No-Fault Liability for Institutional Sexual Abuse Since the Trilogy of E.D.G., K.L.B. and M.B.

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A. INTRODUCTION

1. The suggested theme of this portion of the course was the development of effective litigation strategies by determining the extent of institutional vicarious liability, or no-fault liability, for sexual abuse. The starting point for any useful strategy, either for the plaintiff or the defendant, is a realistic assessment of the risk of liability based on an understanding of the present law and likely developments.[1] Thus, the primary focus of this paper is a review of developments over the past decade and particularly since the trilogy—E.D.G., K.L.B. and M.B.[2]

2. The decade leading up to the trilogy witnessed what Professor Feldthusen, Dean of Common Law, University of Ottawa, referred to as "revolutionary Canadian developments in civil liability for sexual abuse".[3]

3. Some commentators and judges viewed these developments with enthusiasm. In the B.C. Court of Appeal in *M.B.*[4], Madam Justice Prowse wrote in response to some of the more cautious concerns of her colleagues as follows in paragraph 76:

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[1] In writing this paper, I have drawn liberally from prior papers I have written on the topic including a *Brief Review of Vicarious Liability in Sexual Abuse Cases*, Continuing Legal Education Society of British Columbia, Sexual Tort Claims, January, 2004; *The Sexual Tort Wars, 16 Years in the Trenches*, Continuing Legal Education Society of British Columbia, Update on Torts, April, 2004.
[2] *E.D.G. v. Hammer* 2003 SCC 52; *K.L.B. v. British Columbia* 2003 SCC 51; *M.B. V. British Columbia* 2003 SCC 53
[3] Forward, Grace & Vella, *Civil Litigation for Sexual Abuse and Violence in Canada*, Butterworths, 2000
[4] *M.B. v. British Columbia* (2001) 87 B.C.L.R. (3d) 12 (BCCA), at para.76

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> *It may well be that the law has developed to the point where children's claims to fair compensation for injuries they have suffered at the hands of surrogate caregivers may impose heretofore unknown liability on parents or guardians. From the point of view of children, this could be viewed as a positive, not ominous, development.*

4. Others viewed these developments with more trepidation. Professor Klar wrote in the *Symposium on the 125th Anniversary of the Supreme Court of Canada: Legacy and Challenges* as follows:

> *Balancing considerations of judicial precedent and legal principle on the one hand, and the need for the Supreme Court to take into account the social and economic implications of their decisions on the other, is a difficult task. The common law most grow and reflect current societal needs. It also, however must be relatively certain and predictable. Courts must be aware of the limitations which exist on their abilities and responsibilities in the area of policy making. This is an issue of which the Supreme Court of Canada is fully aware. It has been a courageous and adventurous court, which at times has, in this author's respectful view, gone too far in ignoring judicial precedent and legal principles in deference to achieving policy objectives.* [5]

[5] Judicial Activism in Private Law (2001) 80 Can. Rev. 1 and 2-215.

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5. These revolutionary developments included the abolition of limitation periods in British Columbia for causes of action based on misconduct of a sexual nature in the early 1990s, the Supreme Court of Canada decisions in *Bazley v. Curry*[6] and *Jacobi v. Griffiths*[7] establishing new tests for vicarious liability, expanding obligations for non-delegable duties and fiduciary liabilities, and the elimination of caps on general damages in sexual abuse cases.

6. These bold and revolutionary changes were tempered to a large degree by the Supreme Court of Canada in the trilogy in which the court largely ruled in favour of the institutions. (In *K.L.B.*, the court upheld the claim of one plaintiff where there was evidence of direct negligence by the Crown.)

7. In *K.L.B.* and *M.B.*, the court held that the Crown was not vicariously liable for the wrongs of foster parents against children who had been placed in their care. Vicarious liability requires a sufficiently close relationship between the tortfeasor and the party sought to be held responsible and a sufficiently close connection between the tort and the tortfeasors assigned task. The court noted that vicarious liability is less likely to be imposed in employer/independent contractor relations such as existed here as there was usually insufficient proximity to satisfy these requirements.

[6] [1999] 2 S.C.R. 534
[7] [1999] 2 S.C.R. 570

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8. The court also rejected the plaintiffs' claims in both *M.B.* and *K.L.B.* for breach of a non-delegable duty. Such liability usually has a source in statute. In these cases, the legislation offered no basis for imposing on the Superintendent of Child Welfare a non-delegable duty to ensure that no harm comes to children through the abuse or negligence of foster parents. Further, in *K.L.B.*, the court also upheld the Court of Appeal's conclusion that the Superintendent was not in breach of any fiduciary obligations to the children. There was no evidence that the government put its own interest ahead of the children or committed acts that harmed the children in a way that amounted to betrayal of trust or disloyalty.

9. In *E.D.G.*, a school janitor had sexually assaulted the grade 3 child over a period of two years. The case was dismissed at trial on all grounds—independent negligence, vicarious liability, breach of fiduciary duty and breach of non-delegable duty. On appeal, in both the B.C. Court of Appeal and to the Supreme Court of Canada, the Plaintiff had abandoned the claim in vicarious liability as the Supreme Court of Canada had explicitly endorsed the trial judgment in *Jacobi*. Binnie J. had cited the case as an illustration of the principle that "creation of opportunity without job-created power over the victim or other link between the employment and the tort will seldom constitute the strong connection required to attract vicarious liability".[8]

[8] *Jacobi*, supra, @ para.45

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10. In *E.D.G.*, the Supreme Court of Canada upheld the trial decision, and the majority in the Court of Appeal on the issues of non-delegable duty and fiduciary duty, holding that the appellant could not be successful on either ground. With respect to non-delegable duty, the focus here, as in *K.L.B.*, was on the duties generated by statute. After analyzing the provisions of the *School Act*, McLachlin C.J. said this at paragraph 20:

