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**AUTHORITY, INTIMACY, POWER
AND THE MANIFESTATION OF RISK:
VICARIOUS LIABILITY OF INSTITUTIONS
FOR SEXUAL ABUSE**

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The modern approach to the imposition of vicarious liability on institutions for sexual abuse committed by persons working on their behalf began in 1999 with the Supreme Court of Canada's decisions in *Bazley v. Curry*¹ and *Jacobi v. Griffiths*². In those cases, the Court held that vicarious liability can be imposed if the risk of wrongdoing is sufficiently connected to the power and authority that are given to the assailant by his or her employer's enterprise.

In the landmark 2003 decision of *K.L.B. v. British Columbia*³, the Supreme Court of Canada explained the basis for the imposition of vicarious liability in the following terms:

The doctrine of vicarious liability ... does not require tortious conduct by the person held liable. Rather, liability is imposed on the theory that the person may properly be held responsible where the risks inherent in his or her enterprise materialize and cause harm, provided that liability is both fair and useful.

These pithy sentences provide a good foundation for understanding the law of vicarious liability in the sexual abuse context. The wrongful acts, and the conditions that led to them, must logically flow from the situation created by the employer (be it a government entity, for-profit, or not-for-profit enterprise) in order for a court to impose vicarious liability.

Later in *K.L.B.*, the Court explained that the imposition of vicarious liability serves two purposes: fair and effective compensation for victims and the deterrence of future harm. The Court held that it is fair for the organization that creates the risk to bear the consequences of injuries that are materializations of the risk. The Court also held that assigning liability to an employer will have a deterrent effect because employers are in a position to reduce intentional wrongs through efficient organization and supervision.

The Court in both *Jacobi* and *Bazley* confirmed that in order to impose vicarious liability on an employer there must be a significant connection between what the employer has asked the employee to do and the employee's wrongful act. The Court in *Bazley* stated that "It must be possible to say that the employer significantly increased the risk of the harm by putting the employee in his or her position and requiring him to perform the assigned tasks".⁴

¹ [1999] 2 S.C.R. 534. (see also *Ivic v. Lakovic*, 2017 ONCA 446 (CanLII))

² [1999] 2 S.C.R. 570.

³ [2003] 2 S.C.R. 403.

⁴ *Bazley*, *supra* note 1 at para 42.

The issue is then addressed through a two-step analysis. Firstly, the Court considers prior cases and assesses whether or not they are determinative of the issue. Second, the Court addresses policy matters, specifically the principles of compensation for the victim and deterrence of future wrongdoing. The need to prove a strong connection between the employee's duties and the wrongdoing theoretically limits circumstances where compensation will be ordered simply because an employer has deep pockets.

Justice McLachlin, as she then was, in *Bazley* provided a non-exhaustive list of factors that may be relevant in determining the sufficiency of the connection between an employer's creation or enhancement of a risk and the intentional tort committed by an employee:

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

Much judicial ink has been spilled in determining the extent of the connection that is required in order to impose vicarious liability on an employer. These cases are fact-specific and often contradictory. This paper attempts to cut through the noise by taking a cross-industry perspective to the issue of vicarious liability. The common themes examined by courts when determining whether to impose vicarious liability center on authority, intimacy and power. Specifically, courts tend to ask whether the authority came from the employer, whether the employee's job required intimacy with the victims, and whether the wrongdoing that occurred was a manifestation of the risks inherent in the employer's enterprise. The following examples will explain how courts have applied these factors in practice.

Mere opportunity is insufficient

The fact that an employee of an institution commits acts of sexual wrongdoing will not, on its own, lead a court to impose vicarious liability. Courts have held that the mere creation of the opportunity for an employee to commit sexual abuse is insufficient to ground such a finding.

For instance, school boards employ hundreds of employees from principals to teachers to audio-visual technicians to custodians. Each of these employees is placed in an environment where they work closely with children. The chance for abuse is therefore omnipresent. The jurisprudence shows, however, that something more than this opportunity is required for vicarious liability to be imposed on the school board.

A good example of this doctrine is the Supreme Court of Canada's decision in *E.D.G. v. Hammer*⁵. Released at the same time as *K.L.B., Hammer* confirmed that there must be more than the mere creation of an opportunity for abuse. In *Hammer*, the plaintiff was abused by a school janitor over the course of several years. The janitor had no direct duties related to the care or instruction of students, did not have direct authority over students, and was not under the supervision of the principal. The trial judge and the Court of Appeal held that it was inappropriate to impose vicarious liability because of the lack of authority bestowed upon the janitor by the school. The Supreme Court of Canada held 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*". The Court concluded that the "*mere fact that an organization provides a person with the opportunity to commit a tort does not, on its own, render that tort a manifestation of risks created by the organization.*"

This theme was also present in *K.G. v. B.W.*⁶ where a school board was not held vicariously liable for the actions of a teacher when the wrongdoing occurred off school grounds and outside of the teacher's duties. In *K.G.*, the teacher was a family friend of her victim and the assaults all happened in the student's home. The Court decided that the teacher's involvement with the student's family fell outside of her duties as a teacher. As such, there was no connection between the wrongdoing and the teacher's employment.

