

Student/learner allegations of teacher sexual misconduct: A teacher's right to privacy and due process

Elda de Waal

BA Hons MEd PhD

Associate Professor, Education Law, North-West University, Vaal Triangle Faculty

Ralph D Mawdsley

JD PhD

Professor, Special Education and Sports Law, Cleveland State University, USA

OPSOMMING

Student/Leerder bewerings van seksuele wangedrag deur onderwysers: 'n Onderwyser se reg op privaatheid en administratiewe geregtigheid

Veel is op die spel wat betref die seksuele wangedrag van opvoeders in die VSA en Suid-Afrika. Albei lande verwag van veral opvoeders om die misbruik van kinders by die onderskeie maatskaplike dienste en wetstoepassers aan te meld: die versuim hiervan kan in die VSA lei tot die herroeping van onderriglisensies. Hierdie artikel fokus op (i) die mate waartoe lede van die publiek daarop geregtig is om die name van aangeklaagde opvoeders te ken, (ii) wie seksuele klagte behoort te ondersoek, en (iii) op watter privaatheid opvoeders tydens die ondersoek aanspraak kan maak. Hierdie saak word vanuit 'n VSA en RSA regsvergelykende perspektief aangespreek, met spesifieke verwysing na die feiteondersoek-proses en Skoolbeheerliggame se beheeruitoefeningsrol in die Suid-Afrikaanse openbare onderwyssektor, en skool amptenare se rol in die VSA. Uit die bespreking van hoe die VSA tot onlangs hierdie dilemma aangespreek het, blyk dit dat opvoeders geregtig behoort te wees op beskerming teen die skade wat ongestaafde bewerings van seksuele wangedrag hulle reputasies kan aandoen. Van die aanbevelings wat gemaak word om die Suid-Afrikaanse situasie te remedieer is dat die feiteondersoek-proses na aanleiding van 'n klag van seksuele wangedrag onberispelik bestuur moet word, en dat regsprekers in laer howe een of ander bewusmaking moet ondergaan ten opsigte van basiese feite-ondersoek flaters wat hulle op hierdie vlak begaan.

1 Background

Whether investigations of alleged teacher sexual misconduct are conducted by school officials, law enforcement or social services, the issues in the paper are (1) the extent to which members of the public are entitled to know the names of teachers against whom allegations of sexual misconduct have been made, (2) who should investigate sexual misconduct complaints, and (3) what privacy expectation teachers have during the investigation. The issue will be addressed from a comparative perspective between the United States and South Africa, with specific reference to the fact-finding process and School Governing Bodies' governance role in South African public education and school officials' role in the United States.

In the United States this issue is complicated by the fact that, in addition to investigations conducted by social service and law enforcement agencies, school boards or school administrators also generally conduct investigations and, while some allegations result in a finding of teacher misconduct, most either find the charges to be false or unsubstantiated for lack of evidence. The recent decision of the Supreme Court of Washington in *Bellevue John Does v Bellevue School District No 405*¹ addresses whether these investigations by school personnel are adequate for finding and punishing abusive teachers, and if not, what options need to be considered "to assure that [school] children ... will not continue to suffer at [the] hands [of predatory teachers]".² Whether the names of all United States teachers against whom charges of sexual misconduct have been made, regardless of the outcome of investigations, should be revealed presents a difficult balancing question between a teacher's privacy interest in his/her identity and the public's interest in schools that are free from sexual misconduct of publically paid teachers.

The stakes are high in the United States and South Africa regarding teacher sexual misconduct. Teachers found to have engaged in such misconduct are subject to criminal prosecution, revocation of their teaching credentials, and discharge from employment. Both countries require teachers and other school personnel to report suspected child abuse to social service or law enforcement agencies and failure to do so in the United States, can result in revocation of teaching or administrative licenses.

South Africa has recently adopted a Children's Act³ which aims at, among other things, "to give effect to ... constitutional rights of children ..." such as keeping them safe from "maltreatment, neglect, abuse or degradation", advancing their well-being⁴ and ensuring that their best interests are regarded as of paramount importance in all relevant matters.⁵ Moreover, the Criminal Law (Sexual Offences and Related Matters) Amendment Act (Criminal Law Amendment Act)⁶ sets out to "provide adequate ... effective protection to the victims of sexual offences" in order to minimize ensuing victimization and traumatisation.⁷ While both these Acts are clearly timeous reactions to an increased incidence of sexual offences specifically against women and children, three pertinent questions that now need to be raised are (1) whether the legal system offers those accused of sexual offences,

1 189 P3d 139, 155 1234 Ed Law Rep 1007 Wash 2008.

2 *Idem*.

3 38 of 2005.

4 *Idem* s 2(b), 2(b)(iii) and 2(b)(i).

5 *Idem* s 2(b)(iv), 7(1) and 9. See also s 28(2) of the Constitution of the Republic of South Africa, 1996.

6 32 of 2007.

7 *Idem* Preamble.

protection from false and/or unsubstantiated accusations;⁸ (2) how the “weighting effect”⁹ or balancing should apply to determining an appropriate balance between a teacher’s right to privacy and the public’s interest in schools that are free from sexual offences; and (3) the role of the fact-finding process in determining the credibility of witness testimony.¹⁰

This presentation will address teacher misconduct and privacy by exploring the United States and South African approaches to the public’s right to know whether those persons responsible for the education of their children have been charged with sexual misconduct, the extent to which investigations by schools or other public agencies should be appropriate vehicles for investigating allegations without the need for disclosing teacher names, and what privacy expectation teachers have during the investigation.

2 The United States Experience

While at school, United States students are protected from employee abuse by a comprehensive network of state statutes and regulations that can result in criminal sanctions, civil damages,¹¹ and professional discipline¹² where an investigation has produced evidence of sexual abuse.

8 See, for example, the unreported case of *HK van Niekerk v The State* Case No A215/2007 TPD and the District Court Kimberley case of *S v Du Plessis* Case No ASOC 122/2004: both of them teachers who were eventually found innocent of the sexual charges learners brought against them.

9 *S v Dodo (Dodo)* 2001 1 SACR 594 CC 595.

10 See *Vilakazi v S* [2008] 4 All SA 396 (SCA); *S v B* 2006 1 SACR 311 SCA at 316.

11 The issue of civil damages presents two separate aspects in the US: the first aspect is whether a teacher can sue school officials or the school board where personally identifiable information has been released about the teacher without consent. See, in this regard, Prosser *Privacy* 1960 *Cal L Rev* 383 398, describing a private facts tort as an extension of defamation, except that the private facts tort punishes the publication of truthful non-newsworthy matter that is damaging to a person’s reputation. The second aspect of civil damages is whether the school district is liable in damages for teacher sexual misconduct with students. See McQuillin *The Law of Municipal Corporations 16B* (2011) par 13.25, indicating that where there is no conspicuous, plain, and clear reason to exclude liability coverage for teachers’ criminal acts of sexual misconduct with students, the teacher is covered by the district’s policy to the extent that the teacher is considered to have committed a “wrongful act” under the school board’s liability policy.

12 Beckham *Meeting legal challenges* (1996) 70-73; Thomas, Cambron-McCabe and McCarthy *Public school law – teachers’ and students’ rights* (2009) 415-418, indicating that inasmuch as teachers are viewed as student role models the threshold for determining when a teacher acts immorally is fairly low and acts of moral turpitude, criminal convictions, and sexual misconduct with students constitute the typical grounds for disciplinary action on the grounds of immorality). But see *Matter of Renewal of Teaching Certificate of Thompson* 893 P2d 301, 99 Ed Law Rep 1108 Mont 1995,

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These sanctions, though, have not always been successful in preventing student sexual abuse and, among a comprehensive compilation by the United States Department of Education of student sexual misconduct studies,¹³ one such study reported that 9.6 percent of all children in grades 8-11 have been subjected to educator sexual misconduct.¹⁴ From a broader perspective, “[m]ore than 4.5 million students are subject to sexual misconduct by an employee of a school sometime between kindergarten and 12th grade.”¹⁵

As pointed out before, the issue of this paper concerns itself with the extent to which members of the public, including the media and parents, are entitled to know the names of teachers against whom allegations of sexual misconduct have been made. While some investigations do in fact result in a finding of teacher misconduct, most either find the charges as false or unsubstantiated for lack of evidence.