> *These specific duties do not permit the inference that boards are generally and ultimately responsible for the health and safety of school children on school premises, in a way as would render them liable for abuse at the hands of a school employee. The same is true of the provisions laying out the general duties of school boards. None of the general duties give school boards full responsibility for students' welfare while on school premises, in a way that the statutes in Lewis gave the Ministry full responsibility for overseeing maintenance projects and for ensuring that workers exercised reasonable care. Consequently, the Act does not appear to impose a general non-delegable duty upon school boards to ensure that children are kept safe while on school premises, such as would render the Board liable for abuse of a child by an employee on school premises.*

11. The court also held that the plaintiff's claims for breach of fiduciary duty also could not succeed. The court said this at paragraph 24:

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> *The appellant's claim that the Board has a fiduciary duty to ensure that no employee harms school children on school premises regardless of fault fares no better. This proposal amounts to an attempt to recast the appellant's claim for breach of non-delegable duty into the language of fiduciary duty and extends fiduciary law beyond its natural boundaries. Fiduciary obligations are not obligations to guarantee a certain outcome for the vulnerable party, regardless of fault. They do not hold the fiduciary to a certain type of outcome, exposing the fiduciary to liability whenever the vulnerable party is harmed by one of the fiduciary's employees. Rather, they hold the fiduciary to a certain type of conduct. As Ryan J.A. held in A.(C.) v. C.(J.W.) (1998) 60 B.C.L.R. (3d) 92, (CA) at para.154, "A fiduciary is not a guarantor". A fiduciary "does not breach his or her duties by simply failing to obtain the best result for the beneficiary.*

12. Although these cases may have placed a temporary brake on expanding no-fault liability, a review of the cases since then suggest that the pendulum may be shifting once more to the victims of sexual abuse. I will now turn to a review of some of the more significant cases decided since the trilogy.

B. THE PRIEST CASES

13. The Supreme Court of Canada had the opportunity to review the priest cases in *John Doe v. Bennett* 2004 SCC 17 within months of the trilogy. This case dealt

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with the liability of a diocese of the Roman Catholic Church for the sexual wrongdoing of a priest.

14. In the Newfoundland Court of Appeal [2002] N.J. No. 218, the majority held that there should be no vicarious liability, although it found that there was evidence which supported the trial decision that there was independent negligence. There had been conflicting decisions throughout Canada on whether a diocese should be held vicariously liable. In the pre-*Bazley* decision of the Nova Scotia Court of Appeal in *F.W.M. v. Mombourquette* [1996] N.S.J. No. 260, the court reversed the trial decision in which vicarious liability had been imposed. The court in *Mombourquette* said the following in part:

> *47. There was no evidence that the appellant was negligent in appointing or supervising Mombourquette. The fact that the appellant employed him as a clergyman and authorized him to act in a privileged position is not sufficient to impose liability particularly where he acts criminally and totally contrary to the religious tenets which he has sworn to uphold. One may well ask how it can be said in such circumstances that he was acting in the course of employment? With respect, it is clear that he was not doing so when he approached and subsequently assaulted Mr. F.M. With respect, I would uphold the appellant's contention that*

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> *the learned trial judge erred in holding the appellant vicariously liable for the criminal activities of Mombourquette.*

Leave to appeal to the Supreme Court of Canada was refused.

15. There had also been the lower court decision in *K.W. v. Pornbacher* (1997) 32 B.C.L.R. (3d) 360 (BCSC) in which Quijano J. had held that the Catholic Church was vicariously liable through the bishop, although the diocese, a corporation sole created by statute with limited powers was not liable. In doing so, she refused to follow the decision of the Court of Appeal in *Mombourquette*, preferring the reasoning of the trial judge. Parenthetically, it was noted in *Bennett* by the Newfoundland Court of Appeal that this decision on the liability of the church is contrary to the weight of authorities as the church is not a legal entity, nor was it a party in *Pornbacher*. *Pornbacher* was resolved by the parties before the appeal.

16. In the Court of Appeal decision in *Bennett,* the majority decision on vicarious liability was written by Marshall J.A. although he agreed with Cameron J.A. on the issue of independent negligence. In rejecting vicarious liability, Marshall J.A. focused primarily on the charitable non-profit nature of the diocese. He wrote in part as follows:

> *37. In addressing whether other policy justifications exist, the factors that militate against the exposure of non-profit corporations to vicarious liability must be taken into consideration as well as those which support*

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its attribution. In that regard, it may be argued that the Episcopal Corporation of St. Georges should be exposed to vicarious liability because the office of the Bishop, which it personifies, invested the tortfeasor with the position of trust that gave him access to his victims. One the other side of the scale, the implications of visiting indirect responsibility on the Corporation, or any non-profit charitable body, for actions totally unconnected with the tortfeasor's engagement must also be addressed. In considering those implications, the contributions of all non-profit bodies, religious and secular, to society can neither be overlooked nor underestimated.

17. Marshall J.A. concluded that while pragmatic policy considerations *"of deep pockets is behind the imposition of vicarious liability on commercial ventures organized for profit, this judgment adopts the view that equally pragmatic social policy justifies rejecting the attribution of vicarious liability to non-profit charitable bodies, whether secular or religious"*. (para.42). He particularly relied on the majority judgment of Binnie J. in *Jacobi* in reaching his conclusion. Further, he was of the view that the majority in *Jacobi* had apparently approved the decision in *Mombourquette*.

18. In reasons pronounced March 25, 2004, the Supreme Court of Canada held that the office of Bishop/Archbishop, the enterprise of the diocese and the Episcopal Corporation were all legally synonymous and that the bishop was a corporation

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capable of suing and being sued in all courts with respect to all matters. Thus, the court confirmed the conclusions below that the Roman Catholic Episcopal Corporation of St. Georges was directly liable for its negligence in failing to properly direct and discipline Father Bennett. More significantly, the court reversed the Court of Appeal decision and held that the diocese was also vicariously liable. In an unanimous decision written by the Chief Justice, it was held that the evidence overwhelmingly satisfied the test affirmed in *Bazley* and *Jacobi* in that the relationship between the diocese and Bennett was sufficiently close and that the enterprise substantially enhanced the risk which led to the wrongs the plaintiffs suffered. The court held that the majority of the Court of Appeal erred in reading *Jacobi* as suggesting that its effect is that non-profit employers should not be held vicariously liable for sexual assaults by their employees.

