tests. Mr. Rector told her he would be happy to discuss and go over the tests with her but she would have to make an appointment as he had the tests at home. Mrs. Fairchels became angry at the reply and left a letter dated March 23, 1992 writing "Why is it that tests aren't returned promptly after marking?" and requesting that her son be moved to another computer class.

5 Mr. Rector testified at trial that his policy was not to return tests because the tests came from a test bank which came with the course, and it was necessary to keep the tests to preserve the integrity of the grading system; that students were welcome to review their tests after marking in the presence of the teacher to understand their grading and learn from mistakes made - but not permitted to take the tests home. Jayeson was transferred to Mr. Moore's class. Mrs. Fairchels did not make an appointment to review her son's tests with Mr. Rector, instead she decided to picket the school.

6 For approximately three weeks during April and May 1992, Mrs. Fairchels attended at the only entrance to Sentinel School, generally 7:30 a.m. to 8:30 a.m., with various signs, on one occasion riding a large tricycle. One of the signs had Mr. Rector's name on it and asked what he had to hide. She spoke to students and parents entering the school. Some of the teachers felt threatened by her form of protest carrying the sign criticizing Mr. Rector. Later the sign was changed by deleting Mr. Rector's name to read "Crucial Issue. Whose Property is it?" On several occasions Mr. Knight, the school's Vice-Principal, approached Mrs. Fairchels and told her she was welcome to come into the school and look at her son's exams which they had collected for her, however she refused and demanded they be sent or given to her in a brown paper envelope.

7 By letter dated April 8th, Douglas Player, Superintendent of Schools, wrote to Mrs. Fairchels as follows:

You have requested an explanation as to why the particular tests associated with your son's computer course cannot be released from the school.

Be advised that these particular tests are drawn from a "test bank" which has been developed to support this course and as such may be used from class to class, section to section over the next few years. In order to ensure their integrity it is important that they remain under the control of the classroom teacher. It is and will continue to be our practise to review completed exams with students in the classroom setting in order to allow them to learn from their results.

The same opportunity is available to parents should they request it.

With respect to an appeal to the Board regarding this practise, I enclose a copy of the procedure to be followed.

8 Mrs. Fairchels stopped her protesting outside the school when she was given time on the School Board agenda to address the issue with the Board which she did May 11, 1992. In December 1992 the Board passed a formal policy concerning the discretion to retain student examinations and parent observation of classes.

9 On May 22, 1992 Mrs. Fairchels attended the school to observe Jayeson's grade 11 English and grade 11 Science and Technology classes. Again she gave no notice of her intentions to do so to the teachers or the school. She went into the English class taught by Mrs. Pereira with the students, not telling Mrs. Pereira that she was there or what her purpose in being there was. Mrs. Pereira was in the process of going up and down the aisles showing students their marks on a cross grade examination. She was surprised to see Mrs. Fairchels there and mindful of the protest and public criticism of Mr. Rector by name, immediately became apprehensive. Mrs. Pereira went to the office and asked the Assistant Principal, Mr. Knight, to come to her class. Mr. Knight observed Mrs. Pereira to be "white, voice shaky - noticeably upset". Mr. Knight went to the class and asked Mrs. Fairchels to come out of the classroom with him but she said she was there to observe and was not going to leave. Mrs. Pereira continued to be upset - she changed her lesson plan; the students went to the library to complete their assignments and Mrs. Pereira went to the staff room to calm down.

10 Mrs. Fairchels proceeded to the library with the students. There the Principal, Peter Lefaiivre, tried to speak to her but she ignored him and walked away. Mr. Lefaiivre decided that Mrs. Fairchels' presence was causing an undesirable disturbance in the school and called the West Vancouver Police for assistance.

11 Mrs. Fairchels and the class at the next change proceeded to the Science and Technology class taught by Sue Pederson. Ms. Pederson did not see her there and proceeded with her lesson until Constables Buchanan and Needham arrived with Mr. Lefaiivre about five minutes after the class started. Constable Buchanan made notes of what occurred and I accept his evidence as an accurate recounting of the events. Mr. Lefaiivre told him that the school had a restraining order against Mrs. Fairchels; he had asked her to leave several times but she refused. There was in fact no restraining order. Mr. Lefaiivre seems to have had the impression there was from the picketing incident, however, that was not the basis Constable Buchanan acted upon as he clearly stated in his evidence.

12 Constable Buchanan and Constable Needham went with Mr. Lefaiivre to Ms. Pederson's class. Mr. Lefaiivre walked over to Mrs. Fairchels at Constable Buchanan's instruction and asked her to leave the school grounds. He touched her left arm when doing so and she refused to leave. Constable Buchanan then asked her to leave. She said no, she wanted to discuss it. The Constable said he would discuss it, but not in the classroom. She did not leave as requested and Constable Buchanan arrested her in the classroom for assault by trespass. He testified that

in arresting her he was not relying on the *School Act* or a possible restraining order but his observation of what in his opinion was the commission of the offence of assault by trespass when Mr. Lefavre asked her to leave, touched her and she resisted and refused to do go.