The recent decision of the Supreme Court of Washington in *Bellevue*¹⁶ addresses whether these school official investigations are adequate for finding and punishing abusive teachers or not. Moreover, the decision also point out that teachers’ privacy interests in their identity and the public’s interest in schools that are free from sexual misconduct of publically paid teachers need to be balanced when looking at whether the names of teachers against whom charges of sexual misconduct have

where the board of education's order denying the renewal of a teaching certificate on the grounds of the moral unfitness of a teacher accused of and acquitted on criminal charges of sexual misconduct with students was clearly in violation of teacher's due process rights, and the trial court properly reversed the board's order, where the decision of the board was clearly erroneous and unsupported by substantial evidence.

13 US Department of Education, Office of the Under Secretary, Policy and Program Studies Service “Educator Sexual Misconduct: A Synthesis of Existing Literature” Washington DC Doc # 2004-09 2004. Report is available at: www.ed.gov/rschstat/research/pubs/misconduct

14 See Shakeshaft “Educator sexual abuse” 2003 *Hofstra Horizons* 10-13; also an analysis of the Shakeshaft data by the American Association of University Women reported in *Educator Sexual Misconduct*, where students were asked to respond to the following kinds of teacher sexual abuse:

“Made sexual comments, jokes, gestures, or looks; Showed, gave or left you sexual pictures, photographs, illustrations, messages, or notes; wrote sexual messages/graffiti about you on bathroom walls, in locker rooms, etc.; spread sexual rumors about you; said you were gay or a lesbian; spied on you as you dressed or showered at school; flashed or “mooned” you; touched, grabbed, or pinched you in a sexual way; intentionally brushed up against you in a sexual way; pulled at your clothing in a sexual way; pulled off or down your clothing; Blocked your way or cornered you in a sexual way; forced you to kiss him/her; forced you to do something sexual, other than kissing.”

The result of this survey was that “9.6 percent of all students in grades 8 to 11 report[ed] contact and/or noncontact educator sexual misconduct that was *unwanted*.” *Educator Sexual Misconduct supra*. Of this number, “6.7 percent reported physical sexual abuse.” *Idem* 18.

15 *Idem* 18.

16 *Bellevue John Does v Bellevue Sch Dist No 405* 189 P3d 139.

been brought should be made public even before the investigations have been completed.

2 1 *Bellevue*: Facts and Court Decisions

The majority and dissenting opinions in *Bellevue*¹⁷ present dramatically different perspectives as to the appropriateness of teacher sexual misconduct investigations by school officials and as to whether teachers should have any privacy interests regarding conduct that occurs during their employment responsibilities.

2 1 1 *Facts and Trial Court Decision*

The *Seattle Times* newspaper applied under the state's Public Disclosure Act (PDA)¹⁸ (recodified as the Public Records Act (PRA))¹⁹ for "seeking copies of all records for three school districts relating to allegations of teacher sexual misconduct in the preceeding 10 years."²⁰ Washington's PRA defines a public record broadly as

any writing containing information relating to the conduct of government or the performance of any governmental or proprietary function prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics.²¹

The PRA protects an employee's privacy to the extent that any disclosure of employee information "(1) [w]ould be highly offensive to a reasonable person, and (2) is not of legitimate concern to the public."²² To the degree that making information public would represent "an unreasonable invasion of personal privacy ... an agency *shall delete identifying details* in a manner consistent with this chapter when it makes available or publishes any public record."²³ However, the Washington Code accords a "good faith" exemption to any public agency or employee that releases information while attempting to comply with the provisions of this chapter.²⁴ The Washington Code goes so far as to require that, except for pending civil or criminal investigations or charges or a contrary request from the employee, "[a]ll information determined to be false and all such information in situations where the employee has been fully exonerated of wrongdoing, shall be promptly destroyed."²⁵

Pursuant to the *Seattle Times*' request, the three school districts identified 55 current and former teachers who fitted the profile and, pursuant to the PRA, they notified the teachers of the request. Of the 55 teachers, 37 responded with a lawsuit alleging that "the release of

17 *Idem*.

18 Rev Code of Wash, ch 42.17.

19 Rev Code of Wash, ch 42.56. A change in the name from PDA to PRA did not change the statutory content as affecting this case.

20 *Bellevue John Does v Bellevue School District No 405* 189 P3d 139 143.

21 Rev Code of Wash ch. 42.56.010(2).

22 *Idem* ch 42.56.050.

23 *Idem* ch 42.56.070 (1) (emphasis added).

24 *Idem* ch 42.56.060.

25 *Idem* ch 41.06.450(1)(b), (2)(a) and (b).

records identifying them with accusations of sexual misconduct would be an invasion of privacy.”²⁶ The school districts released to the newspaper the unredacted records of the 18 teachers who did not join the lawsuit,²⁷ in addition to having earlier released

numerous records [regarding the 37 teachers] documenting the nature of the allegation in each case [against the teachers], the grade level[s] [they taught], the type of investigation conducted [by the school district], and any disciplinary action taken [by the district]... [but without] disclosure of [the 37 teachers'] real names.²⁸

Against a backdrop of PRA statutory policy that “free... open examination of public records is in... public interest, even [if] such examination may cause inconvenience or embarrassment to public officials”²⁹ and after considering documentary evidence introduced by the plaintiff teachers, the trial court ordered the disclosure of 22 of the 37 teachers' records where “alleged misconduct was substantiated, [where the misconduct had] resulted in some form of discipline, or [where] the school district's investigation [had been] inadequate.”³⁰ Twelve of the 22 teachers sought review of the order for the disclosure of their names and the *Seattle Times* was permitted to intervene “seeking release of identifying information for the 15 [of the 37] prevailing John Does.”³¹

2 1 2 Appeals Court Decision

The Washington appeals court held that the names of all but three teachers had to be disclosed to the *Seattle Times*, including those in the group of 15 who had been excluded from disclosure by the trial court, holding that non-disclosure did not apply to “unsubstantiated [allegations] or [those] determined not to warrant discipline”³² or to teachers who had received “letters of direction.”³³ In effect, the appeals court limited non-disclosure only to those fact situations where an investigation had occurred and “an allegation against a teacher [was] plainly false.”³⁴ For the three appeals cases where nondisclosure was not required under the PRA, the appeals court found those cases to involve

26 *Bellevue John Does 1-11 v Bellevue Sch Dist No 405* 120 P3d 616, 620 202 Ed Law Rep 346 Wash Ct App 2005.

27 *Bellevue John Does v Bellevue School District No 405* 189 P3d 139 143.

28 *Bellevue John Does 1-11 v Bellevue Sch Dist No 405* 120 P3d 621.

29 Ch 42.56.550 (3) PDA.

30 *Bellevue John Does v Bellevue Sch Dist No 405* 189 P3d 139.

31 *Ibid.*

32 *Bellevue John Does 1-11 v Bellevue Sch Dist No 405* 120 P3d 616 620.

33 *Idem* 623-24. In Washington, “[a] counseling letter, or ‘letter of direction’, is a practice a district may use to respond when it views a teacher's conduct as inappropriate but not serious enough to warrant a reprimand or other discipline.” *Idem* 621.

34 *Idem* 627.

reports that were “blatant fabrication”³⁵ or “patently false.”³⁶

2 1 3 Supreme Court Majority Decision

The Supreme Court of Washington, in a complicated and divided 5-3 opinion, partly reversed the appeals court decision. In effect, this court had to establish whether “the identities of teachers who are the subjects of allegations” and information in letters of direction were “personal information” under the PRA “to the extent that disclosure would violate [the teachers’] right to privacy.”³⁷ In its interpretation of the PRA, the majority decision firstly observed that

the public lacks... legitimate interest in... identities of teachers [subjected to] unsubstantiated allegations of sexual misconduct because [their] identities do not aid in effective government oversight by... public and... teachers' right to privacy [is independent of] the quality of... school districts' investigations.³⁸

Secondly, the majority opined that

the [PRA] mandates disclosure of letters of direction... [but] where a letter simply... guide[s] future conduct, does not mention substantiated misconduct, and a teacher is not disciplined or subject to any restriction, the name and identifying information of the teacher should be redacted.³⁹

Moreover, the court held that “teachers’ identities” and letters of direction “contain[ing] information regarding the school districts' criticisms and observations of the DoE employees that relate to their competence as education professionals,” constituted “personal information”⁴⁰ under the statute, and were therefore subject to the

35 A complaint involving a teacher “sitting out in the hallway with a middle school girl on his lap turned out to be a blatant fabrication by an unruly student whose credibility was completely undermined by an immediate investigation.” *Idem* 628.