19. The court held that relevant precedents dealing with church related activities do not clearly determine the issue, although they tended to support the imposition of vicarious liability on the Episcopal Corporation. The court appeared to distinguish the *Mombourquette* decision on the basis that a key factor there was that the priest had acted totally contrary to the religious tenants which he had sworn to uphold. This seems a rather curious distinction to make as one would have thought that the same evidence would have existed in *Bennett*. One might also have thought that the refusal to grant leave to appeal in the *Mombourquette*

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decision might have been taken as an indication that it was properly decided. Indeed, the case appeared to have been cited with approval by Binnie J. in *Jacobi*.

20. In any event, the court held that the bishop exercised extensive control over the priest akin to an employment relationship. "The incidents of control far exceed those characterizing the relationship between foster parents and the government, discussed in *K.L.B.*" (para.27). The evidence also established the necessary connection between the employer created or enhanced risk and the wrong complained of.

21. In *Bennett*, the Supreme Court of Canada focused on the "psychological intimacy inherent in his role as a priest" (para.29). This psychological intimacy encouraged the victim's submission to abuse and increased the opportunity to abuse. The priest had an enormous degree of power because of his position as the parish priest.

22. McLachlin C.J. concluded as follows at paragraph 32:

> *In summary, the evidence overwhelmingly satisfies the test affirmed at Bazley, Jacobi, and K.L.B. The relationship between the diocesan enterprise in Bennett was sufficiently close. The enterprise substantially enhanced the risk which led to the wrongs the plaintiff-respondents suffered. It provided Bennett with great power in relation to vulnerable victims and with the opportunity to abuse that power. A strong and direct*

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connection is established between the conduct of the enterprise and the wrongs done to the plaintiff-respondents. 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. Georges vicariously liable for Father Bennett's assaults on the plaintiff-respondents.

23. The decision in *Doe v. Bennett* obviously discouraged appeals in some of the other trial level decisions in which a diocese had been held vicariously liable for the sexual wrongdoings of priests. In *Doe v. O'Dell*, [2003] O.J. No. 3456, Swinton J. had refused to follow the Newfoundland Court of Appeal in *Bennett*. She also found that *Mombourquette* was not helpful as it was decided prior to the *Bazley* and *Jacobi* decisions.

24. In another decision of the Ontario Supreme Court, Kerr J. in *J.R.S. v. Glendinning* 2004 O.J. No. 285 had also found a diocese vicariously liable for the sexual torts of a priest. Further, Karen J. also held that the diocese was liable on the basis of independent negligence.

C. THE NON-RESIDENTIAL SCHOOL CASES

25. In *H.(S.G.) v. Gorsline*, [2001] 6 W.W.R. 132 (ABQB), the plaintiff student had been sexually abused by her physical education and science teacher in a public school. The abuse had occurred in the school, in his vehicle, at his home, and

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elsewhere and included all manner of sexual abuse short of intercourse. The plaintiff argued that the school was independently negligent, vicariously liable, in breach of its fiduciary duty, and in breach of its duty under the *Occupiers Liability Act*. In the trial decision in 2001, McMahon J. dismissed all claims against the school district.

26. With respect to vicarious liability, the Court noted that there were no cases in which a non-residential school had been found vicariously liable for the sexual wrongdoing of an employee. Notwithstanding this, the Court held that previously decided cases were all distinguishable to some extent and that they did not unambiguously determine on which side of the line the case fell. Thus, the Court examined the underlying policy considerations set out in *Bazley*.

27. Although a finding of vicarious liability would surely provide for "effective compensation" of the plaintiff, the Court found that such would not be just and fair in these circumstances. When the legislature empowers school boards to employ teachers and requires compulsory attendance, that cannot be said in and of itself to materially enhance the risk of harm. The goal of deterrence would also not be served by imposing vicarious liability as there is little that school boards can do to deter teachers committed to perversion and as teachers, parents and school boards are now well aware of the risk of abuse. There was no significant connection between the teacher's duties and the wrongs that justified vicarious liability. Obviously, mere opportunity was not sufficient to impose vicarious

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liability. "*No doubt teachers occupy a position of trust and responsibility, but they do not replace the parents in the same way that custodians of a residential institution do*" (para.76).

28. In conclusion, McMahon J. said this:

> *80. The plaintiff is a brave woman. She has suffered much. It would be satisfying to give her a better expectation of recovery but it would be unjust. As said by Vickers, J. in G.(E.D.) v. Hammer, supra and quoted by Binnie, J. in Jacobi at para. 45:*
>
> > *If school boards are to become insurers for all of the actions of their employees then that is a policy choice that must be made by Members of the Legislative Assembly.*
>
> *81. I respectfully concur with Binnie, J. that in the understandable pursuit of a satisfactory remedy for children harmed, we cannot overlook the longer term consequences. Current events tell us that there is no certain prevention for child abuse. Policies against closed doors, less personal involvement with students and no physical contact may reduce opportunity, but they come at a price. An assistant superintendent who worked in the system for 34 years said hugging kids when they needed it used to be commonplace, but he recently and regretfully had to tell a teacher it could no longer happen. The chill of strict liability may cause school boards to introduce policies and rules that would be retrogressive*

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> *to the education system and ultimately harmful to the same children for whom protection is sought.*

29. The Alberta Court of Appeal decision in *Gorsline* 2004 ABCA 186 was rendered after the trilogy. The court unanimously upheld the trial judgment dismissing all claims of the plaintiff against the school district. With respect to vicarious liability, the court held that the trial judge correctly applied the test set out by the Supreme Court of Canada in *Bazley* and *K.L.B.* The court said this at paragraph 18:

> *In K.L.B., the court held that to make a successful claim for vicarious liability, plaintiffs must establish first, that the relationship between the tortfeasor and the person against whom liability is sought is sufficiently close as to make a claim for vicarious liability appropriate and second, that the tort is sufficiently connected to the tortfeasor's assigned task that the tort can be regarded as a materialization of the risk created by the enterprise.*

30. Although it was argued by the school board that prior cases throughout the common law world now established that school boards are not vicariously liable for the criminal sexual acts of teachers, the court held that it was not necessary to consider that issue as it was sufficient to uphold the trial judgment on the basis of the lack of a strong or significant connection between the employment and the wrongful act. Although the duties required of the board by the teacher provided

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an opportunity for abuse, they did not significantly contribute to the risk of child abuse.

