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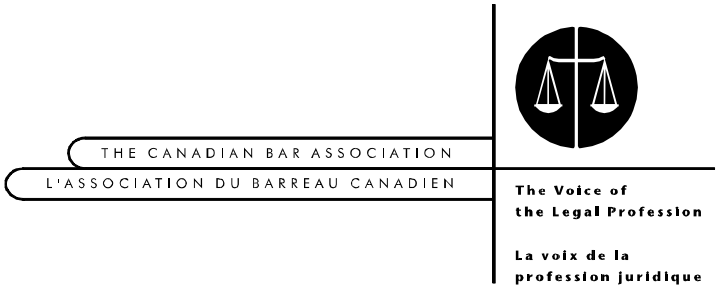

UPDATE ON VICARIOUS LIABILITY IN THE CHARITABLE SECTOR

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UPDATE ON VICARIOUS LIABILITY IN THE CHARITY SECTOR

(*NOTES FOR PRESETNATION*)[1]

1. Introduction

- The Supreme Court of Canada ("SCC") has pronounced on the application of the doctrine of vicarious liability ("VL") in two recent cases: *Blackwater* v *Plint* (2005) ("*Blackwater*") and *E.B. v Order of Oblates of Mary Immaculate in the Province of Ontario* (2005) *("OMI").* This recent jurisprudence is the occasion for this paper. The paper provides an update on this area of the law and a brief evaluation of the developments in the doctrine of VL since it was reformulated in the SCC decision in *Bazley* (1999).

- VL is a difficult doctrine to understand. It makes one person liable for the fault of another, but only in the restricted contexts of employment and agency relationships. As the High Court of Australia in *Lepore* (2003) stated recently, it does not appear to have a principled basis:

> (106) The absence of a satisfactory and comprehensive jurisprudential basis for the imposition of liability on a person for the harmful acts or omissions of others - vicarious liability, as it is called - is a matter which has provoked much comment. It may be that the lack of a satisfactory jurisprudential basis is referable, at least in significant part, to the fact that certain cases have been decided by reference to policy considerations without real acknowledgement of that fact. It may also be that, in some cases, employers have been held vicariously liable on the assumption that they would not otherwise have been liable for the injury or damage suffered. Further, it may be that the failure to identify a jurisprudential basis for the imposition of vicarious liability has resulted in decisions which are not easily reconciled with fundamental legal principle.

  The recent jurisprudence of the SCC on VL does attempt to identify a golden thread in the case law on the doctrine, but as I and others have argued elsewhere, it is not clear that the court has succeeded.

- *Blackwater* raised three interesting doctrinal questions: (1) whether two employers can be held vicariously liable for the act of a common employee; (2) if so, how should damages be allocated between them? and, (3) whether punitive damages are available on a vicarious liability basis? On the first question the court held that two employers of the same employee could be held liable vicariously. On the second question the court held

[1] This paper is based on J Neyers and D Stevens "Vicarious Liability in the Charity Sector" (2005) 42 CBLJ 372 and contains excerpts from it. I have also benefited from two other recent articles published by Professor Neyers: Neyers "Joint VL" and Neyers "Theory".
All citations in these presentation notes are to shortform names which are identified in the bibliography.

that damages could be allocated on an other than equal basis. The first response is notable for its novelty, but is probably otherwise unobjectionable. The second response is intriguing since the vicarious liability basis of the liability assumes that there is no fault at all on the part of the employer; therefore it would seem that it is not possible to allocate damages on the basis relative fault, as is typical in contribution claims. Perhaps responsibility should be distributed equally, as it was in the recent House of Lords decision in *Viasystems*.

- *OMI* does not raise any novel questions but is of interest to the extent that it demonstrates how the new VL test developed in *Bazley* will be applied. Interestingly, there is a vigorous dissent in *OMI* rendered by Abella J which may indicate that the "close connection" test stated in *Bazley* is as vague as the "course of employment" test it replaced, and that it will become the vehicle for further extension of the VL doctrine beyond its limited current context in employment law and agency law.

- Other recent decisions are canvassed briefly to assist in the evaluation of the direction of the "close connection" doctrine. For example, based on the dissent of Arbour J in *K.L.B*, discussed briefly below, a formal relationship of employment or agency may soon not be required.

2. The Doctrine of Vicarious Liability

(a) Traditional Formulation

- VL arises when there is a tort committed by an agent or employee in the scope of their employment. The doctrine imposes liability for the agent's or employee's tort on the principal/employer. The doctrine is not based on a finding of actual fault on the part of the principal or employer – it assumes there is no direct liability in the employer/principal. The doctrine is a common law doctrine, but it is well-known in other systems of law and it is sometimes imposed by a statute. The traditional doctrine, as well as the version of it formulated in *Bazley*, apply only to principal/agent and master/servant relationships. It does not apply to the employer/independent contractor relationship (*Sagaz*), the parent/child relationship (*Carmarthenshire*), the beneficiary/trustee relationship (but consider the doctrine in *Hardoon*), or the shareholder/director relationships.

- Under the traditional formulation of the doctrine, the agent or servant must commit a tort in the "scope of authority" or "course of employment." The classic formulation of this key part of the test for VL is set out in *Salmond:*

> A master is not responsible for a wrongful act done by his servant unless it is done in the course of his employment. It is deemed to be so done if it is either (1) a wrongful act authorized by the master, or (2) a wrongful and unauthorized mode of doing some act authorized by the master. Although there are few decisions on the point, it is clear that the master is responsible for acts actually authorized by him: for liability would exist in this case, even if the

> relation between the parties was merely one of agency, not one of service at all. But a master, as opposed to the employer of an independent contractor, is liable even for acts which he has not authorized, provided they are so connected with acts which he has authorized that they may rightly be regarded as modes, although improper modes, of doing them. **In other words, a master is responsible not merely for what he authorized his servant to do, but also for the way in which he does it.**

The sexual assault cases all involve the second branch of the Salmond test: They raise the issue whether the employee's assault can be construed as a "wrongful and unauthorized mode of doing some act authorized by the master." The answer, until the SCC decision in *Bazley*, was that is could not.