36 Two complaints involved rape, one an “accusation that the teacher was guilty of violent rape, kidnapping, and satanic torture[,] was completely implausible [because it lacked any] corroborat[ion] by physical evidence, [and] no one reading the file would reasonably believe that the allegations against [the teacher] were anything but fabrications”. *Idem* 627. A second complaint concerning “an individual with a well documented history of psychiatric problems [that] was purportedly based on a memory suppressed for 15 years ... [and during the investigation produced no] corroborative evidence ... [but did reveal that] ... [t]he accuser and her mother both admitted to the investigator that the police report had been filed with the thought of getting money from the teacher.” *Idem* 627-28.

37 Rev Code of Wash ch 42.56.230(2): “Personal information in files maintained for employees, appointees, or elected officials of any public agency to the extent that disclosure would violate their right to privacy.”

38 *Bellevue John Does v Bellevue Sch Dist No 405* 189 P3d 139.

39 *Idem* 153.

40 *Idem*. The court found this definition similar to other states within the Ninth Circuit. See for example Alaska Stat 40.25.350(2) 2006 (“information that can be used to identify a person and from which judgments can be made about a person's character, habits, avocations, finances, occupation, general reputation, credit, health, or other personal characteristics”); Cal Civ Code 1798.3(a) West 2005: “any information that is maintained by an agency that identifies or describes an individual, including, but not limited to, his or her

statutory limitation on invasion of privacy. The *Bellevue*⁴¹ Supreme Court was constrained by two of its earlier opinions reaching opposite results regarding disclosure, the first, *Brouillet v Cowles Publishing Co*,⁴² deciding that the public had a legitimate interest in information about the revocation of a teacher's certification involving "the extent of *known* sexual misconduct in schools,"⁴³ and the second, *Dawson v Daly*⁴⁴ that disclosure of a deputy prosecutor's performance evaluation was not required under the PRA because it would have violated the prosecutor's right to privacy.⁴⁵

In both of these decisions, the Washington Supreme Court had relied on the definition of "invasion of privacy" in the Restatement of Torts:

[o]ne who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of privacy, if the matter publicized is of a kind that (a) would be highly offensive to a reasonable person and (b) is not of legitimate concern to the public.⁴⁶

However, in *Brouillet*, the supreme court had never reached the question as to "whether teachers have a right of privacy in *unsubstantiated* allegations of sexual misconduct,"⁴⁷ and in *Dawson*, whether disclosure of a performance evaluation "would violate the prosecutor's right of privacy [where] it would be highly offensive and the public [did] not have a legitimate concern in such information."⁴⁸

In *Bellevue*, the Supreme Court addressed the unanswered question from *Brouillet*, holding that "unsubstantiated or false accusation[s] of sexual misconduct [do not involve] action taken by an employee in the course of performing public duties [and thus]... are matters concerning the teachers' private lives."⁴⁹ In essence, the Supreme Court determined that where "the fact of the allegation, not the underlying conduct ... lacks any evidence that misconduct ever occurred," the court refused to permit "the teacher's performance or activities as a public servant ... [to be] held

name, social security number, physical description, home address, home telephone number, education, financial matters, and medical or employment history."

41 *Bellevue John Does v Bellevue School District No 405* 189 P3d 139.

42 791 P2d 526, Ed Law Rep 638 Wash 1990.

43 *Idem* 147 (emphasis added), citing *Brouillet v Cowles Publishing Co* 791 P2d 526, 532, 530 Ed Law Rep 638 Wash 1990 (holding that disclosure of teacher records was permissible as "effective law enforcement" under state statute because revocation of a teacher's license involves the "imposition of sanctions for illegal conduct.")

44 845 P2d 995.

45 *Idem*: "if public employees were aware that their performance evaluations were freely available to their co-workers, their neighbors, the press, and anyone else who cares to make a request under the act, employee morale would be seriously undermined."

46 Restatement (second) of torts par 652D 1977.

47 *Bellevue John Does v Bellevue Sch Dist No 405* 189 P3d 139 147 (emphasis added).

48 *Ibid*.

49 *Idem* 147-48.

up to hatred and ridicule in the community.”⁵⁰ This court found the appeals court’s distinction between reportable “unsubstantiated” claims and unreportable “patently false” claims to be a “vague and impractical” one that placed “unworkable [and] time consuming ... [burdens] on agencies and courts ... likely to lead to radically different methods and conclusions.”⁵¹

In holding that “[w]hen an allegation is unsubstantiated, the teacher’s identity is not a matter of legitimate public concern,” the Supreme Court of Washington rejected the *Seattle Times* argument that “the public has a legitimate concern in monitoring the school districts’ investigations of sexual misconduct and the identity of the accused is imperative to the effectiveness of such monitoring.”⁵² The court refused to make “the quality of a school district’s investigation” a relevant factor in determining teacher privacy because “the accused [teacher] has no control over the adequacy of the investigation.”⁵³

The *Bellevue* majority opined that even in the case where school districts were conducting

less than acceptable investigations and permit teachers (whose reputations have not been cleared by thorough investigations) to avoid public scrutiny of their alleged misconduct... the public can [still] access documents related to the allegations and investigations (*subject to redactions*), thus maintaining the citizens’ ability to inform themselves about school district operations.⁵⁴

Similarly, the public is entitled only to redacted letters of direction in teacher personnel files where the letter “does not identify unsubstantiated misconduct and the teacher is not disciplined or subjected to any restriction.”⁵⁵ Even with redactions of teacher identities, the public’s interest is still protected “in overseeing school districts’ responses to allegations...[by] giv[ing] citizens a complete picture of a school district’s investigations and accompanying procedures.”⁵⁶

2 2 Analysis and Implications of *Bellevue*

Bellevue specifically addresses the difficult policy question of how much information about sexual misconduct complaints involving teachers should be disclosed. The policy reasons against disclosure are arguably more persuasive where allegations of sexual misconduct have been found to be false, but one has to assume that even in such cases the investigation of those allegations was adequate. Thus, for purposes of this paper, all allegations in the United States - those found to be false, substantiated, and unsubstantiated - will be included together since,

50 *Ibid.*

51 *Idem* 149.

52 *Idem* 150

53 *Idem* 150-51.

54 *Idem* 151 (emphasis added).

55 *Idem* 152.

56 *Idem* 153.

whatever differing privacy interests may be asserted by teachers, and those privacy interests depend arguably on the adequacy of the investigations.

Although issues concerning teacher privacy and disclosure of information are state specific,⁵⁷ the overarching issue regardless of current state law, is whether teachers *should have a protectable privacy interest at all* in complaints about their performance as a public employee. Whether information requested for disclosure should be denied as an invasion of privacy is the threshold issue in all jurisdictions, although courts do not reach the same conclusions.⁵⁸ Generally, courts have held that information regarding teacher sexual misconduct can be revealed as long as the teacher's name is redacted.⁵⁹ However, as suggested by the dissent opinion in *Bellevue*, redacting information about teacher identities whenever a student claim cannot be substantiated may only serve to send the message to the public that when "predatory teachers ... go undetected, ... children will continue to suffer at their hands."⁶⁰

Bellevue also, among others, highlights two policy questions related to allegations of teacher sexual misconduct: (1) whether school officials or board members are the appropriate persons to investigate allegations of teacher sexual misconduct and to make decisions regarding the substantiated or unsubstantiated results of such investigations; and (2) whether sexual misconduct charges related to teacher performance of their public educational duties are (or should be) protected by privacy.

2 2 1 The Investigatory Role of School Officials or School Boards

An appellate brief filed on behalf of thirty of the teachers in this case began with a plea that pointed out that it was vital that the Supreme Court of Washington shielded the identity of teachers "against whom false allegations are made," but then the brief subtly expanded its claim to

57 See *Stern v Wheaton-Warrenville Community Unit School Dist 200*, 894 NE2d 818 237 Ed Law Rep 509 Ill App Ct 2008, in holding that the details of a superintendent's employment contract were not exempt public records under state law, the court observed that "*the disclosure of information that bears on the public duties of public employees and officials shall not be considered an invasion of personal privacy*" (emphasis in original); *Anonymous v Board of Educ for Mexico Cent School Dist 616* NYS2d 867 4 Ed Law Rep 883 NY Sup Ct 1994, holding that a settlement agreement disposing of charges of misconduct against a teacher was subject to disclosure under the Freedom of Information Law.

58 For a comprehensive discussion of cases discussing the balance between disclosure and invasion of privacy, see Nadel "What constitutes personal matters exempt from disclosure by invasion of privacy exemption under state freedom of information Act[s]" 2008 *ALR* 666.

59 See for example, *Booth Newspapers Inc v Kalamazoo School Dist 450* NW2d 286 58 Ed Law Rep 295 Mich Ct App 1989, awarding partial attorney fees to a newspaper that prevailed in securing disclosure of information about allegations of sexual misconduct even though the teacher's name could be redacted.