31. The court also approved the policy analysis of the trial judge. Although the "likelihood of recovery of a substantial award is improved if the victim has access to the employer's pocket", this must be "tempered by the rationale that it must be fair and just that the employer pay" (para.23). Citing *Jacobi*, "these pro-liability policies have therefore been restrained historically by recognition that competing social objectives also have to be weighed in balance".

32. On the issues of influence and authority, the relationship fostered by the board fell far short of the "parent like" control or authority discussed in *Bazley*. These relationships were not expected to have any element of intimacy.

33. Finally, the court agreed with the trial judge's view that imposing vicarious liability on school boards would have the chilling effect of introducing rules and policies that would be regressive to the educational system and harmful to the students. The Supreme Court of Canada refused leave to appeal to the plaintiff: 2004 SCCA 385.

34. Shortly after the decision in *Gorsline*, Faour J. of the Newfoundland and Labrador Supreme Court came to a contrary decision in *Doe v. Avalon East School Board* [2004] N.J. No. 426. In this case, the school board was found vicariously liable, on an agreed statement of facts, when a teacher with a 20 year teaching history

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assaulted a grade 12 student. The assault took place when the student was requested to study in another room while the rest of the class wrote an exam. The trial judge found that *Gorsline* was an ambiguous precedent. He distinguished *Gorsline* on the basis that many of the assaults were outside the purview of the school mandate and in many cases off the premises. In reviewing the precedents cited, the trial judge held in the case of *Avalon*, the fact situation was somewhere between the line of cases in which no liability was found and those in which vicarious liability was imposed.

35. As the court held that there were no conclusive precedents, the court then went on to the second stage of analysis in *Bazley* to consider whether vicarious liability should be imposed in light of the broader policy rationales behind the concept of vicarious liability. This of course involves an examination of:

(a) the role and mandate of the employer, and its connection to the wrongdoing;

(b) the relationship between the wrongdoer and the employer, and whether the defendant had control and direction over the wrongdoer; and

(c) the connection between the wrongdoer's action and the employer's enterprise.

36. With respect to the first factor, the court concluded that education was a service that is directly delivered to youths who were vulnerable by virtue of their age and

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the near custodial context in which the abuse took place. Although the teacher was not given the kind of intimate parental role described in *Bazley*, the teacher had a significant measure of power and authority over the students. As a consequence, such activity carried with it a risk of harm if an employee abused that authority. With regard to the second factor, the court found that there was a sufficiently close relationship between the teacher and the school board and he was subject to its direction, discipline and control. With regard to the third factor, the court concluded that the teacher's actions were so closely connected with this authority that it would be fair and just to impose vicarious liability.

37. The court rejected the policy arguments that had been accepted and approved in *Gorsline*. With respect to the argument that vicarious liability might have a chilling effect on school boards, Faour J. said this at paragraphs 68-70:

> *I was presented with no evidence of the likelihood of this "chilling" effect having a negative impact on education. The defendant asked me to take notice of its potential harmful impact without evidence—that it was a logical consequence, and was self-evident. The plaintiff took the opposite view, and insisted that the education system would not flounder because of a finding of liability. I note, however, that the possible consequences of school board operations cannot dissuade me from a finding of liability where the circumstances warrant. It is a case of striking the right balance.*

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When one examines the policy framework, an analysis which considers whether it is "fair and just" to impose vicarious liability on an organization will balance these factors. One could make the "chilling" argument in the context of any organization. Education boards are not the only enterprises which provide a socially desirable service, but all must take responsibility for the risk they introduce or enhance by virtue of their enterprise. The analysis set out in Bazley seeks to balance the considerations for all organizations. In addition, the discussion in Bennett confirms that the policy considerations inherent in vicarious liability should apply equally to organizations, notwithstanding the impact on their socially desirable enterprises.

I was not satisfied that it would be significantly more difficult for school boards to appropriately manage the school system if I were to find the board liable. There was no compelling reason presented to deny liability on policy grounds. Schools today are operating in an environment where they have to consider many social and other factors in their operations. Any competent manager would already have taken into account the potential for sexual abuse in the normal risk management associated with the operation of schools. Sexual assault is a serious matter and it would be unfair for the defendant school board to avoid the consequences of its employees' actions in the absence of compelling evidence of the adverse impacts on day to day operations of the school system.

38. The court also rejected the arguments that a different standard should apply to non-profit organizations noting that the Supreme Court in *Bennett* "put that argument permanently to rest. Non-profit organizations are to be held to a similar standard as other organizations" (para.78).

39. Unfortunately, the school board chose not to appeal the decision in *Avalon*. For my part, I have great difficulty in seeing any significant distinguishing features in the power and authority given to the teachers in *Gorsline* and *Avalon*. I can perceive no meritorious distinctions between the physical education and science teacher in *Gorsline* and the thematic literature teacher in *Avalon*. Although Faour J. noted that many of the assaults in *Gorsline* took place outside the school premises, he appears to gloss over the facts that many of the assaults occurred in Gorsline's office and the school nurse's office. Although both teachers had the opportunity and power to be alone with students, neither relationship, in my view, could be said to have involved the intimate "parent like" control or authority discussed in *Bazley*.

