

# Vicarious Liability for Sexual Assault

BY FREYA KRISTJANSON

*Cet article examine l'évolution historique des concepts du droit civil qui tendent à utiliser la substitution dans les cas d'inconduite sexuelle des employés, et aborde les développements récents de la loi canadienne.*

There has always been a high incidence of sexual assault and abuse in Canadian society. However, for the first time, and in significant numbers, individuals and groups are seeking legal redress—civil, criminal, and administrative—against both perpetrators and others, such as employers, who may be held responsible.

The rise in sexual assault litigation in the last decade has spurred tremendous developments in legal doctrine, in areas such as limitation periods and fiduciary duty (see *M. (K.) v. M. (H.)*; *Norberg v. Wynrib*). The next frontier for radical legal developments will be the area of vicarious liability for sexual assault. Trial and appellate courts across the country are developing new—often contradictory—tests for determining when a person or institution will be vicariously liable for the tortious sexual misconduct of someone else. This article will provide an overview of legal issues relating to vicarious liability for vicarious assault—the “who, what, where, when, and why.” The focus of this paper will be on institutional vicarious liability for the sexual misconduct of employees and agents. Whether it is religious organizations, sports teams, daycare centres, child protection agencies, private employers, residential facilities for the disabled, hospitals, or schools, there is the potential for the sexual exploitation of children and vulnerable adults.

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This article will also examine the historical evolution of the common law concept of vicarious liability; the policy justifications which operate both in favour of and against extending such liability; and examines developments in Canadian law. The Supreme Court of Canada will shortly be examining these issues: now is the time for those concerned with the development of the law to focus their attention on this important question.

## **What is vicarious liability?**

Vicarious liability means that the law holds an individual/entity liable for the misconduct of another, even though that individual or entity is free from personal blameworthiness or fault and is, in that sense, “innocent” of any wrong-doing. The theoretical basis for vicarious liability has been historically located in two competing maxims. The first maxim, *qui facit per allium facit per se* (“whoever

acts through another, acts through himself”), is based on the enterprise theory of liability—where the acts of the tortfeasor are sufficiently connected with the enterprise, they are construed as the acts of the enterprise. The second maxim, *respondeat superior* (“the superior must answer”), identifies a liability principle on the basis of control.

The key, however, is that an individual or entity may be held liable in the absence of any evidence of fault, knowledge, carelessness, recklessness, wilful blindness, negligence, or any of the traditionally accepted bases of legal liability. The law requires us to presume that the employer in these cases is morally blameworthy; where there is fault, the institution will be held liable for that fault under the appropriate legal doctrines.

## **Distinguishing direct and vicarious liability**

Institutions may be directly liable where their own negligence created the conditions for the misconduct and damage to occur. Examples of claims advanced against institutions for negligence generally include: hiring (failure to properly screen candidates; failure to contact references; failure to test employee propensities); supervision and training (failure to adequately supervise; failure to train employees relating to sexual conduct, detection, reporting); performance review (failure to monitor; failure to record issues as they arise; lack of regular feedback, failure to address suspicions); security (failure to ensure that the premises are properly secured to prevent the occurrence of sexual misconduct); appro-

appropriate response (failure to respond immediately or appropriately to awareness of sexual misconduct); and, failure to warn (failure to warn individuals of the risk of sexual misconduct, including failure to warn subsequent employers).

In each of these instances, the allegation is that the institution should have, or could have done something to reduce a foreseeable risk. These factors are irrelevant to the analysis of vicarious liability, where the issue is not—could or should the institution have done something? Did the institution fail its duty?—but rather, a strict liability imposed solely because of the juridical relationship with the wrongdoer.

#### Who is vicariously liable?

A person or entity may be held vicariously liable for a tort committed by someone else, as long as that person and the tortfeasor are connected by a relevant juridical relationship. Traditional common law holds that vicarious liability may attach to a person in an employment or agency relationship with the tortfeasor; vicarious liability will not attach if the tortfeasor is an independent contractor. The classic test used by the courts in determining either employment or agency is a four-fold test involving: (1) control; (2) ownership of tools; (3) chance of profit; and (4) who bears the risk of loss.

More recently, courts are supplementing this analysis with reference to the organizational test in order to determine whether the tortfeasor is an integral part of the organization, on the theory that the organization is responsible for what is done by those who act on its behalf. The emphasis is on whether the alleged servant or agent is part of his or her employer's organization, and whether his or her work is subject to "coordination or control as to 'where' and 'when' rather than 'how'" (see *Mayer v. J. Conrad Lavigne Ltd.*). The organizational test distinguishes between an employee, who forms an integral part of the

business, and an independent contractor, whose services are accessory to the normal business activities.