60 *Bellevue John Does v Bellevue Sch Dist No 405* 189 P3d 139 154.

read that no legal public interest existed in knowing the identity of teachers in cases of “no finding of misconduct and allegations remain unsubstantiated or false after an adequate investigation of those allegations.”⁶¹ Indeed, one of the core issues in this discussion is how the categorization following an investigation should affect disclosure of teachers’ identities.

In the three school districts involved in this case, a person in each was designated as personally responsible for scrutinizing any charges of teacher misconduct and “imposing appropriate discipline where allegations... [were] substantiated and issuing letter[s] of direction when allegations [were] not.”⁶² The advantage of such a letter, for both the school district and the employee, was that it did not amount to a finding of misconduct or that the employee had transgressed a District policy. Therefore its significance as “[an] evaluative tool [was] ... [that] the employee... avoid[ed] [the] time-consuming grievance process”⁶³ that is normally associated with employee discipline.

Yet the school districts’ position in *Bellevue* was that:

[r]eleasing letters of direction would harm the public interest in efficient government administration by interfering with the employer’s ability to give candid advice and direction to its employees and would ... chill employer-employee communications ... if all written communications between the employer and employee were subject to disclosure.⁶⁴

The teachers’ position in *Bellevue* was that there was no public interest in knowing the identity of teachers where “*an adequate or extensive investigation* ... revealed no finding of misconduct [or] imposed [no] discipline.”⁶⁵ However, the adequacy of an investigation and the recommendations of the investigator are two quite different matters and, to follow the reasoning of the teachers in *Bellevue*, the latter can be emphasized at the expense of the former. Thus, if school officials conducting an investigation choose to frame their evaluative comments as “*concerns* about [an employee’s] handling of specific incidents at the schools ... [or] shortcomings and performance criticisms [without] ... discussion of specific instances of *misconduct*,”⁶⁶ the public, even though no consideration has been given to the adequacy of the

61 Appellate Brief of Amicus Curiae Washington Education Association Feb 4, 2005, 2005 WL 5288867 *1 (hereinafter referred to as WEA Appellate Brief).

62 *Idem* *3.

63 *Ibid*.

64 *Idem* *4.

65 *Idem* *5 (emphasis added).

66 *Brown v Seattle Public Schools* 860 P2d 1059, 1063 86 Ed Law Rep 475 Wash Ct App 1993, dealing with a request for evaluation records of a school principal under the prior PDA, not involving sexual misconduct but still involving the same public interest issue.

investigation, should have no right to disclosure.⁶⁷

The trial court in *Bellevue* had refused to defer to the school district's investigation and after "an *in camera* review of the records ... the trial court [had] order[ed] disclosure o[f] the identity of [those] teacher[s] ... [where] there [had] not [been] an adequate investigation,"⁶⁸ a position affirmed by the appeals court.⁶⁹ On appeal, the Supreme Court of Washington in *Bellevue* reversed and refused to make inadequate investigations the basis for unredacted disclosure of teacher identities,⁷⁰ reasoning that school districts could be sued under separate lawsuits for negligent retention or supervision⁷¹ or breach of its supervisory duty to investigate allegations of sexual abuse,⁷² or school districts could be subject to "significant penalties and attorney fees ... if the [school district] fail[ed] to comply with the [PRA]."⁷³

The dissent opinion in *Bellevue* had little confidence in allowing school officials to "control the scope and depth of its investigation,"⁷⁴ adopting what in essence was a "foxes guarding the henhouse" position that such self-investigation would serve to erode public trust and leave the public with the perception that "the school board is not responsive to the

67 *Bellevue John Does v Bellevue Sch Dist No 405* 189 P3d 139 158 Madsen J dissenting: "the majority leaves school districts free to control whether an accused teacher's identity must be released by controlling the scope and depth of its investigation."

68 WEA Appellate Brief *15 and 16. The trial court in *Bellevue* conducted an *in camera* review of all the records sought by *the Seattle Times* and on the basis of that review decided to disclose teachers' records where either there had been substantiated evidence of misconduct or an inadequate investigation. *Bellevue John Does v Bellevue Sch Dist No 405* 189 P3d 139 143.

69 *Bellevue John Does v Bellevue Sch Dist No 405* 189 P3d 139 143.

70 *Idem* 151: "the identities of teachers who are subjects of unsubstantiated complaints should not be disclosed, regardless of the quality of the investigation."

71 See for example, *Peck v Siau* 827 P2d 1108 73 Ed Law Rep 859 Wash Ct App 1992 holding that a school district could not be held liable to a high school student with whom the school librarian had sexual contact, on the theory of negligent supervision of the librarian, absent showing that the district knew, or in exercise of reasonable care should have known, that the librarian constituted a risk of danger to the students. See generally, Miller "Liability, under state law claims, of public and private schools and institutions of higher learning for teacher's, other employee's, or student's sexual relationship with, or sexual harassment or abuse of, student" 2001 *ALR* 86.

72 See for example, *Christensen v Royal Sch Dist No 160* 124 P3d 285 287 204 Ed Law Rep 385 Wash 2005, rejecting a school's claim that a contributory defense should be permitted to an eighth grade student who had sexual contact with a teacher, reasoning that "children do not have a duty to protect themselves from sexual abuse by their teachers" and if the student's lies frustrated the school's investigation, that would relate to the breach of a school's duty to supervise its students.

73 *Bellevue John Does v Bellevue Sch Dist No 405* 189 P3d 139 151.

74 *Idem* 158 (Madsen J dissenting).

taxpayers, and the school board is hiding something.”⁷⁵ In its appellate brief, the *Seattle Times* cited an unreferenced six-week nationwide study that found “at a minimum, hundreds of cases involving sexual abuse of students are unfolding publicly.” The study concluded that school officials “have fallen short in their duty to keep students safe,” resulting in multimillion-dollar jury verdicts for victims or in costly out-of-court settlements.⁷⁶

Some courts have called into question the adequacy of internal investigations of teacher sexual misconduct, particularly where those investigations substitute for reporting the alleged misconduct to social services.⁷⁷ However, even if school districts forgo investigation of sexual misconduct complaints by referring all complaints to social welfare agencies as required under state child abuse statutes,⁷⁸ such referrals do not necessarily require disclosure of the teacher’s identity (including teacher name, certificate/license number, and schools taught at)⁷⁹ if the investigation does not substantiate that sexual misconduct occurred, or if the result generates a “letter of direction” that allegedly is not based on a finding of sexual misconduct. In other words, if a social service agency investigation does not produce a substantiated finding of child abuse,⁸⁰ the public is likely to discover the names of teachers against whom complaints of sexual misconduct have been made only if a student is willing to pursue a lengthy, costly, and cumbersome lawsuit for negligent hiring, supervision or retention.

75 See Stuart “Citizen teacher: damned if you do, damned if you don't” 2008 *U Cin L Rev* 1331, applying the foxes and henhouse argument to school boards after *Garcetti v Ceballos* 547 US 410 2006. The latter allows boards to retaliate and, thus, control teacher speech where that speech is part of a teacher’s job.

76 Appellate Brief of *Seattle Times*, 2004 WL 5252059 *3-4 Wash.

77 See *Yates v Mansfield Bd of Educ* 808 NE2d 861 Ohio 2004, where a school principal conducted the internal investigation of a student’s complaint of coach sexual harassment, determining that the student was lying, but the case was remanded in subsequent damages lawsuit for negligent supervision and retention as to whether the principal had a duty under the state’s child abuse reporting statute to report the alleged harassment to social services under a “knew or reasonably suspected” standard.

78 See http://childwelfare.gov/systemwide/laws_policies/search/, the United States Department of Health and Human Services National Clearinghouse on Child Abuse and Neglect Information listings of each state’s mandatory reporting statutes, what professions are required to report, and which states recognize an exception to mandatory reporting due to privileged communications; Veilleux “Validity, construction, and application of state statute requiring doctor or other person to report child abuse”, 2005 *ALR* 782.

79 See *Seattle Times Appellate Brief**14.

80 See, for example, West’s Ann Cal Penal Code par 11165.12 defining the following results of a social services investigation:

“(a) 'Unfounded report' means a report that is determined by the investigator who conducted the investigation to be false, to be inherently improbable, to involve an accidental injury, or not to constitute child abuse or neglect.