⁵ [2003] 2 S.C.R. 459.

⁶ [2000] O.T.C. 416.

The case of *S.G.H. v. Gorsline* involved a physical education teacher that sexually abused multiple students over a number of years and was later criminally convicted.⁷ The abuse occurred in the teacher's office, vehicle, and home, as well as in a park and the nurse's office. However, the Court declined to hold the school board vicariously liable as it failed to find sufficient connection between the duties of the teacher and the sexual abuse. While the teacher's role as a PE teacher provided him with opportunities for physical contact with students as well as after-hours contact related to coaching the Court stated that he had the "usual authority" of a teacher related to marks and discipline. The Court also focused on the presence of other authority figures that diluted the influence of the defendant teacher, including other teachers, administrative staff as well as the plaintiff's parents. The Court concluded that the connection between the teacher's duties and the sexual abuse was not strong enough to ground vicarious liability on behalf of the school board.

The Court in *Gorsline* acknowledged that there were no school board policies regarding teachers transporting students in their vehicles or meeting alone with students. However, the Court stated that the defendant teacher was not required by his employer to be alone with a student for extended periods of time and that his duties did not require intimacy comparable to cases like *Bazley*. The Court stated that "His duties only provided him with the opportunity he wanted but did not, in my view, materially enhance the risk". While the school board encouraged teachers to be "role models and to develop a relationship of trust with students, it did not thereby encourage sexual intimacy".⁸

Authority from the organization

In *John Doe v. Bennett*⁹, the Supreme Court of Canada imposed vicarious liability on the Roman Catholic Episcopal Corporation of St. George's for the sexual abuse of a variety of parish children by a priest. The Court imposed vicarious liability on the Roman Catholic Episcopal Corporation because of the immense authority it provided to the priest, especially over children. This authority gave the priest not only the opportunity to abuse children, but the opportunity to use his power to do so. This made incidents of abuse more likely and tied them closely to the Corporation. The Court noted that the Corporation expected its parish priests to be closely involved with children. His anointment gave him the opportunity to assume a leadership role over children. The Court also noted that the priest had immense authority in his small, rural, heavily

⁷ *S.G.H. v. Gorsline*, 2001 ABQB 163, aff'd 2004 ABCA 186 [*Gorsline*].

⁸ *Ibid* at paras 75-77.

⁹ [2004] 1 S.C.R. 436.

Catholic parish and that this power stemmed from the authority of the Roman Catholic Episcopal Corporation.

Bennett can be contrasted with *Hammer*, where the Court held that the school janitor was provided with the opportunity to engage in wrongdoing, but those wrongdoings did not flow from his employment or the authority given to him by the school board. In contrast, vicarious liability was imposed in *Bennett*, because the Roman Catholic Episcopal Corporation not only provided the opportunity for wrongdoing, but the authority it granted the priest “*substantially enhanced the risk which led to the wrongs ... suffered.*”

Vicarious liability was imposed against a school board for a teacher’s abuse of a student in *Doe v. Avalon East School Board*¹⁰. In that case, the victim was a student in the assailant teacher’s computer course. The teacher instructed the victim to study in a separate room, where the assault occurred.

The Court imposed vicarious liability on the basis that the school board gave the teacher the authority that he used to set up the circumstances where the offence was committed. The Court held that the abuse of the authority given to the teacher by the school board could lead to harm.

Expected intimacy with vulnerable persons

The case law has also established that another touchstone of vicarious liability is whether the employer expected the assailant to establish psychological intimacy with the people under his or her control. This factor is linked to the ultimate question of whether the abuse is a manifestation of the inherent risks of the organization.

Recall that in *Bennett*, one of the factors acknowledged by the Supreme Court of Canada was the fact that the wrongdoing was strongly related to the priest’s inherent psychological intimacy with his minor parishioners. In *B.M.G. v. Nova Scotia (Attorney General)*¹¹, the Nova Scotia Court of Appeal held that a provincial probation officer’s psychological intimacy with a person under his charge can encourage the victim’s submission to abuse and increase the opportunity for such abuse. As a result, whether the mandate of the organization encourages or expects intimacy, either physical or psychological, between its employees and vulnerable persons is a significant factor in the vicarious liability analysis.

¹⁰ 2004 NLTD 239. (see also *Langstaff v. Hastings & Prince Edward Board of Education*, 2013 ONSC 1448)

¹¹ 2007 NSCA 120.