40. I would argue that the truly distinguishing features between *Gorsline* and *Avalon* are the emphasis that the courts placed on the underlying policy issues. In using the policy analysis employed by Faour J., it is difficult to see that any non-residential school could avoid vicarious liability for the sexual wrongdoings of teachers. In my respectful opinion, I would be inclined to predict that the courts are more likely to follow the *Gorsline* case in non-residential school cases in the

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future. I am buoyed in that view by the fact that the Supreme Court of Canada did refuse leave to appeal to the plaintiff in the *Gorsline* case, although I had the same confidence with respect to priest cases when the Supreme Court of Canada refused leave to appeal in *Mombourquette*.

41. *Aksidan v. Canada (Attorney General),* [2008] B.C.J. No 178 (B.C.C.A.) addressed the issue of the vicarious liability of Canada for sexual torts against students perpetrated by a teacher in an aboriginal school. The British Columbia Court of Appeal found that Canada was not vicariously liable for the abuse by the teacher. Any liability would lie with the school board. In 1969 Canada entered into an agreement with the province, under s. 133(1) of the *Indian Act*, under which Canada delegated responsibilities of education for aboriginal children to the province. The province established the school board which employed the teacher.

42. The Court considered the Court of Appeal decision of *Blackwater v. Plint* 2003 BCCA 671 (which is discussed in the following section), noting at paragraph 12 that:

> *… there is no non-delegable duty of Canada inherent in the exercise of the power to make agreements under s. 113(1).*

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43. The Court refused to find vicariously liability against Canada, despite the fact that Canada held title to the land, and the buildings were constructed by Canada. The Court concluded:

> *18. [The teacher] was employed by [the school board] and any vicarious liability for his assaults rest with [the school board] together with any liability for breach of a supervisory duty of care. There are no policy reasons why Canada should be implicated where control of all aspects of education has been reasonably delegated to provincial authorities. The duty of care connected to the education of Indian children accepted by the Province should not be obscured by claims of vague residual responsibilities of Canada.*
>
> *19. In my view, the delegation of exclusive control by Canada to the Province under the 1969 Agreement is a complete answer to the claims of the appellants …*

D. THE RESIDENTIAL SCHOOL CASES

44. *T.W.N.A. v. Canada* 2003 BCCA 670 and *Blackwater v. Plint*, were heard consecutively by a five-member bench. In both cases, the churches and federal government were held vicariously liable in varying degrees for sexual abuse on students in residential schools.

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45. In *T.W.N.A.*, Canada was found 40% at fault and the church 60% at fault. The appeal by the church was adjourned generally pending settlement discussions. Thus, the court only dealt with the issue of damages in *T.W.N.A.* One of the important features that arose from *T.W.N.A.* was the decision that there was vicarious liability for aggravated damages as such damages are compensatory and thus a component of general damages.

46. In *Blackwater v. Plint*, the case proceeded to appeal on all issues. At trial, Brenner C.J. had held that Canada and the United church were jointly liable and apportioned fault between them 75% against Canada and 25% against the church. The church appealed against its liability in its entirety, while Canada took issue with the apportionment.

47. Brenner C.J. held that both Canada and the church were employers of Plint, the dormitory supervisor. On appeal, the court found little authority for the proposition that there could be more than one employer. In any event, the larger issue was whether a charitable institution could or should be held vicariously liable in the circumstances of this case. Esson J.A. reviewed the decision of McLachlin J., as she then was, in *Bazley* where she had refused to carve out a general exception for charitable or non-profit institutions from vicarious liability. Esson J.A., writing for unanimous court on this issue, noted that in *Bazley*, the Supreme Court of Canada was faced with the policy dilemma that arises when the choice is simply between the innocent victim and the innocent charitable

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institution. Esson J.A. concluded that this policy dilemma did not arise here. He held that *Bazley* left open the argument that "in a case where the government is liable and 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 government, no liability should be imposed upon the organization" (para.48). As the government had admitted liability, and only contested the apportionment, the choice was not between the innocent victim and the non-profit organization.

48. The Supreme Court of Canada decision in *Blackwater* was handed down in October, 2005, (2005 SCC 58). The court upheld the trial judgment that both the church and the government were vicariously liable for the wrongful acts of the dormitory supervisor. As previously stated, the Court of Appeal had held that it would be inappropriate to hold the church vicariously liable, given the degree of control over operations exercised by the government. The Supreme Court of Canada disagreed. McLachlin C.J. said this at paragraph 34:

> *…the incontrovertible reality is that the church played a significant role in the running of the school. It hired, fired and supervised the employees. It did so for the government of Canada, but also for its own end of promoting Christian education to aboriginal children. The trial judge's conclusion that the church shared a degree of control of the situation that gave rise to the wrong is not negated by the argument that as a matter of law Canada retained residual control, nor by formalistic arguments that*

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> *the church was only the agent of Canada. Canada had an important role, to be sure, which the trial judge recognized in holding it vicariously liable for 75% of the loss, but that does not negate the church's role and the vicarious liability it created.*

49. The Supreme Court of Canada also disagreed with the Court of Appeal that it would be inappropriate to find two defendants vicariously liable for the same conduct. McLachlin C.J. said this at paragraph 38:

> *In this case, the trial judge specifically found a partnership between Canada and the church, as opposed to finding that each acted independently of the other. No compelling jurisprudential reason has been adduced 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…*

50. The Supreme Court of Canada also disagreed with the Court of Appeal's creation of any sort of charitable immunity for non-profit organizations. McLachlin C.J. wrote that this conclusion was based on a misapprehension of the principles governing vicarious liability. McLachlin C.J. further stated that the Court of Appeal erred in reasoning that, "The party best able to bear the loss should be liable, provided it bears more responsibility than a party less able to pay."