(b) 'Substantiated report' means a report that is determined by the

continued on next page

More troublesome, though, is that even if parents can pursue these negligence claims, actions against state officials for inadequate investigations may be blocked by state immunity statutes.⁸¹

2 2 2 Privacy Rights of Teachers

From the teachers' perspective, the core issue is the extent to which teachers charged with sexual misconduct are government actors subject to public scrutiny or citizens entitled to have their identities shielded from such scrutiny as long as those allegations are not substantiated.⁸² The teachers in *Bellevue* argued that the purpose of the State of Washington's PRA was

to monitor government, ... not to scrutinize individual ..., [and the effort to gain access to teacher records] relating to [other than] actual misconduct ... constitute[d] scrutiny of individuals, not of government.⁸³

For the plaintiff teachers in *Bellevue* the conflict focused on the extent to which teachers in public schools retain the privacy rights of a citizen while they perform their contracted responsibilities in classrooms and other school venues. While the answer to this question is framed to a large extent in a localized context by a state's statutory and common law, it also invokes in the larger context a public policy consideration of the quality of education, a topic discussed in the next section.

The Supreme Court of Washington majority rested its *Bellevue* decision on the privacy rights of teachers' "personal information" under the state's PRA.⁸⁴ Appellate briefs on behalf of the teachers claimed broadly that public disclosure of an accusation of sexual misconduct, especially if unsubstantiated or false, would be highly offensive under state law because such release would taint a professional teacher's career and shed doubts on the character of the accused teacher.⁸⁵ The argument contrary to the *Bellevue* majority is that complaints of teacher sexual misconduct have to be disclosed because "a teacher's conduct with his or her students ... on the job is not a private matter ... [nor does it] relate to 'the intimate details of one's personal and private life.'"⁸⁶

investigator who conducted the investigation to constitute child abuse or neglect, based upon evidence that makes it more likely than not that child abuse or neglect, as defined, occurred.

(c) 'Inconclusive report' means a report that is determined by the investigator, who conducted the investigation not to be unfounded, but the findings are inconclusive and there is insufficient evidence to determine whether child abuse or neglect . . . has occurred."

81 See for example, *BT v Santa Fe Pu Schs* 506 FSupp2d 718 225 Ed Law Rep 300 DNM 2007

82 See the Reply Brief of Appellant Bellevue John Doe Np 11 (May 28 2004) *3 (hereinafter referred to as "Reply Brief of John Doe #11").

83 *Idem* *11.

84 *Bellevue John Does v Bellevue Sch Dist No 405* 189 P3d 139.

85 See *WEA Appellate Brief* *9; *Reply Brief of John Doe #11* *4.

86 Supplemental brief of respondent *Seattle Times Company* Feb 2 2007 *2 (hereinafter referred to as "*Sup. Seattle Times Brief*"). See *Spokane Police*

continued on next page

Courts have taken three approaches to disclosing education-related information regarding sexual misconduct: (1) Some courts have rationalised disclosure of personal identities where such disclosure would not only “encourage... the public [to] evaluate the expenditure of public funds and the efficient and proper functioning of its institutions, but also to foster confidence in government through openness to the public;”⁸⁷ (2) however, even when ordering disclosure, other courts have taken the *Bellevue* majority approach that complaint or grievance records are discoverable only after individual identity material has been redacted;⁸⁸ and, (3) yet other courts have adopted the *Bellevue* trial court approach that information can be disclosed after an *in camera* hearing to determine if disclosure would constitute an invasion of privacy.⁸⁹

Privacy in its broadest meaning is the protection of an individual's interest in making decisions free of government interference.⁹⁰ The United States Supreme Court has recognized that the Liberty Clause of the Fourteenth Amendment⁹¹ protects “a right of personal privacy”⁹² that includes “the interest in independence in making certain kinds of important decisions.”⁹³ However, the right to make decisions without government interference is not without limits. For public school teachers, their expectation of privacy, one can argue, is diminished by the reality that they have been employed to instruct students, most of whom are

Guild v Washington State Liquor Control Bd 769 P2d 283 Wash 1989, holding that an investigative report regarding the investigation of liquor law violations on policy guild property had to be disclosed, because under state law it would not be highly offensive to a reasonable person and was not of legitimate concern to the public.

- 87 See *Athens Observer Inc v Anderson* 263 SE2d 128 130 Ga 1980, upholding the disclosure of a consultant's evaluative report of the mathematics department with comments on the faculty, because the public policy was not only to encourage public access to such information in order that the public could evaluate the expenditure of public funds in the efficient and proper functioning of its institutions, but also to foster confidence in government through openness to the public.
- 88 See *United Federation of Teachers v New York City Health and Hospitals Corp* 428 NYS2d 823 NY Sup Ct 1980, upholding under the state Freedom of Information Act, the disclosure of grievances and decisions rendered on grievances filed by registered nurses represented by competing union, but only after all personal identifying details were redacted and deleted from the records.
- 89 See *News and Observer Pub Co v State ex rel Starling* 309 SE2d 731-732 NC Ct App 1983, upholding the trial courts disclosure of an investigative report of a school superintendent after balancing the interests of disclosure and confidentiality, reasoning that the public's interest prevailed “as to how the official is functioning who is entrusted with responsibility for the day-to-day operations of the Wake County Public Schools”.
- 90 See for example, *Littlejohn v Rose* 768 F2d 765 26 Ed Law Rep 955 6th Cir 1985, cert. denied, 475 US 1045 1985, where a non-tenured teacher's privacy right might have been violated if the school board's non-renewal decision was based on her divorce.
- 91 US Const amend XIV par 1 (“[No] State shall ... deprive any person of life, liberty or property without due process of law”).
- 92 *Roe v Wade* 410 US 113 152 1973.
- 93 *Whalen v Roe* 429 US 589, 599-600 1977.

minors required under state compulsory attendance laws to attend school.

3 A Perspective on the Law in South Africa

There is a world-wide concern and growing awareness of the particular vulnerability of children and of the fact that child abuse, including sexual exploitation of children, is a serious and ever-escalating problem. In South Africa, unfortunately, the extent of this problem is truly appalling.

In accordance with this, according to the objectives of the Criminal Law Amendment Act,⁹⁴ all complainants of sexual offences are afforded the maximum and least traumatizing protection the law can provide which, among other things, include guarding against the possible secondary victimization of these complainants and their families.⁹⁵ While this would then serve as legislation aimed at safeguarding the constitutional rights of especially young complainants by considering their best interests to be of paramount importance,⁹⁶ the question arises as to how, for example, a teacher's right to privacy⁹⁷ is balanced against the public's interest in having schools free from, among other things, the sexual misconduct of publically paid teachers.⁹⁸

Reciprocating the protection granted to complainants of sexual offences, one would thus expect to see that the persons accused of such transgressions are afforded protection from false or unsubstantiated accusations, while at the same time taking note of the fact-finding process after a learner has filed a complaint of sexual misconduct against a teacher.

3 1 The Panoply of Constitutional Rights in South Africa

The fundamental rights are prefaced at the beginning of both the Constitution⁹⁹ and the Bill of Rights¹⁰⁰ with the three seminal values of human dignity, equality and freedom. The former of these three, human dignity, which is expounded as everyone's "inherent dignity and the right to have [it] respected and protected,"¹⁰¹ appears to be central¹⁰² to a

94 S 2 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.

95 *Idem* s 2(d).

96 S 28(2) of the Constitution of the Republic of South Africa, 1996.

97 *Idem* s 14; see also ss 9, 10, 12 and 33.

98 S 17(1)(b) and (c) of the Employment of Educators Act 76 of 1998, which point out certain dismissal of educators who have been found guilty of acts of sexual assault on and/or sexual relationships with learners.

99 S 1(a) of the Constitution of the Republic of South Africa, 1996 provides "The Republic of South Africa is a democratic state founded on human dignity, the achievement of equality and the advancement of human rights and freedoms."

100 *Idem* s 7(1) which also describes the Bill of Rights as "a cornerstone of democracy."

101 *Idem* s 10.

102 See *S v Makwanyane* 1995 6 BCLR 665 CC 722-23.

society founded on democracy.¹⁰³ At the same time, it is the only one of the three seminal values which does not have a direct counterpart in the United States Constitution. While the wide-ranging exact grants of fundamental rights in the South African Constitution would seem to invite numerous legal challenges,¹⁰⁴ the number of cases which address concerns in education law to date has been fairly limited and the number of cases dealing with teachers' privacy rights even more so.