- Fridman, *The Law of Torts* provides a conventional description of this part of the doctrine as well:

> In the modern law of vicarious liability there appears to be no reason to differentiate an agent who is employed by a principal for the purpose of negotiating contracts on his behalf from a servant whose functions are associated less with the transaction of legal business than with the performance of non-legal acts on his master's behalf. Older law referred to a principal's liability for torts committed by his agent in terms of whether they were committed while the agent was acting within the scope of his authority, and to a master's liability for torts committed by his servant in terms of whether such acts were performed by the servant while he was acting in the course of his employment. The expressions 'scope of authority" and "course of employment" have now become indistinguishable. They are in effect interchangeable.

- This feature of the doctrine presents a serious issue where the plaintiff's claim in vicarious liability is based on an intentional tort of the employee or agent, since, presumably, the principal or master will typically have a compelling argument that the intentional tort was not committed in the "course of employment." Atiyah, *Vicarious Liability*, remarks on and laments this feature of the traditional doctrine as follows:

> [The Salmond test] is not so easy to apply to wilful acts for in many circumstances a wilful act may well be an act in itself rather than an improper mode of performing another act.
>
> … In the modern law it is clear that even a completely wilful act does not necessarily take the servant outside the course of his employment although it is still true to say that it is harder to establish liability for a wilful act than for a purely negligent act. In dealing with such wilful acts there is no doubt that the Salmond test really ceases to be of much help. It is only possible to treat a

> wilful act as an improper mode of performing an authorized act if a very wide view indeed is taken of what the servant is authorized to do. Although it is possible to do this the exercise is largely a semantic one for, as has already been pointed out, conduct can be correctly described at varying levels of generality, and no one description of the 'act' on which the servant was engaged is necessarily more correct than any other. The attempt, therefore, to answer all questions in this field by a blind application of the Salmond test is an unsatisfactory one, and it would be far better if other tests could be formulated for this purpose. Instead of asking what acts the servant was engaged in performing when he committed the tort, and whether the tort was merely an improper mode of performing an authorized act, it would be preferable if the courts were to ask, e.g., is the servant's tort an act of a kind sufficiently similar to the acts he has been authorized to perform?; is there a substantial risk the employer's object cannot be achieved without torts of this kind being committed by his servants? In general the risk of a negligent act is clearly much greater than the risk of wilful wrongdoing by a servant. A stationmaster, for example, is much more likely to arrest a passenger by mistake than he is to do so deliberately knowing that he has no right to make the arrest. On the other hand, certain types of wilful acts, and in particular frauds and thefts, are only too common, and the fact that liability is generally imposed for torts of this kind shows that the courts are not unmindful of considerations of policy.

- VL has, nonetheless been applied in limited situations where the tort committed by the employee was intentional. One line of cases deals with situations where the employer has created a situation of friction – doormen, repossessors, and bartenders (*Dyer*, *Poland*, *Daniels*, *Lakatosh*, *Cole* and *Ryan*). Another line of cases deals with situations where the employee has committed fraud and thefts (*Lloyd*, *Morris*, *Photoproduction*, and *Armagas*). These are limited situations which have other obvious explanatory factors

(b) Theoretical Basis of Vicarious Liability

(i) Control

- VL might be justified on the basis that the employee's or agent's tort is the master's tort or principal's tort because the latter "controls" the former. But this is inconsistent with the fact that the doctrine is not available against parents (for torts of their children) or teachers (for torts of their students) or others in control situations. Moreover, the absence of control does not preclude VL.

(ii) Deterrence

- The "deterrence argument" – that VL encourages employers/principals to behave better in some way – is probably incoherent because, either it is based on the fault of the

employer or it will not work. Either the reason the employer pays is that the employer committed some fault (such as failing to lead or guide, foster a proper environment, or to select appropriately) and making her liable will encourage her and her kind to perform better in the future, or there is nothing she should have done, and therefore punishing her will not achieve anything.

- Perhaps what the SCC in *Bazley* meant in deploying a deterrence rationale, was that, given the difficulty in proving personal negligence in the employment context, vicarious liability serves as a fault-proxy that ensures that employers do not routinely escape punishment for their personal faults (of either omission or commission). That is one interpretation of the court's statement that

> [b]eyond the narrow band of employer conduct that attracts direct liability in negligence lies a vast area where imaginative and efficient administration and supervision can reduce the risk that the employer has introduced into the community. Holding the employer vicariously liable for the wrongs of its employee may encourage the employer to take such steps, and hence, reduce the risk of future harm.

However, if the failing of the law is indeed in overcoming problems of proof that are endemic in the employment context, the correct legal response is to reverse the burden of proof by assuming that a tort committed by an employee was exacerbated by the negligence of the employer and then leaving it up to the employer to prove that she was not at fault. The fact that a harm could have been prevented is not a sufficient basis for liability – A duty of care in tort law is imposed only for reasonably foreseeable risks of injury to others.

- The conceptual problems with using deterrence as an explanation of vicarious liability may explain why in *K.L.B.*, a case dealing with whether provincial governments should be vicariously liable for the torts of foster parents, the majority of the SCC did not give full credence to the deterrence rationale in its analysis of the issue. The deterrence argument is inherently expansive.

(iii) Compensation

- The compensation argument – that the plaintiff deserves compensation for the harm caused - is flawed since it does not follow that the need for compensation means the employer should pay. The plaintiff would be equally well compensated if the payment came from any other source, such as social insurance. Likewise, even if the search is for "effective compensation", as the court said in *Bazley*, then clearly the government would be in the best situation to pay compensation as opposed to any employer.

