VICARIOUS LIABILITY UPDATE

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In 1999 the Supreme Court of Canada decided two cases involving employer's liability for sexual assaults committed by employees.

In *Bazley v. Curry* [1999] 2 S.C.R. 534, a non-profit association operating residential care facilities for children **was held vicariously liable** in an action brought by a former resident for sexual assault by a child care counsellor. The court unanimously rejected the argument that non-profit bodies should be protected from tort liability in the public interest, a position reaffirmed in the case *Blackwater v. Plint* discussed below. The relationship between the employer and employee was sufficiently close, while the wrongful act was a manifestation of risks inherent in the employer's enterprise. Liability was found against the foundation on the basis that the assaults took place in circumstances that flowed from its mandate, and the abuse of the authority given to the employee.

In *Jacobi v. Griffiths*, [1999] 2 S.C.R. 570 the majority of the Court found a non-profit Boys' and Girls' Club **not vicariously liable** for sexual assaults committed by its employee, the program director. Some of the assaults took place in the employee's home, and some of them in the course of excursions relating to children's sports activities. In applying the test set out in Bazley, the majority found that the required strong connection between the risks inherent in the employer's enterprise and the wrong had not been established. The employer organized recreational activities and the employee's job did not give him the degree of control or intimacy with respect to the children that would attract liability.

The test with respect to vicarious liability per McLachlin J. (as she then was) in *Bazley* and affirmed in *Jacobi* is two-step. First, precedents should be examined – are there decisions in cases dealing with similar fact situations which unambiguously determine whether the case should attract vicarious liability? Second, if prior cases do not suggest a solution, determine whether vicarious liability should be imposed in light of the broader public policy rationales behind the concept of strict liability. *Bazley* sets out a principled framework to apply this policy rationale to a particular set of facts (at paras 41-43). The factors to consider, as summarized in *Doe v. Avalon School Board,* [2004] N.J. No. 426 (N.L.) (Sup. Ct.) (discussed in detail below) include: (a) the risk of the wrongdoing must be sufficiently connected to the employer's enterprise, and the power and authority which flows therein; (b) there must be a sufficiently close relationship between the wrongdoer and the Defendant; and (c) the impugned action must be

sufficiently connected to the exercise of the authority and power provided by the Defendant (at para. 31).

On October 2, 2003 the Supreme Court of Canada released its reasons in a trilogy of historical sexual and physical assault cases: *K.L.B.* v. *British Columbia* [2003] S.C.J. No. 51 ("*K.L.B.*"); *E.D.G.* v. *Hammer* [2003] S.C.J. No. 52 ("*Hammer*"); and *M.B.* v. *British Columbia* [2003] S.C.J. No. 53 ("*M.B.*"). In *K.L.B.* the Plaintiffs were all victims of abuse at the hands of their foster parents. The Plaintiffs sued, *inter alia*, the Crown. In *Hammer*, the Plaintiff was sexually assaulted by the school janitor and named the North Vancouver Board of School Trustee as a defendant. Finally, in *M.B.* the Plaintiff suffered a number of sexual assaults perpetrated by her foster father and also sued the Crown.

In *K.L.B.* the Supreme Court held that the Government was not vicariously liable for torts committed by the Plaintiffs' foster parents. The Court reasoned that because of the nature of foster care, governments could not regulate foster parents on a regular day-to-day basis. This was prompted by a policy encouraging foster parents to create an environment where children in foster care may experience a more traditional family environment. In furtherance of this policy goal, foster parents are permitted to act with a substantial amount of independence and autonomy. The Court also noted that foster parents did not hold themselves out as agents of the government nor were they perceived as such. The Court distinguished *Bazley* v. *Curry* because in *Bazley*, while the employees were to act as "parent figures", the care was provided in a facility overseen and managed by the Foundation and not in the employee's private homes.

The Court also distinguished *K.L.B.* from *Lister* v. *Hesley Hall Ltd.*, [2002] 1 A.C. 215 (HL). There, vicarious liability was imposed on a company because it provided care in a boarding annex, and the warden of said annex would have been reasonably perceived as acting on the company's behalf. To illustrate this point, the Court observed that the care was provided in an annex, not a private home, and the warden of the annex received a salary, not the cost-recovery payments received by foster parents.