3 1 1 A Teacher's Right to Human Dignity¹⁰⁵

In a disconcerting case, it took a female teacher of the public Orkney High School four years, six months and fifteen days to be able to hold her head high after having been accused of the indecent assault of a fifteen-year-old schoolboy. The learner accused his teacher in 2003 of having fondled him, having played with his genitals and having had sex with him on a desk in the classroom. She was accordingly found guilty on two accounts of indecent assault.¹⁰⁶

On appeal, the High Court¹⁰⁷ pointed out (1) that it was confronted with two mutually exclusive versions of the events¹⁰⁸ and that it had to adjudicate the reliability of the complainant and the appellant separately,¹⁰⁹ (2) that a Court had to acquit accused persons if any reasonable possibility existed that their testimony could be true,¹¹⁰ and (3) that the complainant was a single witness¹¹¹ of a young age and that the case revolved around accusations of sexual misconduct.¹¹² The latter three factors traditionally call on a court to evaluate the factual position of such a case extremely carefully.¹¹³

Contrary to the original court proceedings that found the complainant to be a trustworthy and reliable witness based solely on the fact that the Magistrate thought that he fitted the psychic profile of a molested child,¹¹⁴ the High Court stated that the available evidence of parental violence and threats¹¹⁵ against him sounded a warning to be wary of his testimony.¹¹⁶ At the same time, the Court referred to the possibility that the complainant never intended to accuse the teacher of sexual relations,

103 Preamble to the Constitution of the Republic of South Africa, 1996.

104 See Mawdsley and De Waal "Symbolism in education: a comparative legal analysis of symbolism, language and culture in the United States and South Africa" 2008 *De Jure* 561-579.

105 S 10 of the Constitution of the Republic of South Africa, 1996.

106 Sentence was handed down by the regional court at Klerksdorp in 2003.

107 *HK van Niekerk v The State* Case No A215/2007 TPD.

108 *Idem* par 3.

109 *Idem* par 7. See also par 15.

110 *Ibid.*

111 *Idem* par 8.

112 *Idem* par 8. See also par 4.

113 *Ibid.*

114 *Idem* par 16.

115 *Idem* paras 9 and 23.

116 *Idem* paras 24-25. See also par 22.

but merely originally mentioned her touching him inappropriately to stay out of trouble.¹¹⁷

In reflecting on the fact-finding process of the regional court,¹¹⁸ the High Court opined that the Magistrate's criticism of the appellant's trustworthiness simply because she had appointed a private investigator to help her with her defence and was not fully forthcoming in this regard, was unjustified.¹¹⁹ Moreover, the High Court remarked that the regional court's critique on the appellant's testimony was mostly unjustified and thus did not reflect negatively on her trustworthiness,¹²⁰ indicating that the Court could not reject her version as not reasonably possibly true.¹²¹ Finally the High Court found that there were a number of improbabilities in the complainant's testimony,¹²² and that Van Niekerk's testimony deserved the benefit of the doubt.¹²³

Van Niekerk's appeal against the guilty conviction was upheld, she was found not guilty and the sentence handed down by the court *a quo* was set aside.¹²⁴ Moreover, although Van Niekerk has since left education apparently due to medical reasons,¹²⁵ she refers openly to the humiliation and trauma which she suffered¹²⁶ before winning her appeal on two charges of indecent assault.

This High Court judgment is reminiscent of the fact that teachers at public schools are also entitled to having their innate dignity revered and looked after,¹²⁷ and that the investigation into the credibility of witness testimony needs a careful fact-finding process after a complaint of sexual misconduct has been filed, in order to offer protection from false or unsubstantiated accusations to the accused teacher.

3 1 2 A Teacher's Right to Equal Protection and Benefit of the Law¹²⁸

In *S v Marais*¹²⁹ a male teacher was accused of two accounts of indecent assault on a nineteen-year-old female learner. On the first charge of the teacher's approaching her and rubbing his genitals against her arm while

117 *Idem* par 25. See also par 11.

118 *Idem* paras 21, 22, 30 and 32.

119 *Idem* paras 18 and 34.

120 *Idem* paras 34-36.

121 *Idem* par 36.

122 *Idem* par 21.

123 *Idem* par 37.

124 *Idem* paras 1 and 37(2).

125 *Beeld* (2002-01-15) 4.

126 *Ibid.* The female educator, Van Niekerk, described the four years as being an ordeal and of having been literally stripped naked in court; see also s 10 of the Constitution of the Republic of South Africa, 1996, which recognizes human dignity both as a human attribute and a fundamental right.

127 S 10 of the Constitution of the Republic of South Africa, 1996.

128 *Idem* s 9(1).

129 Regional court held at Kimberley, Case No ASOC 122/2204.

she was writing a test,¹³⁰ the complainant's original statement in court was inconclusive as to which part of the teacher's body was involved in the alleged assault, since she reported not being able to remember clearly.¹³¹ However, contrary to this testimony, during cross-examination led by her legal representative, she firmly recollected that the teacher had rubbed his genitals against her arm.¹³²

When her female friend who sat in front of her in the class during the test gave evidence, new facts were mentioned concerning the first charge¹³³ and the court found her testimony not to be the truth.¹³⁴ However, the Court found the complainant's boyfriend to be the most credible witness of the three, based on the fact that (1) he suggested that the complainant speak to his mother, a teacher, about the incident,¹³⁵ and (2) he admitted to the court that he would not have handled the incidents as the complainant did.¹³⁶

On the second charge of the teacher having touched her genitals,¹³⁷ the complainant's original statement in court contained testimony to the fact that he had touched her breasts over her jacket and proceeded to touch her genitals over her jeans.¹³⁸ Yet during cross-examination led by her legal representative, she indicated this as having occurred when he placed his hands inside her jacket.¹³⁹

Turning to the matter at hand, the regional court first of all referred to the duty that the State has to prove the case beyond a *reasonable* doubt and not beyond *every inkling* of doubt.¹⁴⁰ In the second case, the court stated that accused persons do not have the responsibility to prove their innocence themselves,¹⁴¹ and in the last instance, the Court pointed out that clear verdicts of criminal cases relied on considering all probabilities and improbabilities.¹⁴²

As was the case with *Van Niekerk* above,¹⁴³ the regional court pointed out the care that had to be taken with the complainant's testimony in this

130 *Idem* par 2.

131 *Idem* par 6.

132 *Idem* paras 6-7.

133 *Idem* paras 7, 10 and 11.

134 *Idem* paras 10-11 and 15.

135 *Idem* paras 8-9.

136 *Idem* paras 14-15.

137 *Idem* par 2.

138 *Idem* paras 7-8.

139 *Idem* par 8.

140 *Idem* par 3. The regional court referred to *S v Tsele* 1998 2 SASV 178 A 182 E where the Appellate Division reminded everyone of the duty the State has to prove guilt beyond a reasonable doubt and not beyond any inkling of doubt.

141 *S v Alex Carriers* 1998 3 SA 79 T, where the Provincial Court stated that it was not necessary for the accused person/s to push the wall of guilt over the side of the State.

142 *Idem* par 4.

143 *HK van Niekerk v The State* Case No A215/2007 TPD.

matter, since she was a single witness.¹⁴⁴ While the court reminded everyone that it can pronounce a judgment of guilt based on the evidence of an only witness,¹⁴⁵ it also commented on having to search for guarantees of reliability when considering accepting the evidence of a single witness¹⁴⁶ and being confronted with two sets of facts in this case.¹⁴⁷

Due to the many inconsistencies and improbabilities in the statements of the two state witnesses and the learner,¹⁴⁸ as well as questionable honesty on the side of the complaining learner,¹⁴⁹ the court decided that since it could not be proven beyond a reasonable doubt that the accused was guilty, he was found to be innocent.¹⁵⁰

This court judgment therefore serves as a reminder that also teachers are entitled to be presumed innocent until proven guilty,¹⁵¹ and that the fact-finding process can be managed carefully even at regional court level.

3 1 3 A Teacher's Right to Freedom and Security¹⁵²

In 2002 two schoolgirls charged the principal of Brooklyn Heights Primary School in Crossmoor, Chatsworth, with rape and indecent assault and he was thus immediately suspended from his position. Four years later, the suspended principal was acquitted of all charges.¹⁵³ He prepared documentation to enable the Department of Education to reinstate him towards the end of 2006 and started the process of suing the parents of the two girls who accused him for R5 million.

A case dealing with sexual offences in a context other than education, *S v Fhetani*¹⁵⁴ concerned itself with looking at whether the Venda High Court had facts before it to "establish that the appellant was guilty of rape."¹⁵⁵ The appellant was 23 years old at the time of the original trial, completing Grade 12 at school,¹⁵⁶ and he was only 15 years old when the offence was committed.¹⁵⁷ He was arraigned in the Venda High Court on a charge of rape, or alternatively unlawful sexual intercourse

144 *Idem* par 8.