- Moreover, the policy of compensation, when taken seriously, also tends to destroy the employer/independent contractor distinction, a fundamental dividing line in vicarious liability doctrine, since an employer will be richer than the workers he employs, whether they are servants or independent contractors.

(iv) Enterprise Risk

- Recognizing a need to overcome these problems and to connect the employer to the harm, the court in *Bazley* applied this policy: it is fair to make the employer pay because the employer's enterprise created or exacerbated the risk. This enterprise risk argument at first appears to be a more sophisticated and coherent explanation of the law. Unfortunately, when examined more closely this is not the case, since much like the policies of deterrence and compensation, this version of the enterprise risk theory cannot explain salient features of the law surrounding vicarious liability.

- On the one hand, the theory has never been applied in a principled way in the common law. Courts never restrict the liability to the enterprise, they always leap to the conclusion that the person who owns the enterprise, whether individual or legal person, is responsible and that all her assets are available to answer the claims of the tort victim.

- On the other hand, the enterprise risk policy cannot explain why the enterprise is responsible only for the torts committed by its employees and not all accidents. As was noted by Glanville Williams in 1957:

> In an action against the master for the negligence of the servant, it is necessary to prove the servant's negligence. This should not be the case if the underlying reason for the law is to impose upon an undertaking the social loss caused by its operations. A loss caused without negligence is just as much a loss as one caused by negligence. For example, neither a trading firm nor its van men can avoid some traffic accidents; yet these accidents are part of the social cost of the firm's activities.

Thus, logically, these non-negligent losses should be borne by the employer as well as the losses occasioned by the employee's negligence if the enterprise risk is to explain vicarious liability.

- A third problem with the enterprise risk policy, is that even if it is accepted, it is hard to see how it cannot apply to the facts in the sexual assault cases. If we assume that a number of key facts are roughly speaking, a constant (i.e.: (1) the number of adult supervised children; (2) the number of paedophiles; and (3) the number of children supervised by strangers) then any particular orphanage or childcare facility, therefore, does not by virtue of its existence increase the risk of paedophilia. Presumably, the risk of paedophilia is higher in situations where children are supervised by strangers. Therefore, it is legitimate to ask the leaders of these institutions to take great care to ensure that the children under their supervision are safe and it is reasonable to expect them to act on the basis that their institutions are particularly vulnerable to infiltration by paedophiles. But, it does not make sense to say that the existence of any particular institution increases the risk of paedophilia if we accept the assumption that there should be a sufficient number of these institutions to look after all children in need. The assumption is a solid one since the alternative to the institution is the street. Surely the children are more vulnerable and the paedophile more empowered if they are left on the street. So, the policy argument

supporting vicarious liability cannot apply to any particular charity—any institution based on altruism—since the existence of a particular institution does not put a new risk into the community, it merely localizes an existing risk in a particular.

Thus, the court must ("logically") mean that all childcare institutions which provide parental-like intervention into the lives of children are strictly liable for incidents of paedophilia that occur “on their time” since it is the risk of paedophilia or, simply, the presence of children that generates the liability.

(v) Simple Fairness

- One final point about the SCC’s explanation deserves examination. Perhaps what was meant by the Court was not that deterrence, compensation and enterprise risk by themselves were a strictly logical defence of vicarious liability or its limits. Instead, the argument would be that all the policies pragmatically taken together, combined with others influences such as the courts impression of the facts or instances of insurance, made it just plain “fair” that the employer assume the loss in these situations. While this argument is not strictly incoherent, it is in essence a political question, the issue being: what scheme of harm distribution in this context—employer/employee relations with third parties—makes sense. Economic and fairness criteria are, among others, the relevant standards. There are no right answers, only more or less good ones, for here and now. The decision should be made by a legislature since we should all have input (through our elected representatives) and a chance to debate the question before its resolution, opportunities that the very structure of private law denies.

3. *Bazley*

- The defendant was a non-profit foundation (the “Foundation”) that operated two residential care facilities for the treatment of emotionally troubled children, providing, through its employees, “total intervention” in all aspects of the lives of those children it cared for. That is, its employees carried out all parental duties, from general supervision to intimate duties such as bathing children and putting them to sleep. After performing a background check, the Foundation hired Curry to work in its Vancouver home, unaware that he was a paedophile. Upon discovering that Curry had abused a child in one of its homes, the Foundation discharged him from employment. Curry was ultimately convicted of 19 counts of sexual abuse, two of which concerned the plaintiff, who sued the Foundation to recover for the injury he suffered at the hands of Curry while in the Foundation’s care. The issue before the court was whether the Foundation was vicariously liable for the intentional tortious conduct of its employee.

- The SCC formulated a two-pronged approach to vicarious liability. In the first instance, a court should examine existing case law for a precedent that governs the fact situation. If that examination does not lead to a clear answer to the issue, a court should evaluate whether the act complained of was committed by an employee who was placed in a position of power such that the risk of the intentional tort was materially increased. The court stated that “there must be a strong connection between what the employer was

asking the employee to do … and the wrongful act". The court suggested five factors to consider in making such a determination:

(a) The opportunity that the enterprise afforded the employee to abuse his or her power;

(b) The extent to which the wrongful act may have furthered the employer's aims (and hence be more likely to have been committed by the employee);

(c) The extent to which the wrongful act was related to friction, confrontation or intimacy inherent in the employer's enterprise;

(d) The extent of power conferred on the employee in relation to the victim; and

(e) The vulnerability of potential victims to wrongful exercise of the employee's power.

- The court stated that such a test should be applied with policy considerations in mind to determine whether the imposition of vicarious liability is justifiable in that situation. The court suggested that the main "policy" issues to be considered when making such a determination under this test are that of fair and sufficient compensation for wrong and deterrence. Compensation was to be considered fair where:

> The employer puts in the community an enterprise which carries with it certain risks. When those risks materialize and cause injury to a member of the public despite the employer's reasonable efforts, it is fair that the person or organization that creates the enterprise and hence the risk should bear the loss. This accords with the notion that it is right and just that the person who creates a risk bear the loss when the risk ripens into harm.