In the case of *CO v Williamson and Trillium Lakelands District School Board* the defendant school board was found vicariously liable for a high school music teacher's sexual assault of the plaintiff.¹² The incidents began on a school trip and continued in the teacher's office, classroom, his vehicle, as well as outdoors. The Court stated that it was "trite that teachers have power over students", and that "teachers who lead extra-curricular activities often have additional power". The Court noted that teachers with control over participation in an activity can lead students to depend on the teacher's approval, and that a teacher's role in these activities can lead to a closer relationship. The Court also highlighted the fact that the defendant teacher had taken on a "mentor/confidant/counsellor role" with the plaintiff.

In *Trillium Lakelands* the Court noted that while there was no policy dictating whether or not teachers could transport students in their vehicles, it was found to be "accepted practice" for teachers to do this in smaller population centers. Further, the defendant teacher in this case was permitted to conduct individual testing behind closed doors. Finally, the school board also approved of the defendant teacher taking his students on a band trip. These were all considered to have created opportunities which materially increased the risk of sexual assault and harm.

Power imbalances

The ability of the assailant to exercise power over their victims is another factor that is considered in the vicarious liability analysis. In *K.T. v. Vranich*¹³, the Ontario Superior Court of Justice noted that the victim's boss wielded considerable economic power over her and that this made abuse more likely.

In *Bennett*, the Supreme Court of Canada placed special emphasis on the power differential that was created by the position of the church in the community, which the Court described as "God like".

Was the abuse a manifestation of the risks inherent in the employer's organization?

In *Ivic v. Lakovic*, 2017 ONCA 446, the Ontario Court of Appeal refused to impose vicarious liability on a taxi company for the sexual abuse of a lone, intoxicated woman by one of the drivers employed by the company. The Court of Appeal held that the requisite strong connection between the wrongdoing and the risks inherent in the enterprise was not present. Specifically, the Court held that the assault did not further the taxi company's aims in any respect and was not related to friction, confrontation or

¹² *C.O. v. Williamson and Trillium Lakelands District School Board*, 2020 ONSC 3874 [*Trillium Lakelands*].

¹³ 2011 ONSC 683.

intimacy inherent in the employer's enterprise. The Court noted that the company's rules and regulations contained provisions intended to minimize any such friction and to prevent physical contact and harassment. The Court also held that the taxi company did not confer any power on the driver in relation to the victim and that the vulnerability of this particular person was not heightened by the taxi company's enterprise.

Recently, the Newfoundland and Labrador Court of Appeal reversed a trial decision and imposed vicarious liability on The Roman Catholic Episcopal Corporation of St. John's for historic sexual abuse perpetrated by the Irish Christian Brothers, a lay apostolate organization that was, by Canon Law, answerable to the Vatican, not the Episcopal Corporation of St. John's.¹⁴ The Episcopal Corporation invited the Irish Christian Brothers to come to Newfoundland in the late 19th century to establish an orphanage. The Court of Appeal found there was a sufficiently close connection between the Episcopal Corporation and the Brothers and imposed vicarious liability on this basis. The Corporation argued that the Brothers were a separate organization and that it had no control over day-to-day operations at the orphanage. Some of the factors that the Court considered were that the Corporation owned the land where the orphanage was situated, had publicly referred to the orphanage as belonging to the Corporation, had fundraised money for the maintenance of the orphanage, installed one of its priests in residence at the orphanage and, by Canon Law, had significant powers over certain operations, including the power to dismiss a teacher at the orphanage for moral failings. As a result of all of the above, the Court found that the risk of sexual abuse was one that the Corporation had placed into the community as a result of its enterprises related to the orphanage.

Courts will impose vicarious liability if there is a sufficiently strong connection between the purpose of the enterprise and the actions of the assailant. This connection must extend beyond merely creating the opportunity for the assailant to engage in sexual abuse. Instead, the abuse must flow from the operations of the organization and the power it gives to its employees. As has been shown, courts examine the extent of the authority granted to the assailant by the organization, the level of intimacy expected of the assailant relative to the victims, and the power imbalances at work, in order to determine if the sexual abuse was a manifestation of the risk created by the organization.

Vicarious liability is imposed without direct fault on the part of the organization. This draconian remedy is imposed to further the societal goals of full compensation for victims (in circumstances where such compensation is fair to the organization) and deterrence. It

¹⁴ *John Doe (G.E.B. #25) v. The Roman Catholic Episcopal Corporation of St. John's*, 2020 NLCA 27.

is incumbent upon organizations to take all necessary steps to ensure that persons they entrust with authority and encourage to become psychologically intimate with vulnerable populations do not abuse their power.

Vicarious liability exposures on government entities, for-profit and not-for-profit enterprises related to sexual abuse claims will continue to pose a significant risk to commercial insurers. The very nature of these claims presupposes that the complainants will come forward years after the fact when the factual matrix is difficult to assemble and witness evidence may be lost. An appreciation of the legal analysis that our courts will undertake when assessing vicarious liability will at least assist those in the insurance industry to embark on a more thorough risk analysis.