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(para.40). She stated that such a class based exemption did not find support in principle nor in jurisprudence. Such an approach would be counter-productive as "exempting non-profit organizations when government is present would not motivate such organizations to take precautions to screen their employees to protect children from sexual abuse." (para.41).

51. Further, the church was not working with volunteers and was, in fact, running a residential school. McLachlin C.J. also used the "floodgates" argument, stating that "a host of organizations may claim to be non-profit, some of such the law might not wish to favour with an exemption. Indeed, the government itself may be considered a non-profit institution." (para.43).

52. McLachlin, C.J. concluded at paragraph 44:

> *One may sympathize with the situation of the church, which generally acts with laudable motives and now finds itself facing large claims for wrongs committed in its institutions many years ago. However, sympathy does not permit courts to grant exemptions from liability imposed by subtle legal principle. I conclude that the Court of Appeal erred in exempting the church from liability on the ground of charitable immunity.*

53. The Supreme Court of Canada did find, however, that the trial judge had erred in finding a non-delegable statutory duty on the part of Canada. The court held that no non-delegable duty could be inferred from the applicable legislation. Although

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the legislation granted Canada the powers to set standards for the schools, they fell short of "imposing the broad statutory duty of care to protect the safety and welfare of the children". (para.54).

54. Not every sexual abuse that occurs in a residential school will result in liability, as the appellate decisions in *E.B. and Order of the Oblates of Mary Immaculate and the Province of British Columbia* make clear.

55. In *E.B. v. Oblates et. al.* 2001 BCSC 1783, Cohen J. held that the Oblates (Order of the Oblates of Mary Immaculate) were vicariously liable for the sexual assaults committed by a baker at a residential school on a student. The baker, deceased, had been given employment at the school after being released from prison on a manslaughter conviction. The judge appeared to have accepted the evidence that this baker was a "*main cog*" in the operation of the school "*clothed with power and authority over the resident children*".

56. Applying the tests in *Bazley* and *Jacobi*, the trial judge was of the view that prior cases did not unambiguously determine on which side of the line between vicarious liability and no liability the case fell. Turning to the policy approach in *Bazley*, the Court held that the evidence established "*a significant connection between the creation or enhancement of a risk and the wrong that accrues therefrom*" and imposed vicarious liability. In so finding, the Court did not find it necessary to determine the issue of independent negligence.

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57. On appeal, 2003 BCCA 289, a five member panel found that the evidence supported converting the offender back into a simple baker, set aside the decision on vicarious liability and remitted the case to the trial court on the issue of independent negligence. In the unanimous decision written by Hall J.A., the Court held that the trial judge erred in failing to pay "*sufficient heed to the circumstance, that, aside from opportunity, there was little else on which to base a finding of vicarious liability*" (para. 26). Hall J.A. referred to "*the touchstone of liability*" in *Bazley* as being the particular circumstances in which the employee had been given both duties of authority and a high level of opportunity for the wrong that was done to a child in care (para. 50). He went on to state the following:

> *[51] Cases, of course, will throw up great variations of factual circumstances but it appears to me that the more closely an employment situation mimics a parental type relationship, the more likely it is that liability will be imposed on a vicarious basis. The enhanced opportunity created by such a relationship, which I suppose could be said to have something in it of mentorship, will very often result in a finding of liability. The enhanced potential created for wrongful conduct attracts the imposition of liability. There is often in such cases a measurable risk created by the position and employment duties assigned by the defendant employer to the tortfeasor employee.*

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58. Applying these principles to this case, the Court found that the offender was not part of the school administration, he was assigned no supervisory or child care duties, his duties entailed no parental function, his employment was not designed to provide opportunity for intimacy with the children, and there was no nexus between his employment duties and the assaults that occurred. Further, Hall J.A. observed that the precedents should be found to unambiguously point in the direction of no vicarious liability in the circumstances of this case. He wrote that the trial judge erred in focusing on opportunity and failing to have sufficient regard to the general employment duties and responsibilities of the offender.

59. On appeal to the Supreme Court of Canada, the majority upheld the Court of Appeal decision, with Abella J. dissenting. Binnie J., writing for the majority, agreed with the Court of Appeal that the trial judge paid insufficient attention to the absence of any strong connection between the sexual abuse and the abuser's job. *"While vicarious liability does not require a claimant to establish that the wrongful employee was placed in a 'parent like' position of authority, it does require consideration of the job created power in the nature of an employee's duties as a fundamental component of determining if the particular enterprise increased the risk of the employee's wrongdoing in relation to the claimant."* (para.29).

60. At the outset, Binnie J. noted that the trial judge erred in concluding that the outcome was not dictated by existing precedent. He said that the courts have now

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dealt with a sufficient number of cases in different residential settings to provide adequate guidance with respect to vicarious liability. *"There was no need here to return to the first principles of a policy oriented analysis. Overly frequent resort to general principles opens the door to subjective judicial evaluations that may promote uncertainty and litigation at the expense of predictability and settlement."* (para.41). He held that the Court of Appeal was correct in finding that the earlier cases preclude a finding of vicarious liability in the circumstances of this case.

61. Although it was not necessary to move to the second stage of the *Bazley* test, Binnie J. wrote that the policy considerations underlying vicarious liability confirmed the correctness of not imposing vicarious liability. He wrote this at paragraph 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 limited role at Christie. Thus, legal principle as well as precedents supports the conclusion that vicarious liability should not be imposed in this case.*

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E. A REVIEW OF MISCELLANEOUS CASES SINCE THE TRILOGY

62. Apart from the above cases, there have been few cases of note with respect to no-fault institutional liability. Given the number of appellate cases on no-fault liability, concessions are frequently made by institutions that if the underlying facts are proven, vicarious liability will be admitted: (see *Gates v. McDougall* 2006 BCSC 1919).

63. A number of cases have been litigated on the issue of whether the underlying abuses actually took place, which is an issue of credibility and reliability of the witnesses: *P.L. v. Canada* 2006 SKQB 298.