The Court also examined the policy basis for imposing vicarious liability. As such, the Court held that imposing vicarious liability would have little effect as a deterrent because of the independent nature of the relationship between foster parents and the Government. (In *Curry*,

deterrence was held to be a key policy goal behind the imposition of vicarious liability.) Without this deterring effect, vicarious liability should not be imposed.

Similarly, in *M.B.* the Court held the Government was not vicariously liable for torts committed by foster parents against their foster children. The Court determined that foster parents were not acting "on account" of the Government (para. 16). For this reason, and for those discussed in *K.L.B.*, the Court failed to find the Government vicariously liable.

There was no appeal on the issue of vicarious liability in *Hammer* presumably because in *Jacobi* v. *Griffiths*, the Supreme Court of Canada directly approved of the British Columbia Court of Appeal's finding in *Hammer* that vicarious liability did not exist. In *Hammer*, vicarious liability was not found because the janitor had no duties with regard to children. However, had the Board assigned work to the perpetrator work that required care or supervision of children, the result may have been different.

Subsequent Developments – Vicarious Liability for Sexual Assaults

Churches

John Doe v. Bennett and the Roman Catholic Episcopal Corporation of St. George's, [2004] S.C.J. No. 17

- The defendant Father Kevin was a Roman Catholic priest in Newfoundland in the Diocese of St. George's and sexually assaulted the plaintiffs in his parishes.
- **Vicarious liability was imposed on** the Roman Catholic Episcopal Corporation of St. George's.
- The relationship between the bishop and the priest is akin to an employment relationship.

J.R.S. v. Glendinning, [2004] O.J. No. 285 (Sup. Ct.)

- Glendinning, who was in a position of trust and assumed a quasi-parental role with respect to the children as their priest, was held liable for sexual assault resulting in serious harm to the children.

- **Secondary victim -** M.S. was abused by her brother J.R.S., but the Court attributed this abuse to Glendinning's abuse of her brother.

- **Vicarious liability was imposed** on the basis that there was sufficient connection between the job-created or job-enhanced risk of harm and the assaults by Glendinning .

Doe v. O'Dell, [2003] O.J. No. 3546 (Sup. Ct.)

- Diocese was **held vicariously liable** as it significantly increased the risk of sexual abuse by putting an individual in the position of Father O'Dell and requiring him to perform the duties of a Parish Priest.

- The Court reasoned that the Diocese was in the position of an employer for the purposes of vicarious liability. Further, the job-created authority of a priest, the vulnerability of the plaintiff and the psychological intimacy in the relationship between a priest and individual who seeks spiritual guidance are factors which significantly increased the risk of sexual abuse in a child and in turn the finding of vicarious liability.

Vicarious liability also lies against churches that operated residential schools, as decided by the Supreme Court of Canada in *Blackwater v. Plint*.

Blackwater v. Plint, [2005] 3 S.C.R. 3

- The Government of Canada and the United Church of Canada jointly operated a residential school in British Columbia during the 1940s until the 1960s. The trial judge ruled that Canada and the United Church were vicariously liable for the abuse perpetrated by a dormitory supervisor they both employed. The trial judge apportioned 75 fault to Canada and 25% fault to the Church. On appeal the British Columbia Court of Appeal exempted the Church from vicarious liability based on the doctrine of charitable immunity

- The Supreme Court of Canada **restored the trial judge's finding of vicarious liability against the Church and Canada,** as well as the apportionment of fault between the Church and Canada found at trial. The Supreme Court of Canada rejected class-based exemptions from vicarious liability since such a doctrine would not motivate such organizations to take precautions to screen their employees and protect children from sexual abuse.

L.E.W. v. United Church of Canada, [2005] B.C.J. No. 832 (Sup. Ct.)

- **Vicarious liability was not imposed.**
- The defendant was a lay minister and a volunteer rather than and employee or full time minister**.**
- The employee had no office with the Church.
- The employee had no duties with respect to being alone with children and was not directed by the Church to minister to people in their homes or develop relationships with children.
- It was not in his role as a lay minister that the defendant ascertained that the Plaintiff was vulnerable following the death of her family members.