145 S 208 of the Criminal Procedure Act 51 of 1977.

146 *Ibid.*

147 *HK van Niekerk v The State* Case No A215/2007 TPD paras 4-5.

148 *Idem* par 10.

149 *Idem* par 9.

150 *Idem* paras 15-17.

151 S 35(3)(h) of the Constitution of the Republic of South Africa, 1996; *S v Dodo* 2001 1 SACR 594 CC paras 386 and 403.

152 S 12 of the Constitution of the Republic of South Africa, 1996.

153 *Hurt and Ndlovu JJ*, sitting in the Pietermaritzburg High Court in October 2006, found the story against the suspended principal to have been fabricated.

154 [2007] ZASCA 113.

155 *Idem* par 3.

156 *Idem* par 9.

157 *Ibid.*

with a girl younger than 16 years, and he pleaded guilty to the alternative charge.¹⁵⁸

On appeal, the Supreme Court questioned the fact-finding process of the trial court, pointing out that the latter had been “under the impression that there were facts” that proved that the appellant was guilty of rape and therefore “sentenced him accordingly”.¹⁵⁹ However, the trial court had erred since “no evidence was led at the trial”¹⁶⁰ and it had “impermissibly relied” solely on the synopsis of important facts to reach its findings.¹⁶¹ Such a synopsis does not represent evidence or admitted facts, but merely serves the purpose of bringing the accused person up to date with the substantial facts on which the prosecution relies.¹⁶²

In this case, the trial court’s “misdirections”¹⁶³ and its incorrect approach in assessing the punishment,¹⁶⁴ led to it handing down “an excessively disproportionate sentence.”¹⁶⁵

At the time of the appeal, the appellant had in actual fact already served five years in prison, because although bail was granted, it was set at “an exorbitant amount of R10,000.”¹⁶⁶ The reasons offered to the court for the delay in conducting the appeal, were seen to be “unsatisfactory” and “unacceptable.”¹⁶⁷ Moreover, since the chief reason offered was linked to the availability and service provided by attorneys of the Legal Aid Board, the Supreme Court of Appeal reminded everyone that making legal representation available to those who cannot pay for it themselves, was “discharging one of the most important constitutional obligations imposed on the state.”¹⁶⁸

In the final instance, this court pointed out that lawyers who were appointed by the Legal Aid Board and who delivered sub-standard service, were violating accused persons’ rights and not fulfilling their obligation to the person appropriately.¹⁶⁹ With reference to this case, the outcome of the questionable fact-finding process and the delays was that the appellant had served an “unjustifiably excessive time in prison,”¹⁷⁰

158 *Idem* par 2.

159 *Idem* par 3.

160 *Idem* par 4.

161 *Ibid.*

162 *Ibid.*, referring to *S v Van Vuuren* 1983 1 SA 12 A 21E.

163 *Idem* par 9.

164 *Idem* paras 5, 8 and 11.

165 *Idem* par 5.

166 *Idem* paras 10-12.

167 *Idem* par 14.

168 *Idem* par 15; see also s 35(3)(g) of the Constitution of the Republic of South Africa, 1996.

169 *Idem* par 15.

170 *Ibid.*

depriving him of his right to freedom and security.¹⁷¹

These two matters point to the role of the fact-finding process in determining the credibility of witness testimony, so that teachers are protected from false or unsubstantiated accusations. and underline the guaranteed right of also teachers “not to be treated ... in a ... degrading way.”¹⁷²

In *Vilakazi v S*,¹⁷³ the Supreme Court of Appeal referred to the fact-finding process in prosecuting rape as presenting unusual intricacies that called for “the greatest care to be taken,”¹⁷⁴ especially where the complainant was young. According to the court, prosecutors needed to execute “thoughtful preparation, patient and sensitive presentation of ... available evidence, and [pay] meticulous attention to detail.”¹⁷⁵ At the same time, the judicial officers who tried these cases had to have a precise understanding and do a cautious analysis of all the evidence.¹⁷⁶

The Supreme Court of Appeal expressed four specific concerns that are relevant to taking cognisance of accused persons' privacy rights: Firstly, the complainant's evidence was presented with little care for comprehensiveness and truth,¹⁷⁷ resulting in the evidence being subjected to only slight analysis and the sentencing itself being handed down automatically.¹⁷⁸ Secondly, simply discarding the evidence which accused persons present to prove them free from guilt does not end the enquiry into a criminal case.¹⁷⁹ Thirdly, the Supreme Court of Appeal referred to what it termed “ordinary logic of reasoning,”¹⁸⁰ indicating that a court would be vindicated for accepting uncontested evidence. However, when no evidence is presented, the burden which rests on the State accumulates to the advantage of the accused¹⁸¹ since “the gap in the evidence could not be filled by an inference drawn against the accused. That is... a consequence of... inferential reasoning.”¹⁸² Finally, the Supreme Court of Appeal voiced its concern at the fact that the appellant in this case had been imprisoned on the day of the alleged crime and had remained imprisoned ever since then, that he had not been brought to trial swiftly, and that this was “most unjust.”¹⁸³

171 *Idem* paras 1 and 16: the sentence of 15 years' imprisonment was set aside, a three years' term was handed down and so he was released from prison immediately, since he had already served five years there.

172 S 12(1)(e) of the Constitution of the Republic of South Africa, 1996; see also *S v Fhetani* 2007 ZASCA 113 par 6.

173 2008 SCA 87 RSA.

174 *Idem* par 21.

175 *Ibid.*

176 *Ibid.*

177 *Idem* paras 22 and 50.

178 *Idem* par 22.

179 *Idem* par 47.

180 *Idem* par 48. See also *R v Blom* 1939 AD 188 AT 202-05.

181 See also *R v M* 1946 AD 1023 1027; *S v Khubeka* 1982 1 SA 534 W 537E; *S v Ipeleng* 1993 2 SACR 185 T 189b-i.

182 *Vilakazi v S* 2008 SCA 87 RSA par 48.

183 *Idem* par 60.

In a different case,¹⁸⁴ the Supreme Court of Appeal pointed out that the 11-year-old complainant's version concerning the rape which she accused a 39-year-old teacher of committing was "entirely uncorroborated,"¹⁸⁵ that the court had no reason to reject the evidence given by the appellant and the defence witness, and that guilt had not been proven.¹⁸⁶

The trial court had "committed a number of misdirections" while the Magistrate mentioned the variation between the complainant and appellant's testimony on whether sexual intercourse occurred and whether the incident had taken place on a school day or a Sunday, the Magistrate erred in failing to notice (1) the various versions concerning the sequence of events of the day in question;¹⁸⁷ (2) whether the witness for the defence had been at the appellant's house at all on that day;¹⁸⁸ and (3) that no responsibility rests on the appellant to advance reasons why State witnesses would falsely implicate them.¹⁸⁹

In the last instance, the trial court declared the appellant as not making "a good impression"¹⁹⁰ as a witness, based on his being evasive in cross-examination and answering what had not been asked, yet "[n]either of the criticisms levelled by the magistrate at the appellant's evidence appear from the record, as the State's counsel on appeal was constrained to concede."¹⁹¹ Further, the trial court ignored the evidence of the witness for the defence completely since he and the appellant were friends and the court found it strange that the witness remembered what the complainant was eating when he arrived at the house.¹⁹² The Supreme Court of Appeal pointed out that the Magistrate "was not entitled to disregard" his testimony.

By the time the appeal was granted and the conviction and sentence were set aside, this appellant had already been in custody for four and a half years.¹⁹³

3 1 4 1 *The Importance of Weighing the Evidence*

The case of *S v Gentle*¹⁹⁴ refers to weighing evidence and reminds everyone in the first place that substantiating the facts "on the issues in dispute" would imply that other evidence reinforces the evidence offered by the complainant, causing the evidence presented by the accused to be regarded as less credible, less plausible. In the second place, if a

184 *Nonyane v S* 2006 SCA 23 RSA.

185 *Idem* par 6(2).

186 *Idem* paras 7 and 8.

187 *Idem* paras 3 and 6(1).

188 *Idem* par 6(1).

189 *Idem* par 6(5). See *S v Ipeleng* 1993 2 SACR 185 T 189b-i.

190 *Nonyane v S* 2006 SCA 23 RSA par 6 (3).

191 *Idem* par 6(3)(a) and (b).

192 *Idem* at par 6(4).

193 *Idem* at par 1.