Specifically, the court suggested that if a finding of vicarious liability would further these policies, the finding was a just one.

- On the facts in *Bazley*, the court found that there was opportunity created in the ordinary course of his employment for Curry to have intimate control over the plaintiff, and that there was an imbalance of power between the plaintiff and Curry created by the terms of Curry's employment. The court found that these terms created the opportunity for the abuse to take place. Moreover, given that there was a social policy need to protect children from harm, a finding of vicarious liability would be a sufficient deterrent to the Foundation.

4. *Jacobi* (1999)

- In the companion decision of *Jacobi* the SCC followed the test set out in *Bazley*. The facts were similar. A non-profit organization (the "Club") for boys and girls hired Griffiths to supervise its volunteer staff and to organize recreational activities and outings for the children. Griffiths was encouraged by the Club to form friendships with the

children. It was later disclosed that Griffiths sexually abused several of the children while acting as an employee of the Club. He subsequently pled guilty to fourteen counts of sexual assault. However, unlike the facts in *Bazley*, the abuse occurred almost exclusively outside of the Club, on Griffiths' private property. The court held, in a four to three decision, that the connection between Griffiths' employment and the wrong done was not strong enough since Griffiths only had opportunity to abuse his relationship with the children once he managed to "subvert the public nature of [his] activities". That is, the duties of his employment as set out by his employer did not materially increase the risk of the abuse occurring—the risk only increased once Griffiths substantially deviated from these terms such as inviting the victims to his own home to develop relationships outside of the Club. The formation of these outside relationships were not a requirement of the Griffiths' employment.

5. *Blackwater* (2005)

- *Blackwater* dealt with a residential school operated by the Government of Canada and the United Church of Canada in British Columbia in the 1940's, 50's and 60's. The perpetrator in *Blackwater*, Plint, was a dormitory supervisor. He was held liable for sexual assault of the plaintiff and other residents of the school. The court held that both the Church and Canada were vicariously liable for the torts of Plint.

- The court stated that

> "Vicarious liability may be imposed where there is a significant connection between the conduct authorized by the employer or controlling agent and the wrong. Having created or enhanced the risk of wrongful conduct, it is appropriate that the employer or operator of the enterprise be held responsible, even though the wrongful act may be contrary to its desires …"

The court reasoned that the fact that wrongful acts may occur is simply a cost of business. The imposition of vicarious liability in such circumstances serves the policy ends of providing an adequate remedy to people harmed by an employee and of promoting deterrence. When determining whether vicarious liability should be imposed the court bases its decision on the five factors identified in *Bazley*.

- The SCC affirmed the decision of the trial judge holding that the Church did employ and did in fact exert sufficient control over Plint to be found vicariously liable for his actions. The Court of Appeal's decision against imposing vicarious liability on the Church was based on its finding that the agreement between the Government of Canada and the Church did not transfer all management responsibility to the Church and that the Government of Canada, therefore, retained substantial control in regard to the operation of the school. The Court of Appeal had also held that the employee was employed as a dormitory supervisor which was outside of the Church's mandate in the operation of the school, namely, the provision of a Christian education.

The SCC had no difficulty overturning these holdings by the Court of Appeal basing itself on the trial judge's conclusions of fact that the Church exercised substantial control over the operation of the school.

- The case raised three interesting questions (1) whether two defendant employers could be held vicariously liable for the tort of the same employee, (2) if so, how responsibility for damages should be allocated between the two employers and (3) whether such an employer could also be held liable for punitive damages.

On the first question, the SCC came quickly to the conclusion that

> "there is no compelling jurisprudential reason ... to justify limiting vicarious liability to only one employer, where an employee is employed by a partnership. Indeed, if an employer with de facto control over an employee is not liable because of an arbitrary rule requiring only one employer for vicarious liability, this would undermine the principles of fair compensation and deterrence."

On that basis the court concluded that the Church was vicariously liable with Canada for the assaults.

On the second question (apportionment of damages) the court addressed the trial judge's decision to apportion damages 75% to Canada and 25% to the Church as follows:

> (69) This raises the question of whether unequal apportionment of responsibility is appropriate in cases of vicarious liability. The conflicting views on whether vicarious liability attributes any fault or blame on the wrongdoer are summarized in *Bluebird Cabs Ltd. v. Guardian Insurance Co. of Canada* 1999 BCCA 195 (CanLII), (1999), 173 D.L.R. (4th) 318 (B.C.C.A.), at paras. 13-14. The most compelling view is that while vicarious liability is a no-fault offence in the sense that the employer need not have participated in or even have authorized the employee's particular act of wrongdoing, in another sense it implies fault. As D. N. Husak states, "no defendant who is held vicariously liable is selected randomly; the principles used to identify this defendant are not arbitrary. Vicarious liability is imposed on someone who was in a position to have supervised and thus to have prevented the occurrence of the harm": "Varieties of Strict Liability" (1995), 8 *Can. J.L. & Jur.* 189, at p. 215. It follows that the degree of fault may vary depending on the level of supervision. Parties may be more or less vicariously liable for an offence, depending on their level of supervision and direct contact.
>
> (70) The trial judge's reasoning suggests that he applied this analysis to conclude that one of the parties, Canada, was "more senior" and had more control (2001 decision, at para. 324). He

> reasoned that when an employee has two or more employers, it is more likely than not that one exercises more control or plays a more important role than the other. The damage award, he concluded, should reflect that. It is true that at various places the trial judge referred to the "partnership" (1998 decision, at paras. 99 and 119), the "joint enterprise" (at para. 107), and "join[t] control" (at para. 114). However, I cannot accept Canada's argument that the trial judge found no hierarchical relationship between Church and Crown. He found the relationship between Canada and the Church was not that of principal-agent or employer-employee. This does not exclude one party to the joint enterprise being more senior or exercising more control. In these circumstances an unequal apportionment of responsibility is appropriate.
>
> (71) Here the trial judge found that Canada was in a better position than the Church to supervise the situation and prevent the loss. That finding was grounded in the evidence and I would not interfere with it.