John Doe v. Fifield, [2007] N.J. No. 392 (S.C.)

- **Vicarious liability imposed**
- The plaintiff was abused by a salvation army cleric.
- The court held that the duties of the cleric were very much akin to those of the priest in Bennett. Precedent established liability.
- Despite the fact that the assault occurred outside the timeframe during which the perpetrator was performing his mandated duties, the Court still found that vicarious

liability had been established. The psychological intimacy which was established as a result of the perpetrator's role, was not a bond easily broken.

W.R. v. Anglican Church of Canada, [2010] O.J. No. 5492

- **No Vicarious liability for abuse by Choir Master**
- Self-represented Plaintiff
- Court found abuse did not occur
- No strong connection between what the employer asked the employee to do (risk created by the enterprise) and wrongdoing
- Assaults occurred at Plaintiff's home outside the church
- Plaintiff sued wrong legal entity, choir master's relationship was with a distinct and separate corporate entity

Schools

Doe v. Avalon East School Board, [2004] N.J. No. 426 (N.L.) (Sup. Ct.)

- **Vicarious liability was imposed.**
- The Court reasoned that through providing education services to youths, the Board's operations carried a risk of harm to the public through giving authority to teachers over students that could potentially be abused. Further, the court affirmed that the employer-employee relationship between it and the teacher was sufficiently close. Moreover, the Court determined that the teacher's actions were so closely connected with the authority assigned to him by the Board, that it would be fair and just that liability for the assault could properly attach to the Board. In particular, it was the school board which gave the teacher, as a trusted professional employee, the authority to set up the circumstances wherein this offence was committed.
- Noteworthy – this more recent case was decided differently than two other school decisions outlined below

S.G.H. v. Gorsline 2001 ABQB 163; affirmed 2004 ABCA 186

- **No vicarious liability was imposed.**

- The Court found that while the student teacher relationship provided the opportunity for the defendant to meet the plaintiff, the circumstances of the commission of the offence were not sufficiently connected to that relationship.

- Many of the activities and situations which provided for the context for the assaults were outside the purview of the school board's mandate and in many instances, off the premises. Parents sent their students to track meets and other activities which took place outside school hours, thereby breaking the chain of connection with the board's business. Specifically, the trial judge found that "while the defendant teacher's job gave him an opportunity to abuse his authority, his duties did not require anything approaching intimate contact."

- The opportunity created by the employment, itself, is not sufficient to impose liability.

- The court distinguished Bazley by maintaining that the relationship fostered by the Board, "fell far short of the "parent-like" control or authority discussed in Bazley."

- The court reasoned that (1) Gorsline did not have any unusual authority over the student, and (2) that while his influence might be great, he was only one of several teachers who taught the appellant. ***Note*** that this line of reasoning was clearly not adopted by the Lbr. and Nfld. Supreme Court in its' decision in *Doe v. Avalon*

- The trial judge also recognized that the imposition of vicarious liability on school boards could result in the introduction of rules and policies which would be regressive to the educational system and harmful to the students the system serves. The Court of Appeal supported the trial court's findings and reasoning.

K.G. v. B.W., [2000] O. J. No. 2155 (Sup. Ct.)

- The Ottawa Board of Education was **not vicariously liable** for the assaults.

- The Court reasoned that (1) the duties and responsibilities relating to a teacher in a classroom (a public setting) provided an opportunity for the teacher to meet the child but had not "materially enhanced the risk" on the part of the teacher to abuse the child, (2) there was no evidence in the case to establish that the school board was aware that the defendant was allowing the plaintiff to sleep over at her home.

- Arguably, this case is distinguishable because the student had a relationship with the teacher outside of the school. All of the teacher's involvement with the family was outside of his duties and responsibilities as a teacher. The teacher was a family friend and that relationship (as opposed to the employment relationship) gave him the power to abuse. There was very little connection between the teacher's assigned duties and the assault.

Aksidan v. Canada (Attorney General), [2008] B.C.J. No. 178

- **No vicarious liability was imposed against Canada.**

- The plaintiffs were sexually assaulted by a teacher while students at a school on a First Nation reserve.

- The Court found that Canada had delegated exclusive authority over all aspects of the school to the Province, which established a school board.