Religious institutions have tried to defend against vicarious liability claims on the grounds that priests, for example, are not "employees or agents" of the Catholic church; the relationship is a voluntary one, or an

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ecclesiastical one governed solely by canon law to the exclusion of secular employment law principles (see *W.K. v. Pornbacher*; *M. (F.W.) v. Mombourquette*). The courts, however, have held that whatever the ecclesiastical relationship, the indicia of control indicate that a relationship between a priest and his Diocese is akin to an employment relationship, and thus vicarious liability may be imposed upon the Church.

It appears that Canadian courts are reluctant to allow those ultimately responsible to hide behind the veil of the "independent contractor" distinction. A good example is the British Columbia Court of Appeal decision in *C.A. v. Critchley*. The individual plaintiffs were wards of the Superintendent of Child Welfare placed at Arden Park Youth Ranch, a residential facility, where they were physically and sexually abused by its proprietor, John Critchley. Critchley died in jail, and the action proceeded against the Crown. The Crown ar-

gued that Critchley was an independent contractor, an "owner/operator," and his contract specified that he was not a government employee. The evidence, however, demonstrated the degree of control through both government funding, direct involvement in the operations of Arden Park, and the conferral of "virtual 24-hour-a-day parental authority" and the Court concluded that "all of the indicia of a relationship which would attract vicarious liability are present."

#### When will vicarious liability be imposed?

Once it has been established that an employment or agency relationship exists between the employer/principal and the tortfeasor, traditional legal analysis requires that the wrongful act must fall within the scope or course of employment. This is the key issue: when will the courts find that wilful misconduct amounting to criminal activity, specifically sexual misconduct, falls within the course of employment?

The traditional test (often referred to as the Salmond test) was set out by Salmond and Heuston in *The Law of Torts*:

A master is not responsible for a wrongful act done by his servant unless it is done in the course of employment. It is deemed to be so done if it is either (1) a wrongful act authorised by the master, or (2) a wrongful and unauthorised mode of doing some act authorised by the master.... But a master, as opposed to the employer of an independent contractor, is liable even for acts which he has not authorised, provided they are so connected with acts which he has authorised that they may be regarded as modes—although improper modes—of doing them.... If a servant does negligently that which he was authorised to do carefully, or if he

does fraudulently that which he was authorised to do honestly, or if he does mistakenly that which he was authorised to do correctly, his master will answer for that negligence, fraud or mistake. On the other hand, if the unauthorised and wrongful act of the servant is not so connected with the authorised act as to be a mode of doing it, but is an independent act, the master is not responsible: for in such a case the servant is not acting in the course of his employment, but has gone outside it. (Heuston and Buckley 456–57)

This test has resulted in confusion in the jurisprudence, as courts have strained to distinguish between an unauthorized, wrongful act of the servant which is a mode of doing the authorized act, as opposed to a completely independent act. Of note, however, is that the courts have had little difficulty in accepting that certain traditional intentional torts (theft by fund managers, fraud by law clerks) fit within the Salmond test, notwithstanding that they are anti-social, criminal acts that no employer would authorize. They are “wrongful” modes of doing an authorized act. Yet when faced with sexual assault (another intentional, anti-social, unauthorized, and criminal act), there has been great reluctance to impose vicarious liability. The “time and place” connection which weighs heavily in the sexual assault jurisprudence has not had the same force in judicial consideration of the theft/fraud cases: the courts are not, in general, asking whether the embezzling employee doctored the books at home or at work.

#### **Examples: vicarious liability imposed**

In each of the following cases, vicarious liability was imposed upon the employer, where the wrong was held to be a “mode” (although completely unauthorized, and one the

employer would not have authorized, had the employer known) of doing the authorized function:

An employee of a fund manager breached his fiduciary duty by investing in investments unauthorized by the client, and changing the nature of the account. The employer was liable (*Ryder v. Osler, Wils, et al.*).

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A solicitor’s clerk engaged to draft documents and handle property conveyances defrauded a firm client by having the client sign documents transferring the property to the clerk. The clerk was normally entrusted with the handling of deeds of the sort that he used in the fraud. The solicitor was liable, as employer (*Lloyd v. Grace, Smith, and Co.*). On the other hand, where a clerk used the company seal and other documents to fraudulently certify share certificates as genuine, liability was not imposed on the employer as the employee had no actual nor ostensible authority to warrant the authenticity of share certificates (*Ruben v. Great Fingall Consolidated*). More recently, where an employee fraudulently inveigled another party to enter into a three-year charter party where the employee did not have actual or apparent authority to enter into such a charter, the employer was not liable (*Armagas Ltd. v. Mundogas S.A.*).