64. One contested case was *B.M.G. v. Nova Scotia* 2007 NSCA 120. In this case, one of the issues was whether the provincial Crown could be held vicariously liable for the sexual tort of a probation officer. The trial judge found the requisite significant connection between the creation of the risk and the wrong that occurred and that imposing vicarious liability served the needs of providing a remedy and deterring wrongful conduct. The Court of Appeal held that the trial judge had correctly applied the *Bazley* test in finding vicarious liability. In terms of opportunity, the Crown argued that the judge had erred in finding that the probation services allowed the officer the opportunity to abuse his power. The Crown said that the office arrangements for probation officers gave them little opportunity to engage in inappropriate contact with the young people they were supervising, probation officers shared offices, the offices had windows and there

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were other people around during normal office hours. The Court of Appeal said this at paragraph 63:

> *These submissions must fail, however, because they do not take into account other important facts which the judge properly considered. The judge found the probation officers had significant independence and broad discretion in carrying out their responsibility. This included the discretion to meet alone and after hours with young persons…He also found that Lalo (the probation officer) took advantage of this independence and discretion in order to molest B.M.G. Significantly, the judge concluded that Lalo's assaults on B.M.G. occurred after other staff had left for the day…In short, the Province's probation service gave Lalo independence and discretion in carrying out his duties and these enabled Lalo to assault B.M.G. repeatedly.*

65. Applying *Bennett*, the court placed a particular emphasis on the opportunity for psychological intimacy as opposed to physical intimacy. The Court of Appeal agreed with the trial judge that the wrongful acts "were strongly related to the psychological intimacy inherent in his role as a probation officer and that this psychological intimacy encourages victims submission to abuse and increases the opportunity for abuse." (para.65).

66. The law appears to be well-settled with respect to vicarious liability for abuse by a Catholic Priest and is likely applicable to other religious denominations. In *John*

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Doe v. Fifield 2007 NLTD 195, Dunn J. of the Newfoundland and Labrador Supreme Court granted summary judgment in favour of young person abused by a salvation army cleric against both the cleric and the Salvation Army. The cleric had admitted the abuse. The court held that the duties of the cleric were analogous to those of the priest in *Bennett*. The intent of the Salvation Army was to have individuals such as this cleric establish a psychological intimacy with young people of the congregation in the hope that they would ultimately give their life to service in the Salvation Army. This direction "cloaked him (the cleric) with considerable power over the congregation's youth." As was stated in *Bennett*, this psychological intimacy encouraged the victim's submission to abuse and increased the opportunity for abuse. It was unnecessary to review the policy arguments, as the court found that the first stage of the *Bazley* test had been met and that the *Bennett* case was a clear precedent of liability.

67. However, in *L.E.W. v. United Church of Canada*, [2005] B.C.J. No. 832 [*L.E.W.*], the British Columbia Supreme Court found that the church was not vicariously liable for the sexual torts of Bolton, a lay minister, despite most of the assaults occurring on church property. The Court distinguished *Pornbacher, O'Dell*, *Bennett* and *Glendinning* on the basis that, unlike the case before it, these four cases easily met the "close connection" test. In *L.E.W.*, the Court found no close connection between Bolton's assigned role and a risk of harm to the plaintiff:

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66. Bolton was a lay minister. He was never a full time minister with a parish. His duties were confined to services on Sunday before the entire congregation. He had not assigned duties involving children apart from some Sunday school he apparently led under the direction of the Superintendent of Sunday Schools who was appointed by the Church Elders. He was assigned no duty which would bring him in contact with individual children.

67. It was not in his role as lay minister that Bolton gained information that the Plaintiff was vulnerable because of the death of her father and older brother. He knew of that vulnerability in his capacity as a community member.

68. In finding that the church was not vicariously liable for Bolton's actions, the Court considered a number of factors including:

(a) Bolton was not an employee of the church in the usual sense of a minister. He was a volunteer, lay minister;

(b) Bolton had no control over the physical property of the church or its finances;

(c) Bolton had no special access to the church building beyond any other community member; and

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(d) Bolton had no office or private space within the church building.

69. However, the Court considered the most important factor to be that there was no part of Bolton's authorized role which provided him with any greater intimacy with children than any other member of the community.

70. An employer was found vicariously liable for the sexual torts committed against an employee by a supervisor in *Pawlett v. Dominion Protection Services Ltd.*, [2007] A.J. No. 1364 (Q.B.), issue of liability affirmed [2008] A.J. No. 1191 (C.A.). The Court applied the *Bazley* decision and found at paragraph 78 that "[the employer] created a situation wherein [the employee] was left in a vulnerable position vis a vis her supervisor". In reaching this conclusion, the Court considered the following:

(a) The supervisor was employed by the employer to manage the company and supervise employees;

(b) The supervisor was the employee's direct supervisor;

(c) The employee was led to believe that the supervisor controlled the company and there was no one supervising the supervisor;

(d) The supervisor and the employee, by the nature of the work, were often alone together; and

(e) There was no policy in place regarding sexual harassment.

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71. In *Evans v. Sproule* [2008] O.J. No. 4518, Chapnik J. of the Ontario Superior Court of Justice imposed vicarious liability on the Toronto Police Services Board where an officer, who was on duty and in full police uniform, assaulted a young woman he had stopped for suspected driving offences. Applying the second stage of the *Bazley* test, the judge asked whether "the employer's enterprise and its empowerment of (the officer) materially increased the risk of sexual assault with the resulting harm in the circumstances of this case?" Here, the officer was vested with power and authority to detain motorists. The officer was assigned a marked police cruiser, without a partner, as well as gun and other police paraphernalia. Motorists were unable to leave the scene when stopped and detained by a police officer.

72. In these circumstances, there was a significant power/dependency relationship as soon as the officer pulled over the plaintiff. Applying *Bazley*, "the more an enterprise requires the exercise of power and authority for its successful operation, the more materially likely it is that an abuse of that power relationship can be fairly ascribed to the employer. Society has granted police officers extraordinary power and authority. An officer who detains an individual acts as the official representative of the state with all its coercive power. As visible symbols of that power, an officer is given a distinctly marked car, a uniform, handcuffs, a badge and gun." (para.95).