- The perpetrator was hired by the school board. The Court found that any vicarious liability rests with the school board. There was no policy reason to impose liability of Canada.

A.B. v. C.D. and Board of School Trustees of District E.F. [2011] B.C.J. 1087

- **No vicarious liability imposed**

- The opportunity that the Board provided to the teacher to spend time with the student was modest

- It would not further the aims of the Board for the teacher to sexually touch the student
- The student/teacher relationship is not inherently intimate. The court focuses on physical intimacy
- The teacher's power is to provide grades and maintain classroom discipline
- The student's vulnerability was limited, there were many teachers and administrators available and she was under the care of her parents

Hayward v. Cloutier and *Windsor Essex Catholic District School Board 2012* O.J. No. 6415

- **No Vicarious Liability Imposed**
- Cloutier was performing normal teacher duties within the Catholic School Board's system
- The majority of the incidents took place in the back of the classroom during school hours with other students present
- Incident in the nursing room also took place during school hours
- One incident in the school yard during school hours
- No contact between the plaintiff and Cloutier outside the school system
- Students are expected to follow direction of teachers and non-compliance can result in discipline or a strap by the principal.
- The judge said "in my opinion the School Board operating the St. Vincent de Paul school at which Mr. Cloutier was a teacher, did not cause or increase the risk of a sexual assault…there was nothing unusual in terms of Mr. Cloutier's duties as a teacher for the School Board and those duties did not give rise to special opportunities for wrong doing."

S.L. v. R.T.M. and the Hastings and Prince Edward District School Board, [2013] O.J. No. 1541

- **Vicarious Liability Imposed.**

- The School Board has a legal duty to provide for the safety of students
- The law compels parents to send children to school
- The School Board stands in local parentis to child and exercises legal authority to guide, direct and discipline
- The child is required to respect and follow directions of teachers
- Teachers are expected to be role models of attitudes, behaviour and morality to the child
- The teacher's curriculum which included a petting zoo was approved by the School Board
- The teacher's teaching practices were designed to make possible the exploitation of students
- The design of the mini-zoo permitted teacher to gain the trust of students and groom them for personal exploitation
- Teacher used school premises and school resources to exploit children
- Note: this case was overturned on appeal to the Ontario Court of Appeal on the basis of a reasonable apprehension of judicial bias.

Residential Schools

Courts have consistently imposed vicarious liability in the residential school context where the perpetrator had duties directly caring for children. See for example *D.W. v. Canada (Attorney General),* [1999] S.J. No. 742 (Q.B.); *V.P. v Canada (Attorney General),* [1999] S.J. No. 723 (Q.B.); *H.L. v. Canada,* [2001] S.J. No. 298 (Q.B.), varied on different grounds but finding of vicarious Crown liability upheld at Court of Appeal [2002] SKCA 131 and at Supreme Court of Canada [2005] 1 S.C.R. 401; *T.W.N.A. v. Clarke,* [2001] B.C.J. No. 2747 (Sup. Ct.), appeal to B.C.C.A. allowed and damages remitted back to court below; *Blackwater v. Plint,* [2001] B.C.J. No. 1446 (Sup. Ct.), trial judgment restored by the Supreme Court of Canada 3 S.C.R. 3, 2005; *M.A.* v. *Canada (Attorney General)* [2001] S.J. No. 686 (Q.B.), Crown

conceding that it was vicariously liable; *C.M. v. Canada (Attorney General),* [2004] S.J. No. 290 (Q.B.).

However, in a recent Supreme Court of Canada decision, *E.B. v. Order of the Oblates of Mary Immaculate in the Province of British Columbia,* (see below) the Court did not impose vicarious liability where the perpetrator's job as a baker did not require him to interact with the students at the school.

E.B. v. Order of the Oblates of Mary Immaculate in the Province of British Columbia, [2005] 3 S.C.R. 45; 2005 SCC 60 (October 28, 2005)

- The trial judge held the Oblates **vicariously liable** on the basis that the residential school created and materially enhanced the risk of the assaults.

- The B.C.C.A. set aside the trial judge's decision, holding that he had overemphasized job-created opportunity and failed to have regard to specific employment duties and activities assigned to S and the connection, if any to those duties and responsibilities and the wrongs committed by S against B.