The employer was found vicari-

ously liable for the actions of a customs officer who was authorized to deal with dutiable mail, and who stole a parcel of diamonds entrusted to Canada Post. The Supreme Court of Canada held that the customs officer was doing fraudulently that which he was employed to do honestly (*R. v. Levy Brothers Company Limited and Western Assurance Company*). Traditional legal analysis regards this as essentially a case of conversion. The employer had authorized the employee to take possession of the property, which the employee instead stole. Commentators are unanimous in stating that had the employee not been authorized to take possession (i.e., if the employer had merely created an “opportunity” to steal, such that the receptionist had intercepted and taken the parcel), there would have been no vicarious liability.

#### **Examples: no vicarious liability**

Historically, the courts have strained to make the distinction between “mere opportunity,” where no liability will be imposed, and “unauthorized modes,” where liability is imposed. Doctrinally, it is very difficult to distinguish the cases discussed below in which no liability was imposed, from the cases in the previous section, on anything other than a political or ideological disposition of the courts.

The caretaker of a building used a master key to enter an apartment, where he sexually assaulted a tenant. This conduct was held to be an independent act, not within the scope of employment, for which there was no vicarious liability on the employer (although the building management company was held to be negligent for failing to take adequate care to control access to master keys): (*Q. et al. v. Minto Management Ltd. et. al.*).

In the course of a union dispute, municipal firefighters adopted a “go slow” policy resulting in destruction of a property due to their delay in arriving at the fire scene. The court

held that the delaying actions of the firefighters were in furtherance of an industrial dispute, not in furtherance of the employer's business, and constituted "the very negation of carrying out some act authorized by the employer" (*General Engineering Services Ltd. v. Kingston and St. Andrew Corporation*). One must question the extent to which the theft/fraud cases noted above could be construed as "in furtherance of the employer's business." This issue of whether the wrongful act is motivated by the individual employee's needs and desires, versus whether the act may be construed as in furtherance of the employer's enterprise, has also played a role in U.S. vicarious liability jurisprudence.

#### Recent Canadian cases

In a spate of recent cases, Canadian courts have revealed dissatisfaction with the Salmond test as it applies to vicarious liability for sexual intentional torts. The Supreme Court of Canada will shortly have the opportunity to decide the jurisprudential model which will shape sexual assault litigation in the decades to come.

The first Canadian appellate court decision, *McDonald v. Mombourquette*, came from Nova Scotia, and involved the conduct of a Roman Catholic priest. Father Mombourquette had plead guilty to charges under the *Criminal Code*, including a charge for indecent assault on F.M. F.M. had served as an altar server; Mombourquette was the parish priest. When F.M. was eleven years old, the priest invited him to join a "weight lifting" program; he was told this would involve removing his clothes to be measured. On other occasions, Mombourquette took the boy to the glebe house and asked him for a back massage; he placed the boy's hand on his penis. The trial judge had held that the Roman Catholic and Episcopal Corporation of Antigonish was vicariously liable for Mombourquette's actions. The Court of Appeal disagreed.

Speaking for the Court of Appeal, Justice Jones stated:

With respect the test is not simply that an employee is placed in a position of trust and authority that provides the opportunity to do wrong. Applying that test employers would be liable for

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all wrongful acts of their employees. It should be noted that the acts here were not negligent but criminal. (116-117)

The court further held that there was no fiduciary duty owed by the Church directly to the plaintiff. Leave to appeal to the Supreme Court of Canada was refused.

A similar approach was taken in the New Brunswick case of *J.-P.B. v. Jacob*. The male patient was admitted for an infected bronchial cyst and was on antibiotics and analgesics; his in-hospital care did not involve the touching of his genitals or genital area. One of the nurses on duty went into the patient's room, lowered his pyjamas, and touched the patient's penis with his hands or mouth.

The employee had been a nurse for eight years. The trial judge found that prior to the assault the nurse had been a good employee, and the hospital had no reason to expect the sexual assault would occur. The trial

judge, Justice Creaghan, applied the Salmond test and rejected vicarious liability stating:

Jacob sexually assaulted the Plaintiff in circumstances that had nothing to do with his employment.

The fact that he was afforded an opportunity or that he was a nurse on the unit where the Plaintiff was a patient does not in itself give rise to a claim of vicarious liability against the hospital.... (269)

The New Brunswick Court of Appeal affirmed this decision noting that while the act was performed during work hours at the place of employment, the nurse was not assigned to treat the patient. The "opportunity" provided to the nurse was access to the room; he was not in a position of ultimate power, and his wrongful acts were not authorized by the employer.

#### British Columbia: a new approach

On October 16, 1997, the Supreme Court of Canada granted leave to appeal in two significant decisions of the British Columbia Court of Appeal: *B. (P.A.) v. Curry and T. (G) v. Griffiths*. These cases will serve as the foundation for future Canadian jurisprudence on vicarious liability for sexual assaults by employees.