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73. The Queensway X-Ray & Ultrasound Clinic was held vicariously liable for the sexual torts of a part-time ultrasound technologist in *T.W. v. Seo*, [2005] O.J. No. 2467. The technologist videotaped the plaintiff while she was undressing and performed unauthorized tests, including a pelvic examination. The court considered the question on a principled basis, relying on *Bazley* and *Jacobi*, in the absence of factually similar cases. The Court found that:

> *49. The nature of the enterprise and the actual duty of the technician are so connected to the wrong that, in my view, it cannot be said that the clinic provided a 'mere opportunity' to an employee. On an application of the legal principles, Seo's wrongful act was so closely related to the authorized conduct, it justifies the imposition of vicarious liability.*

74. In reaching this conclusion, the Court considered that clinic protocol required Seo to be alone in the room with a patient, who is partially disrobed. In addition, a patient cannot be expected to know the boundaries or limits of appropriate conduct, and what is to be expected of the medical test. This is exacerbated by the vulnerability caused by the stress and anxiety of the patient. The Court further considered that the test itself requires, and therefore the employee is permitted to touch the patient in intimate areas:

> *47. …There is the finest line between legitimate touching and criminal or tortuous conduct.*

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75. By requiring the employee to perform such a test, the employer significantly increased the risk of harm. In considering the policy objectives of vicariously liability, the Court held:

> *51. …There must be an incentive for those who control institutions or enterprises that engage in the intimate touching and/or treatment of vulnerable individuals to minimize the risk of harm to patients. Finding the employer vicariously liable encourages such employers to 'take such steps and hence, reduce the risk of further harm'.*

76. However, in *Broome v. Prince Edward Island*, [2009] P.E.I.J. No. 3 (C.A.), the Court found that the province was not vicariously liable for sexual torts which occurred in the Prince Edward Island Protestant Orphanage. The relationship between the province and the orphanage was not sufficiently close to warrant the imposition of vicarious liability. The Court found that:

> *106. The Province was not involved in the administration of the Orphanage. It was not an employer. It had no involvement in or control over the operations of the Orphanage. The Trustees were the operator, and they were not acting as agent for or on account of the Government. The Agreed Statement of Facts state that the Province did not employ any person engaged by the Orphanage to care for the residents. There is no basis to infer even an independent contractor relationship between the Province and any such person engaged by the Orphanage. There are no*

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contact factors upon which a relationship could be founded between the Province and staff of the Orphanage upon which to base vicarious liability.

77. The Court concluded at paragraph 107 that to impose vicarious liability in such a situation would be "unfair and serve no useful purpose".

78. Not surprisingly, in *P.S. v. R.H.M.*, [2006] B.C.J. No. 504, the British Columbia Court of Appeal refused to impose vicarious liability on a landlord where an employee, sent by the landlord to carry out certain repairs at the leased premises, sexually assaulted the tenant. The Court noted that the landlord knew nothing to the employee's detriment, and in fact, the evidence failed to show that there was anything to know. The Court cautioned that:

17. If the appellant's arguments were to succeed, we would be dangerously close to imposing absolute liability on employers for the intentional torts of their employees.

F. CONCLUSION

79. With the number of sexual abuse cases that have now been decided by the courts at all levels, the task of determining whether no-fault liability will be imposed on institutions may be becoming somewhat easier than it once was. However, the devil is always in the details. Courts will continue to disagree on whether there is

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a line of unambiguous precedent or not and whether the underlying policy considerations favour the imposition of liability or not.

80. Generally speaking, it would appear that it will be becoming increasingly more difficult to successfully defend religious organizations for the sexual wrongdoing of priests or ministers. Clearly, there is no immunity for charitable organizations or non-profit organizations. There is no requirement for job created physical intimacy; psychological intimacy will be sufficient.

81. With respect to such organizations, variations will surely arise in the particular facts of each case. There may be cases where the relationship between the organization and the wrongdoer is more akin to an independent contractor relationship than an employer/employee relationship. The focus in most such cases will likely be on the degree of power, authority and opportunity the priests or minister actually enjoyed.

82. Similar comments apply to the residential school cases, and other institutions which provide custodial care or quasi-parental relationships. The key question in most such cases will be the actual role played by the wrongdoer. Was the wrongdoer engaged in the "care, protection and nurturing" of the vulnerable? Did the wrongdoer enjoy a "God like" relationship? Was the wrongdoer a "main cog" in the organization or a simple baker or janitor? There will be much room for litigation on such issues.

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83. With respect to the non-residential school cases, there will be debate as to whether precedents provide unambiguous authority against vicarious liability. It should be safe to say that no liability will arise on schools for the wrongdoing of custodial staff, groundskeepers, or others not employed with trust like relationships with the students. As for liability for the wrongdoing of teachers, the law will no doubt continue to evolve and will be highly dependent on the position enjoyed by the teacher, the opportunity for wrongdoing and the spatial and temporal circumstances of the wrongful acts. The greater the opportunity or requirement for "care, protection, and nurturing of the children", or the greater the degree of physical or psychological intimacy, the more likely that liability may be imposed.

84. It can also be said with some confidence that employers who provide their employees with guns and uniforms and powers of detention will likely be held liable for the sexual wrongdoings of their employees.

85. In cases where precedent is ambiguous, and one has to resort to the broader policy rationales for vicarious liability, counsel will have to give consideration to providing evidence in support of their arguments. In presenting arguments relating to such issues as deterrence, there may be a need to provide evidence on what the broader social ramifications may be. As in *Doe v. Avalon East School Board*, a judge may well be inclined to dismiss arguments on the "chilling effect" of the imposition of vicarious liability unless there is some evidence on which these arguments may be made.

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