13 Mrs. Fairchels was then escorted out of the school, taken by a police car to the police station where she was released at 2:28 p.m. She was charged with the offence but later, at the request of the School Board, the charges were stayed.

14 The claim against the School District and Mr. Lefavre for wrongful arrest cannot succeed. Mrs. Fairchels was arrested by Constable Buchanan who was acting under his own authority based upon his opinion of what he observed, not on the basis of instruction from Mr. Lefavre. Constable Buchanan acted properly and responsibly in arresting her as he did on the basis of the what he had observed. The *Criminal Code of Canada* provides, at s.41:

41.(1) Every one who is in peaceable possession of ... real property ... is justified in using force ... to remove a trespasser therefrom, if he uses no more force than is necessary.

(2) A trespasser who resists an attempt by a person who is in peaceable possession of ... real property ... to remove him, shall be deemed to commit an assault without justification or provocation.

The *Criminal Code* also provides:

495.(1) A peace officer may arrest without warrant

.....

(b) a person who he finds committing a criminal offence,

.....

(2) A peace officer shall not arrest a person without warrant for (offences which include assault by trespass) in any case where

(d) he believes on reasonable grounds that the public interest, having regard to all the circumstances including the need to

(i) establish the identity of the person,

(ii) secure or preserve evidence of or relating to the offence, or

(iii) prevent the continuation or repetition of the offence or the commission of another offence,

may be satisfied without so arresting the person, and

(e) he has no reasonable grounds to believe that, if he does not so arrest the person, the person will fail to attend court in order to be dealt with according to law.

(3) Notwithstanding subsection (2), a peace officer acting under subsection (1) is deemed to be acting lawfully and in the execution of his duty for the purposes of

(a) any proceedings under this or any other Act of Parliament; and

(b) any other proceedings, unless in any such proceedings it is alleged and established by the person making the allegation that the peace officer did not comply with the requirements of subsection (2).

15 I am satisfied that the arrest was lawful under the circumstances described by Constable Buchanan. He had reasonable and probable grounds to believe the offence was being committed and would continue if he did not arrest her. He himself had asked her to go outside to discuss the matter and she refused.

16 The School Board is not liable to Mrs. Fairchels for any loss caused by her being charged with an offence. There is no evidence that the prosecution was as a result of malice, nor has it been determined that the offence was not committed as the matter did not proceed to trial.

17 Although Mrs. Fairchels has taken the position that her son's tests are his property and must in law be returned to him, she has not provided me with any legal authority to substantiate her claim.

18 The *School Act*, S.B.C. 1989, c.61, provides:

9.(1) A student and the parents of a student of school age are entitled,

(a) on request and while accompanied by the principal or a person designated by the principal to interpret the records, to examine all student records kept by a board pertaining to that student, and

(b) on request and on payment of the fee if any ... receive a copy of any student record that they are entitled to examine under paragraph (a).

19 In my opinion "all student records kept by a board pertaining to that student" in that section do not include all the student's quizzes, tests and exams. I interpret that section to refer to the formal record of grades and results, attendance and other similar matters of record.

20 I accept that there is a genuine policy reason for schools to have a discretion as to whether examinations are returned to the students or not. As explained by Mr. Ned Muhtadi, the Deputy Superintendent of Schools for Abbotsford and the Director of the teachers organization for providing reliable methods to test learning outcomes, it is often necessary to retain possession of examinations so that questions that may be used for other tests in the future are not compromised by wide circulation amongst the students. Mr. Muhtadi explained, so long as the teacher is prepared to go over the exam with the student once it is marked, the student has the necessary opportunity to learn from the examination process. This was the policy of Sentinel School and this was offered to Jayeson and Mrs. Fairchels. If Jayeson and his mother chose not to take this opportunity any prejudice caused thereby to his education was not caused by the defendants.

21 Matters of educational policy are best determined by professional educators or if necessary the School Boards on the advice of professional educators following public debate, rather than on the basis of an allegation

of individual rights in a court action involving a particular student. I agree with the statement of the court in the case of *State v. Shaver*, 294 N.W. 2d 883 (N.D. S.C., 1980), at p.900:

The courtroom is simply not the best arena for the debate of issues of educational policy and the measurement of educational quality.

22 This opinion was quoted with approval by LaForest J. in *R. v. Jones*, [1986] 2 S.C.R. 284, at 304, a case in which the Supreme Court of Canada was dealing with the issue of whether or not parents had the right to withhold their children from attending public schools for religious reasons.

23 No right in law to have examinations returned to students has been established, nor has it been shown that Jayeson suffered any loss as a result of the school's policy. The policy was a reasonable one justified by the evidence. Jayeson and his mother had the opportunity to review the examinations and their grading if they chose.

24 I am also satisfied that there is no evidence that the defendants harassed Jayeson at school. The incident which occurred created a difficult situation and the actions of the teachers and staff were reasonable in the circumstances.

25 The evidence fails to disclose any defamation of Mrs. Fairchels' character by the defendants.

26 The claims against the West Vancouver School District and Peter Lefavre are dismissed.

Action dismissed.

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