- The Supreme Court of Canada (8/9 judges) in finding that the Oblates were not vicariously liable, reasoned that there was no finding of a "strong connection" between the particulars of the baker's employment and the assault, as is required to find vicarious liability under the test set out in *Bazley.*

Police

Evans v. Sproule, [2008] O.J. No 4518

- **Vicarious liability was imposed**

- Police officer on duty and in uniform assaulted a young woman he had stopped for suspected driving offences.

- The officer was vested with power and authority, had a marked cruiser, a badge, handcuffs, a gun etc.

- Motorists unable to leave when detained by police. Police have extraordinary power and act at the official representative of the state.

- The perpetrator's actions were so connected with his authorized role that vicarious liability was justified.

Probation Officer

L.M.M. v. A.G.N.S. [2010] N.S.J. No. 42

- **Vicarious liability was admitted**

Prison Guard

Lakes v. MacDougall [2011] B.C.J. No. 1782

- Crown admitted vicarious liability for proven acts of sexual abuse by a prison guard during the course of his employment with the government

Employer/Employee

Pawlett v. Dominion Protection Services Ltd., [2007] A.J. No. 1364, affirmed [2008] A.J. No. 1191.

- **Vicarious liability imposed.**

- An employee was sexually assaulted by her supervisor.

- The employer created a situation where the employee was left in a vulnerable position vis a vis her supervisor. The nature of the supervisor's employment created a situation where the perpetrator and the survivor were often left alone to work together.

J.C. v. Shaw 2011 B.C.J. No. 2229

- **Vicarious liability was not imposed.**

- Plaintiff sexually abused by her supervisor nine times while working together.

- Employer not vicariously liable because employer's employment of supervisor did not materially increase the risk of sexual assault.

K.T. v. Vranish [2011] O.J. No. 361

- Vicarious Liability imposed on employer
- Perpetrator was operating mind of the corporation
- Perpetrator as manager of corporation wielded considerable economic power
- As boss, perpetrator orchestrated circumstances to commit assault
- There is a definite link between perpetrator operating the company and his ability to dominate the Plaintiff

Orphanage

Reference re Broome v. Prince Edward Island, 2010 SCC 11

- **Vicarious liability was not imposed against the Province.**
- Children were sexually abused while residing in a privately owned and managed children's home.
- The Supreme Court of Canada upheld the Court of Appeal's determination that the facts did not support a finding of vicarious liability. The Province did not exercise control over the orphanage. It was not involved in the administration of the orphanage and had no involvement in its operations.
- The appellants failed to show a close connection between the home and the Province.

Landlord and Tenant

P.S. v. R.H.M., [2006] B.C.J. No. 504 (B.C.C.A)

- Landlord's repairman employee sexual assaulted a tenant.
- Landlord **not vicariously liable**.

Ultrasound Clinic

T.W. v. Seo, [2005] O.J. No 2467 (C.A.)

- The defendant employee worked at an X-ray/Ultrasound Clinic. He surreptitiously video taped the plaintiff and performed unauthorized tests on her, including a pelvic examination.

- The Clinic **was vicariously liable** for the assaults by the employee.

- The Clinic's enterprise and empowerment of the employee material increased the risk of sexual assault. The Clinic's protocol called for the technician to be alone in the room with the patient, who necessarily depends on the technician to perform proper tests. The patient has a certain level of vulnerability arising from the stress and anxiety associated with unknown health problems.

- The technician was permitted to touch the plaintiff in intimate body zones because of the authority granted to him by his employer.

- There is an obvious and strong connection between what the employer was asking the employee to do and the wrongful act. The employer significantly increased the risk of harm by putting the employee in this position and requiring him to perform the assigned tasks.

- The wrongful act was so closely related to authorized conduct, it justifies the imposition of vicarious liability.

Vicarious Liability for Non-Sexual Assaults

Vicarious liability has also been found in a number of cases involving non-sexual assaults. Although many of these cases were decided before *Bazley v. Curry* and *Jacobi v. Griffiths*, their findings are still relevant in terms of categories of employment where vicarious liability for assault may be found.