On the third question, punitive damages, the court held that they were not available since the defendants had not acted in a "high-handed, malicious, arbitrary or highly reprehensible" manner (*Whiten*).

- The Court of Appeal had also decided that, in any event, the Church was exempted from liability on the basis of a doctrine of "charitable immunity". The Court of Appeal's holding was expressed as follows:

> "[where] the government is liable and the in which the non-profit charitable organization is not at fault and, if it can be said to have introduced the risk at all, did so to a lesser degree than the government, no liability should be imposed upon the organization."

The Supreme Court of Canada decision categorically rejects this analysis, stating that it rests on a

> "misapprehension of the principles governing vicarious liability and more particularly, the decisions of this court in *Bazley* and in *Jacobi v. Griffiths*."

- The Court of Appeal had reasoned that one of the policies underlying *Bazley* was a desirability of imposing the cost of harm on the party that was best able to bear it. In *Bazley* the issue was which of the defendant or plaintiff should bear the risk of harm. The Court of Appeal in *Blackwater* applied the same test when deciding which between the defendant Church and the defendant Canada should bear the cost of the harm. The Court of Appeal reasoned that since Canada was better able to compensate, that the Church should not be vicariously liable.

- The Supreme Court of Canada categorically rejected this analysis too.

6. *OMI*

- *OMI* dealt with a claim arising out of a sexual assault which occurred at a residential school on Meares Island, British Columbia. The plaintiff (appellant on appeal) attended a residential school for First Nation's children run by the defendant (respondent on appeal) Order of the Oblates of Mary Immaculate in the Province of British Columbia (the "Oblates"). From 1957 to 1962 the plaintiff suffered sexual abuse at the hands of a lay-employee at the residential school, one Martin Saxey, also of First Nation's origin. Saxey worked in the school bakery and operated the school motorboat. Saxey was deceased at the time of the appeal. His estate was insolvent. The plaintiff's claim, therefore, sought damages from the Oblates on two grounds. First, because of its direct fault in permitting the sexual abuse to occur and secondly on the basis of vicarious liability, irrespective of any direct fault, for the misconduct of its employee, Saxey. The trial judge had not yet dealt with the issue of direct liability. The case on appeal dealt only with vicarious liability.

- The school was in a remote location on Vancouver Island. It was owned, operated and staffed by the Oblates and was incorporated by special act of the British Columbia Legislature. It was staffed by 16 – 20 adult employees and populated by 145 – 158 children. The plaintiff attended the school from the age of 6 in 1956 until June of 1965.

  The defendant was employed at the school commencing in September, 1955.

  The educational and social functions of the school were under the direction of the defendant, Oblates, who were assisted by different Orders of nuns from time-to-time. The federal government contributed a per capita operating grant. Maintenance services and physical operation of the school were in the hands of First Nation's staff who were mostly adult relatives of students. Some of the plaintiff's relatives worked at maintenance jobs at the school. The incidents of abuse occurred over 4 or 5 years in the premises occupied by the defendant which were located upstairs from the premises occupied by the relatives of the plaintiff.

- The majority (Binnie J, for McLachlin CJ and Major, Bastarache, LeBel, Deschamps, Fish and Charron) held that a finding of vicarious liability is a mixed question of fact and law. The court relied on *Housen v Nikolaisen* [2002] 2 SCR 235, 2002 SCC in holding that a trial judge's error

  > "can be attributed to the application of an incorrect standard, a failure to consider a required element of the legal test, or similar error in principle, such an error can be characterized as an error of law, subject to a standard of correctness."

- The majority asked whether, because of the powers, duties and responsibilities conferred on Saxey by the defendant Oblates in relation to students like the plaintiff, there was a

> "strong connection between what the employer was asking the employee to do (the risk created by the employer's enterprise) and the wrongful act. It must be possible to say that the employer significantly increased the risk of harm by putting the employee in his or her position and requiring him to perform the assigned tasks".

Binnie J held for the majority that there was no such strong connection on the facts of this case. Abella J dissented holding there was.

The court examined the Salmond test which requires that a distinction be made between acts which the employee was authorized to do and acts which the employee actually did. Under the Salmond test if the employee was "off on a frolic of his own" vicarious liability would not attach to his or her employer. The court cited the argument of McLachlin J in *Bazley* to the effect that the Salmond test

> "glosses over rather than addresses the policy considerations that argue for and against a finding of vicarious liability and substitutes a debate about semantics in which the outcome is frequently unpredictable".

On the facts before the Court in *OMI* the Salmond test would require the Court to decide whether the defendant's assault was a "unauthorized mode" of doing what he was hired to do or was the defendant engaged in conduct entirely unrelated to his duties. The Court stated that the decision in *Bazley* required that the Salmond test be placed in the larger context of the

> "employer's enterprise and the risk of the enterprise as introduced into the community".

The objective under the *Bazley* test is to provide a "just and practical remedy" but to be just requires that

> "a wrong that is only coincidentally linked to the activity of the employer and duties of the employee cannot justify the imposition of vicarious liability on the employer".

The result of *Bazley* the majority said was

> "its recognition that the Salmond test did not adequately take into account the potential contribution to the wrongdoing made by the general environment created by the employer and which provided the setting within which the employee exercised his or her job conferred power. The employer may be accountable vicariously as well as directly for the fact that it puts in the community an enterprise which carries with it certain risks however the plaintiffs must demonstrate that the tort is sufficiently connected to the

> tortfeasor's assigned tasks, that the tort can be regarded as a materialization of the risks created by the enterprise."
>
> The nature of the risk created by the enterprise must be considered in relation to the wrong done by ... [the defendant] to the … [plaintiff]. It therefore calls for an examination of the job created, powers and duties given to the defendant recognizing of course that those powers and duties are discharged in a particular residential school environment.