194 2005 1 SACR 420 SCA 422.

complainant's evidence disagrees considerably from that of the State witnesses, for example, the Court needs to scrutinize the differences seriously¹⁹⁵ to establish whether the complainant's evidence is trustworthy or not.¹⁹⁶

The Supreme Court of Appeal opined that the trial court had "committed a number of misdirections,"¹⁹⁷ yet chose to focus only on the following two specific ones:¹⁹⁸ the Magistrate was at fault for having relied on the co-accused's evidence to discredit the appellant's version, since the former's testimony "was patently unsatisfactory;"¹⁹⁹ and although the Magistrate found the complainant's testimony reliable, the medical evidence proved the contrary.²⁰⁰ The outcome of the first misdirection was that "inadmissible material"²⁰¹ was considered, leading to the trial court's wrongful discrediting the appellant's version of the events. The outcome of the second misdirection was that the trial court made an incorrect finding concerning the reliability of the complainant.²⁰²

Furthermore, the fact that the complainant's evidence agrees with that of other State witnesses "on issues not in dispute" does not provide substantiation. What is necessary is plausible, trustworthy proof which then renders the complainant's version more probable than that of the accused person.²⁰³

The Supreme Court of Appeal reached the conclusion that the "onus of proof"²⁰⁴ of the appellant's guilt had not been satisfied, since the complainant's account of the issue in dispute was found to be incongruous and untrustworthy,²⁰⁵ and her evidence was found to be "patently unsatisfactory, and ... uncorroborated."²⁰⁶

In this regard the Supreme Court of Appeal set aside both the conviction and the sentence.

This case is reminiscent of the weighting effect which was pointed out above, and which occurs when balancing, for example, a teacher's right to privacy against other parties' interest in maintaining schools that are free from sexual offences. It also emphasizes the role of the fact-finding process in determining the credibility of witness testimony.

195 *Idem* 430.

196 *Idem* 421-22 and 431.

197 *Idem* 427.

198 *Ibid.*

199 *Ibid.*

200 *Ibid.*

201 *Idem* 428.

202 *Ibid.*

203 *Idem* 422.

204 *Idem* 423, 428 and 434.

205 *Idem* 421-23 and 428-30.

206 *Idem* 422 and 434.

3 1 4 2 *The Importance of Being Aware of Inherent Probabilities*

In *Monageng v S*²⁰⁷ a 37-year-old man lost his appeal against both his conviction of the rape of his fifteen-year-old cousin, and the sentence of 18 years' imprisonment. His version was not seen to be reasonably possibly true and therefore the court rejected it. Furthermore, the sentencing court did not hand down a "shocking, startling or disturbingly inappropriate" sentence.²⁰⁸ At the same time, the Supreme Court of Appeal found the single child witness "satisfactory", her version "credible" and she had "no reason to falsely implicate the appellant."²⁰⁹

This court made it clear that examining available evidence asked for (1) balancing all the aspects which indicated the accused persons' guilt against all the aspects which pointed towards their innocence, while (2) accurately considering "inherent strengths and weaknesses, probabilities and improbabilities on both sides,"²¹⁰ and then (3) deciding if the scales were tipped so profoundly that any reasonable doubt concerning the accused person's guilt was eliminated.

Finally, the Supreme Court of Appeal pointed out that while it was acceptable for courts to test an accused person's evidence against the possibilities of it happening just like that, it was unacceptable for courts to establish blame "on a balance of probabilities."²¹¹

With this judgment, everyone is reminded of the fact that single child witnesses can be trustworthy and that their reliable evidence can eliminate any reasonable doubt concerning an accused person's guilt.

3 1 4 3 *School Governing Body's Involvement Questioned*

With reference to the *Van Niekerk* case,²¹² the learner's mother testified that she and her husband had been worried not only about their son's weak academic progress, but also the fact that he had been skipping school. Both of them went to see the principal on several occasions to voice their concern.²¹³

However, the principal assured them that their son was participating in sports and that he was satisfied with the circumstances at school,²¹⁴ without consulting with any of the teachers or pulling any of his school records.

Based on the facts of the case not enough was done to investigate these parental concerns, since from the evidence presented in court, the

207 590/06 2008 ZASCA 129.

208 *Idem* par 3.

209 *Idem* par 10.

210 *Idem* par 13; see also *S v Chabalala* 2003 1 SACR 134 SCA par 15.

211 *Monageng v S* 590/06 2008 ZASCA 129 par 14. See *R v Mambo* 1957 4 SA 727 A 738A; *S v Phallo* 1999 2 SACR 558 SCA par 10 and 11.

212 *HK van Niekerk v The State* Case No A215/2007 TPD.

213 *Idem* par 9.

214 *Idem* par 10.

principal who is an official member of the School Governing Body,²¹⁵ did not take up these two matters at all and did not report back to the parents. It is thus concluded that the School Governing Body did not investigate or react to the learner's skipping school for two weeks²¹⁶ or his regularly skipping school²¹⁷ which the mother testified to.

Everyone is reminded of the fact that the governance of schools is vested in their School Governing Bodies,²¹⁸ that they assume a position of dependence towards the school they serve²¹⁹ which clearly involves the execution of a function in which the public has a very material and direct interest, and that the principals report to them on matters regarding the professional management of the school.²²⁰ It is therefore clear that School Governing Bodies would rely on the fact that principals run their schools effectively, including showing concern for the well-being of, among other people, their learners and educators.

While principals are charged with the professional management of their school,²²¹ they represent the Head of the Provincial Department as non-elected members of their School Governing Body²²² and also support the School Governing Body in managing learner disciplinary issues.²²³

This serves as an example of the vital role that school principals and their School Governing Bodies play in following up concerns voiced by parents and other interested parties. The principal as a representative of the employer may be compelled to investigate alleged learner misconduct and initiate School Governing Body action. It remains an open question whether, if immediate attention had been paid to the parents' repeated visits on behalf of their son, this court case²²⁴ could perhaps have been prevented.

4 The Way Forward: Recommendations for South Africa

The South African and United States case law referred to in this paper reflected on several issues related to (1) the disclosure of teacher identities once learners and students have lodged complaints of sexual misconduct, (2) who should investigate sexual misconduct complaints, (3) and what privacy expectations teachers have during such

215 Ss 23(1)(b) and 24(1)(j) of the South African Schools Act 84 of 1996.

216 *HK van Niekerk v The State* Case No A215/2007 TPD par 21.

217 *Idem* par 23.

218 S 16(1) of the South African Schools Act 84 of 1996.

219 *Idem* s 16(2)

220 *Idem* s 16A(2)(c).

221 *Idem* s 16(3).

222 *Idem* s 16A(1)(a).

223 *Idem* s 16A(2)(d).

224 *HK van Niekerk v The State* Case No A215/2007 TPD.

investigations. Unquestionably, teachers have a great deal at stake when they are alleged to have been involved in sexual misconduct, especially considering that complainants can bring such charges anonymously and maliciously.

Offering a quick solution to the complicated balancing act between teachers' privacy rights and the public's interest in schools that are free from sexual offences is easier said than done. However, to protect South African teachers from the damage that unsubstantiated allegations of sexual misconduct could cause to their reputations, decisive steps must be taken and lessons need to be gleaned from foreign jurisprudence such as the United States.

In the United States, the first obvious solution would be to merely eliminate the statutory privacy protection that exists in most states. However, as is reflected in this article, public policy has favoured protecting teachers from the damage that unsubstantiated allegations of sexual misconduct could cause to their reputations, even at the risk of inadequate school officials' investigations.

Another possible resolution of the United States dilemma concerning the adequacy of school officials' investigation of sexual misconduct allegations might be to remove this function completely from the local level and to transfer it to the state department of education. All investigations would then become matters of professional responsibility and while parents would not necessarily have access to the names of all teachers charged with sexual misconduct, the identities of sanctioned teachers, including those who receive "letters of admonishment" or who enter into consent agreements would be public knowledge. At the very least, it would remove the wall of silence that *Bellevue* sanctions under its state privacy Act for all but the relatively few allegations of sexual misconduct where a finding of abuse has been made.

To remedy the South Africa situation, the following strong recommendations are made:

- a. The fact-finding process after a complaint of sexual misconduct has been filed must be managed smartly.
- b. Magistrates must undergo some form of in-service training to make them aware of the basic fact-finding errors they frequently commit at this level.
- c. Respecting and protecting the human dignity of all people, including teachers, must take up the central role that the Constitution affords it.
- d. Accused teachers must remain innocent until reliable evidence proves their guilt beyond a reasonable doubt.
- e. A teacher's right to privacy must be weighed with careful consideration against the public's interest in maintaining schools free from sexual offences.

Only when these vital issues have been addressed will South African teachers experience the advancement of their human rights and freedoms.