Bouncers

Cole v. California Entertainment [1989] B.C.J. No. 2162

- The individual defendant Wolf was employed by California Entertainment as a doorman and bouncer

- The owner of California Entertainment instructed the bouncers, including Wolf, to clear the doorway, which eventually resulted in a fight between Wolf and the plaintiff Cole

- The fight spilled onto the street and off of California Entertainment's property as the defendant Wolf threw the plaintiff Cole through an adjacent shop window and threw him up against a car

- Both at trial and on appeal to the BC Court of Appeal the defendant **employer was found vicariously liable** even though the damages were sustained when the fight spilled off of California Entertainment's property

Downey v. 502377 Ontario Ltd. 1991 O.J. No. 468

- Two individual defendants were doormen at a strip club

- The doormen forcibly escorted the plaintiff Downey out of the strip club, which resulted in a fight with the defendant doormen which took place outside the door of the club and in the club parking lot

- The **employer was vicariously liable** since the doormen committed the assault "in the course of their employment as doormen"

- Even though the doormen used excessive force, the Court also found "such commission of a crime does not, per se, remove the case from the general principle of the master being vicariously liable for the tortuous conduct of his servant"

- **Bus Driver**

Osz v. Calgary (1987), [1987] A.J. No. 1752

- A student threw a snowball which hit a school bus driver in the face; the bus driver stopped the bus and punched the student twice, breaking the student's nose

- The **City of Calgary was found vicariously liable** for two reasons:

    1. the City of Calgary suspended the driver and ordered him not to contact the student, and by virtue of its acts after the incident "the defendant City assumed responsibility for the acts of the defendant"

    2. maintaining the safety of the bus and its passengers was part of the bus driver's duties and confronting people who interfered with the operation of the vehicle was a mode, albeit unauthorized of carrying out these duties

Correctional Guards

Peeters v. Canada (1992) 54 FTR 289, [1994] 1 FC 562

- The plaintiff Peeters was an inmate at Kingston Penitentiary and injured a corrections officer during a hostage taking; Peeters was subdued and was sent to the hospital via ambulance; the corrections officers in charge of escorting him to the hospital assaulted him in the ambulance in retribution

- the Crown admitted vicarious liability for general damages; at issue was whether the Crown was vicariously liable for punitive damages

- The Court of Appeal **upheld the finding of vicarious liability for punitive damages**; although there must be complicity by employers in order for vicarious liability to be found, the inadequacy of the training provided by the Crown was sufficient to establish complicity.

- NOTE: the outcome in this case was questioned in *G.B.R. v. Hollett* [1996] N.S.J. No. 345 and in Waddam's The Law of Damages on the basis that the Crown, at most, was liable in negligence and bore no fault

Security Guards

Chopra v. T. Eaton Co. [1999] A.J. No. 277

- The individual defendant was a security guard employed by the defendant Eaton's; the defendant security guard used excessive force to restrain and escort the plaintiff from the premises

- **Eaton's was found vicariously liable**

Taxi Stand Operator

Mason v. Sears (1979), 31 N.S.R. (2d) 521

- The individual defendant Sears was a taxi stand operator and had been instructed by his employer to keep the waiting room clear of drivers so that it would be used for customers only; in attempting to keep the plaintiff out of the waiting room Sears struck in the plaintiff in the face with the door

- The **defendant employer was found vicariously** liable; although "the blow was outside the scope of Sears' instructions, but it is quite clear that he was exercising one of the functions for which he was employed as manager"

Unions

Matusiak v. British Columbia and Yukon Territory Building and Construction Trades Council [1999] B.C.J. No. 2416

- The plaintiffs were employed by TNL Construction; TNL employees belonged to unions which were perceived by members of the defendant unions (the British Columbia and Yukon Territory Building and Construction Trades Council (BCYT) and the Building Trade Unions (BTU)) to be "management side"; the defendant unions picketed, intimidated and assaulted the plaintiffs; the defendant unions admitted that they authorized civil disobedience but denied vicarious liability for any of the conduct that amounted to threats to life, injury to person or damage to property.

- The **defendant unions were found vicariously liable**, on the basis that the defendant unions had condoned their members' acts of intimidation and assault, and even if the defendant unions had *not* condoned these acts these acts were modes of carrying out acts that were authorized by the defendant unions