The court held that Saxey did not by virtue of his job have any authority to insinuate himself into the lives of the students of the residential school.

- The court applied the rule established in *Bazley* that the first recourse is to determine whether there are any precedents which determine unambiguously which side the claim for vicarious liability falls. At the second stage if there is no clear answer in the decided cases the holding of *Bazley* requires the court to impose or not impose vicarious liability in light of the broader policy rationales supporting this form of indirect liability, assessed in light of the five factors

- The court held that there were no precedents requiring a holding of vicarious liability after reviewing extensive juris prudence on vicarious liability.

- The court then reviewed the 5 factors and determined that the "close connection" test was not satisfied:

> (48) I therefore turn to the "five factors" listed in Bazley to consider in light of the precedents whether the strength of the "connection between what the employer was asking the employee to do . . . and the wrongful act" (Bazley, at para. 42), was sufficient to impose vicarious liability:
>
> (1) The respondent provided Saxey with the opportunity to come into contact with the children. Opportunity will often be a question of degree. "As the opportunity for abuse becomes greater, so the risk of harm increases" (*Bazley*, at para. 43). The review of previously decided cases shows that opportunity in this case lies at the low end of significance. As put in *Bazley*, "[i]f an employee is permitted or required to be with children for brief periods of time, there may be a small risk of such harm — perhaps not much greater than if the employee were a stranger" (para. 43). Here, Saxey was not "permitted or required" to be with the children at all, apart from trips in the motorboat which were supervised by one of the religious brothers or equivalent and occasionally in the bakery.

(2) The wrongful acts had nothing to do with furthering the respondent's aims. No one disputes that Saxey's conduct was abhorrent and in direct opposition to the Oblates' aims.

(3) While a degree of intimacy with staff is inherent in any residential school, such intimacy did not involve Saxey, who was expected to devote himself to baking, maintenance and driving the motorboat. Saxey's duties required no significant contact with the students, and his quarters where the sexual abuse took place was located in an area off limits to students.

(4) The respondent did not confer any power on Saxey in relation to the appellant. Despite the loose structure of the school, as discussed by the trial judge, Saxey's position was not one involving regular or meaningful contact with the students. Of course, as the trial judge pointed out, the very fact that Saxey was an adult in a children's school conferred a certain status, but to find that Saxey's status as an "adult" in the school was sufficient to attract vicarious liability would in practice cross the line into making the employer an "involuntary insurer" (*Bazley*, at para. 36).

(5) The students in any residential school are vulnerable and require protection, but it is the nature of a residential institution rather than the power conferred by the respondent on Saxey that fed the vulnerability. In *Bazley*, at para. 42, the Court said that "[i]t must be possible to say that the employer significantly increased the risk of harm by putting the employee in his or her position and requiring him to perform the assigned tasks" (emphasis added; emphasis in original deleted). Such a statement cannot fairly be said of the respondent employer in this case.

In summary, the appellant did not establish "a strong connection between what the employer was asking the employee to do . . . and the wrongful act" (*Bazley*, at para. 42 (emphasis added)).

- The court went on to evaluate the policy considerations:

(54) The second stage under the *Bazley* analysis requires the Court to consider whether the imposition of vicarious liability on the facts of the case would further the broader policy rationales used to justify it, namely to provide effective compensation and to deter such misconduct in future. These policy concerns, however, are part of a broader balancing of interests. *Bazley* held that the twin policy concerns "are served only where the wrong is so connected with the employment that it can be said that [by the employment] the employer has introduced the risk of the wrong (and is thereby fairly and usefully charged with its management

and minimization)" (*Bazley*, at para. 37 (emphasis added)). Further, as noted by the majority in *Jacobi*:

> These policy considerations have to be balanced with a measure of fairness to the employer and adherence to legal principle because standing on their own these particular policies will generally favour vicarious liability, i.e., a solvent employer will almost always be in a better position to provide effective compensation to an assault victim than the assailant, and the higher the likelihood of financial liability on the employer, generally speaking, the more potent the deterrent. These pro-liability policies have therefore been restrained historically by a recognition that competing social objectives also have to be weighed in the balance. [para. 67]

(55) With respect to deterrence, for example, both *Bazley* and *Jacobi* were careful to point out that unless deterrence is confined to situations where it can be effective, there is a danger that the general community will be overdeterred from activities which are socially useful and ought to be promoted rather than penalized.

(56) In the present case, the respondent Oblates contend that consideration should be given to their good intentions towards the students in their care, the fact that the misconduct by Saxey contradicts every value and principle the Oblates stand for, and the fact that the Oblates attempted on a not-for-profit basis to meet a need for education of First Nations' children that otherwise would perhaps have gone unmet. The fact is however that the trial judge found that the appellant suffered serious injury from Saxey's abuse and it is clear from our decision in John Doe that a church organization, while non-profit in nature, will generally have sufficient capacity for loss spreading and taking measures to deter future misconduct to merit the imposition of vicarious liability where the "strong connection" test is met.

(57) There is no doubt that the imposition of no-fault liability here would benefit the victim and deter similar conduct in the future. Also, the notion of fairness to the not-for-profit organization remains compatible with vicarious liability, provided that a strong connection is established between the job-conferred authority and the sexual assault. As the analysis above demonstrates, however, the strong connection test cannot be met in this case, given Saxey's limited role at Christie. Thus, legal principle as well as precedent supports the conclusion that vicarious liability should not be imposed in this case. Whether or

> not the respondent can be shown to be directly at fault in a way that contributed to Saxey's sexual assault on the appellant is a matter that will have to be determined by the trial judge.

7. *John Doe v Bennett* (2004)

- The claim in this case involved sexual assaults perpetrated by a diocesan priest, Kevin Bennett, against 36 unnamed plaintiffs. There were a number of defendants besides Kevin Bennett. These included the Roman Catholic Episcopal Corporation of St. George's, the diocese in which the assaults were committed, the Bishop of St. George's at the time of the assaults and at the time the lawsuit was commenced, the Archbishop of St. John's at the time of the abuse, the Archbishop of St. John's at the time the lawsuit was commenced and the Roman Catholic Episcopal Corporation of St. John's and the Roman Catholic Church.

  At trial Bennett was found directly liable and St. George's and the Bishop of St. George's were found vicariously liable. The Bishop of St. John's at the time of the abuse was found liable for negligence and the claims against the other parties were dismissed. At the Court of Appeal the findings of personal liability against the Bishop of St. John's at the time of the abuse and the Bishop of St. George's at the time of the abuse were set aside. The majority found that the Roman Catholic Episcopal Corporation of St. George's was directly and not vicariously liable.

- The main issue on appeal in the SCC was whether St. George's was liable to the plaintiff and if so, on what basis, direct or vicariously. The argument for direct liability turned on the claim that the Bishops of St. George's were in charge of Bennett and knew or should have known that Bennett was perpetrating abuses and negligently did nothing to stop the assaults. Since the Bishops were the corporation themselves, as corporations sole their act was the act of the corporation and therefore the corporation was directly liable. The SCC concluded as follows:

  > "In sum, the Bishop is a corporation capable of suing and being sued 'in all courts' with respect to all matters, and has the power to hold property and borrow money for all diocesan purposes. The corporation can fairly be described as the temporal or secular arm of the Bishop. The argument that only the Bishop's acts relating to property are acts of the corporation must be rejected. All temporal or secular actions of the Bishop are those of the corporation. This includes the direction control and discipline of priests which are the responsibility of the Bishop. If the Bishop is negligent in the discharge of these duties the corporation is directly liable. Furthermore, this liability remains with the corporation sole, as a continuing legal entity, even when the Bishop initially responsible moves from the diocese or retires from his position."

- The plaintiffs also sought a finding that St. George's was vicariously liable for the assaults of Bennett since the Corporation was Bennett's employer. The SCC applied the

two part test in *Bazley*, first whether there are precedents which unambiguously determine whether the case should attract vicarious liability, and second if not, whether vicarious liability should be imposed in light of the five considerations and the broader policy rationales supporting the doctrine:

> "Vicarious liability is based on the rationale that the person who put their risky enterprise into the community may fairly be held responsible when those risks emerge and cause loss or injury to members of the public. Effective compensation is a goal. Deterrence is also a consideration. The hope is that holding the employer or principal liable will encourage such persons to take steps to reduce the risk of harm in the future. Plaintiffs must show that the rationale behind the imposition of vicarious liability will be met on the facts in two respects. First the relationship between the tortfeasor and the person against whom liability is sought must be sufficiently close. Second the wrongful act must be sufficiently connected to the conduct authorized by the employer. This is necessary to ensure that the goals of fair and effective compensation and deterrence of future harms are met."

- The court reviewed the 5 factors from *Bazley* to determine whether a sufficient connection in the case of an intentional tort exists. The court held that the Court of Appeal erred in holding that the SCC's decision in *Jacobi* stood for the proposition that non-profit employers should not be held vicariously liable for sexual assaults committed by their employees. The SCC holding in *Bazley* was a clear indication that this was not the law since the defendant in *Bazley* was a not-for-profit employer.

- With respect to the first part of the *Bazley* test – whether the relevant precedents clearly determined the issue – the court held that the issue had not been unambiguously established in the case law.

- The court concluded in applying the *Bazley* test as follows:

> "The relationship between the diocesan enterprise and Bennett was sufficiently close. The enterprise substantially enhanced the risk which leads to the wrongs to the plaintiff/respondent suffered. It provided Bennett with great power in relation to vulnerable victims and the opportunity to abuse that power. A strong and direct connection is established between the conduct of the enterprise and the wrongs done to the plaintiff/respondent. The majority of the Court of Appeal erred in failing to apply the right test. Had it performed the appropriate analysis, it would have found the Roman Catholic Episcopal Corporation of St. George's vicariously liable for Father Bennett's assaults on the plaintiff/respondent."

8. *K.L.B.* (2003)

- The plaintiffs (appellants) in this decision were the victims of abuse in 2 foster homes. They were placed in foster homes pursuant to decisions made by social workers employed by the Government of British Columbia.

- At the SCC, the majority found that the government was liable on the basis of its own direct negligence. The basis of liability was established on the duty of the government pursuant to the governing legislation to make arrangements for the placement of children in foster homes "as will best meet the needs of the child". The court held that this formulation imposed a high standard of care on the government. Because of the vulnerability of children placed in foster homes the court held that the government must set up adequate procedures to screen prospective foster parents and to monitor homes in which children are placed. Applying the standards of care applicable to placements of children in the 1960's and 1970's the court found that the social workers negligently failed to meet standard of care applicable to them.

> "The system of placement and supervision was faulty, permitting the abuse that contributed to the children's subsequent problems."

- The court also examined the availability of a claim in vicarious liability against the government for the torts of the foster parents. The court provided the following analysis:

> (19) To make out a successful claim for vicarious liability the plaintiffs must demonstrate at least two things. First they must show that the relationship between the tortfeasor and the person against whom liability is sought is sufficient close as to make a claim for vicarious liability appropriate. This was the issue in *671122 Ontario Ltd. v Sagaz Industries Canada* … where the defendant argued that the tortfeasor was an independent contractor rather than an employee and hence was not sufficient connected to the employer to ground a claim for vicarious liability. Second the plaintiffs must demonstrate that the tort is sufficiently connected to the tortfeasor's assigned tasks, that the tort can be regarded as a materialization of the risks created by the enterprise. This was the issue in *Bazley supra* which concerned whether sexual assaults on children by employees of a residential care institution were sufficiently closely connected to the enterprise to justify imposing vicarious liability. These two issues are of course related. A tort will only be sufficient connected to an enterprise to constitute a materialization of the risks introduced by it if the tortfeasor is sufficiently closely related to the employer.

- The SCC held that on the facts the relationship between the foster parent tortfeasors and the government was not sufficiently close. It held that imposing vicarious liability in the context of an employer/independent contractor relationship will not generally satisfy the policy goals of vicarious liability relating to fair and effective compensation and

deterrence of future harm. The court held that competition would not be fair with the organization to be fixed with the responsibility is too remote from the tortfeasor to consider that the tortfeasor is acting on its behalf. In that circumstance the tort could not reasonably be considered to be a materialization of the organization's risk. Whether it is lack of control over the activities of the tortfeasor the organization would not be capable of taking steps to prevent the harm. The court reasoned that foster parents were analogous to independent contractors.

- The court also considered whether the government was liable for breach of a non-delegable duty. The notion of non-delegable duty was described by Lord Denning in *Cassidy v Minister of Health* [1951] 2 KB 343 (CA) at page 363

> "Where a person is himself under a duty to use care he cannot get rid of his responsibility by delegating the performance of it to someone else, no matter whether the delegation be to a servant under a contract of service or to an independent contractor under contract for services".

In a previous decision of the Supreme Court of Canada, *Lewis (guardian ad litem of) v British Columbia*, Mr. Justice Cory stated that the notion of non-delegable duty comprises a "spectrum of liability" and that

> "within that spectrum there are a variety of legal obligations which may, depending on the circumstances, lead to a principle's liability for the negligence of an independent contractor".

With this in mind the court analyzed the *Protection of Children Act* (B.C.) pursuant to which the children were placed in foster homes and concluded that that legislation offered no basis for imposing on the superintendent under the statute a non-delegable duty to ensure that no harm comes to children through the abuse or negligence of foster parents. On that basis the doctrine of non-delegable duty was held not to apply.

9. Reflections and Comments - Impact on Charitable Sector

- The SCC rejection of Salmond test as based on "semantics" in favour of the "close connection" test plus policy, renders their doctrine unpredictable since the policies identified are inherently expansive, pointing in multiple different directions.

- The SCC formulation of the VL doctrine ties it directly to the "policies" the SCC identifies as central to its rationality. As suggested briefly above, and elsewhere by myself and others (Robert Stevens, "Viasystems" and Neyers "Theory") the policies identified do not provide any rationale for the doctrine, separately or all together. It is interesting that the House of Lords in *Lister* and the High Court of Australia in *Lepore* both explicitly avoid or reject this part of the SCC decision, the former while adopting the "close connection" text and the latter while rejecting that part too. In *Lister* Lord Hobhouse said:

> (60) My Lords, the correct approach to answering the question whether the tortious act of the servant falls within or without the scope of the servant's employment for the purposes of the principle of vicarious liability is to ask what was the duty of the servant towards the plaintiff which was broken by the servant and what was the contractual duty of the servant towards his employer. The second limb of the classic Salmond test is a convenient rule of thumb which provides the answer in very many cases but does not represent the fundamental criterion which is the comparison of the duties respectively owed by the servant to the plaintiff and to his employer. Similarly, I do not believe that it is appropriate to follow the lead given by the Supreme Court of Canada in Bazley v Curry 174 DLR(4th) 45. The judgments contain a useful and impressive discussion of the social and economic reasons for having a principle of vicarious liability as part of the law of tort which extends to embrace acts of child abuse. But an exposition of the policy reasons for a rule (or even a description) is not the same as defining the criteria for its application. Legal rules have to have a greater degree of clarity and definition than is provided by simply explaining the reasons for the existence of the rule and the social need for it, instructive though that may be. In English law that clarity is provided by the application of the criterion to which I have referred derived from the English authorities.

- The High Court of Australia in *Lepore* interprets the SCC's "close connection" test, divorced of its policy rationale, as simply the "scope of employment" argument restated., poorly and less clearly. The House of Lords decision in *Lister* took the same view of the test, but liked it.

- The reluctance (recalcitrance) of the Courts of Appeal in *Backwater* and *Bennett* shows either that the *Bazley* test is not being “absorbed” or that it is in fact being resisted. In those decisions the Courts of Appeal apply sophisticated arguments (charitable immunity, government can afford to pay) to resist imposition of liability on charity. SCC categorically rejects these arguments and, coercively, forces Canadian courts to apply its test.

- What may be interesting is the extent to which these policy arguments are deployed to expand VL (or to push it in a variety of contradictory directions, to wit, the CA's decision in *Blackwater* that the Government of Canada should be solely liable since it could better afford to compensate) and how the courts will attempt to resist such expansion. The majority decision in *OMI* is an interesting example of a court resisting expansion courageously. The minority decision in the same case is an interesting example of the ease with which courts can move in the other direction. The "compensation imperative" coupled with a deterrence argument which does not identify what is to be deterred and an enterprise risk argument which argues for strict or quasi strict liability of all enterprises, are the inescapably expansive engines of liability.

- The apportionment argument in *Blackwater* is based on an allocation of fault because it places greater liability on the Government of Canada on the basis of its superior supervisory authority. The reasoning is unpersuasive and comes across, unfortunately, as palm tree justice. This will be a further source of significant confusion in this area of the law.

- Similarly its peremptory treatment of punitive damages and VL, although with respect, correct in the result, adds another layer of difficulty because it is based on VL being a doctrine of strict liability, making the retribution logic of punitive damages inapplicable. We are left to wonder about the deep logic of this doctrine when the force of fault arguments is used to different directions.

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