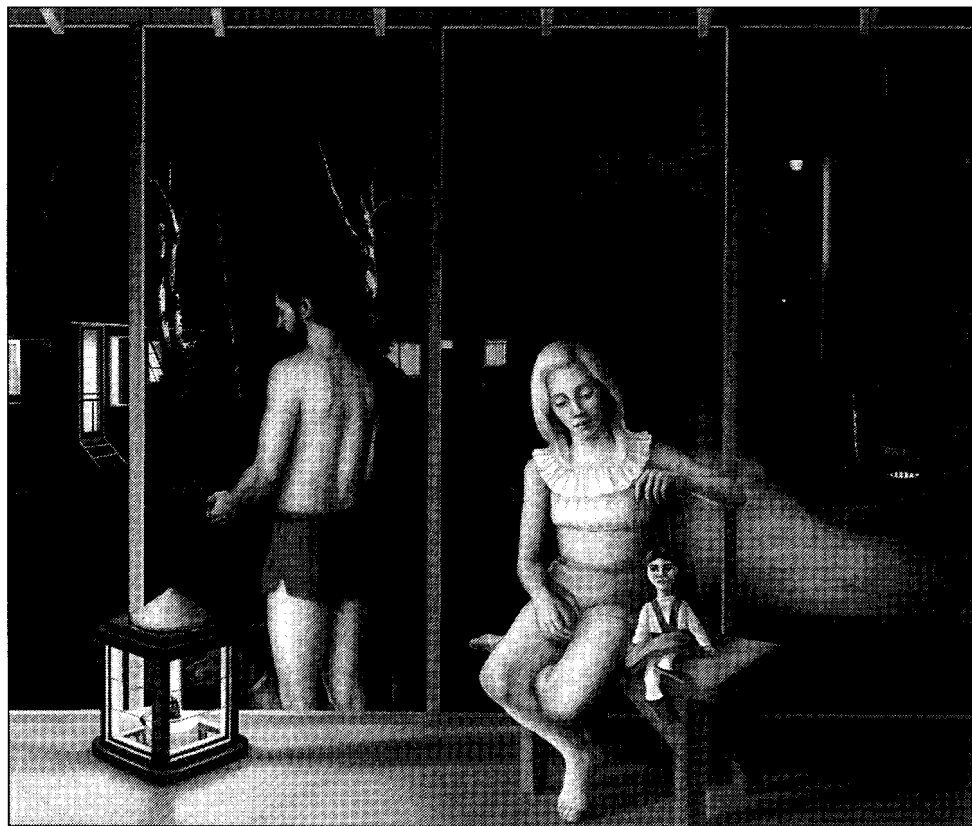
In *Curry*, the trial judge had found the Children's Foundation liable for acts of sexual abuse committed between 1968 and 1971 by one of its employees, Leslie Charles Curry, on a minor residing at one of the Foundation's residential group home facilities. The Foundation provided residential care for children aged 6 through 12; Mr. Curry was hired as a child care counsellor. His duties included: ensuring appropriate hygiene; ensuring various house rules were obeyed; ensuring the children got to school on time; ensuring table manners were appropriate; ensuring the children went to bed on time;

ensuring the children bathed or showered themselves; ensuring the children's clothes were laid out properly; tucking the children in at night; providing an appropriate role model for the children; dealing in an age-appropriate way with the children's questions regarding sexuality; accompanying children on outings and physical activities; and providing a safe and secure environment for the children. Essentially, then, Mr. Curry was entrusted with the duties and obligations of a parent in the lives of the children placed within his care.

Mr. Curry remained with the Foundation until 1980; he was discharged after the Foundation received and investigated a complaint of sexual abuse against a resident child. In 1990, Mr. Curry was charged with 18 counts of gross indecency and two counts of buggery, some of which involved the plaintiff, and was convicted on all but one count. The acts which formed the basis for the civil suit occurred while Mr. Curry was on duty, both at the residential home and on an outing, while the young boy was age 8 through 11. The abuse began with pats on the boy's buttocks, both when he was clothed and when unclothed after a shower or bath. Later Mr. Curry entered the plaintiff's bedroom and fondled him under his pyjamas; the abuse escalated to include oral sex and buggery. In four separate judgments, the court held that the Children's Foundation was vicariously liable for the acts of its employee.

Two strong women judges set out two new, and interesting, approaches to the issue of vicarious liability for sexual misconduct. Madam Justice Huddart rejected the Salmond test:

... the Salmond test is of no use at all when the responsibility of an employer for the intentional tort of sexual assault by an employee placed in a position of control over the victim comes to be considered. (83)



Valerie Palmer, "Luna," oil on linen, 41.75" x 48.5", 1989.  
Courtesy of Nancy Poole's Studio, Toronto, Ontario. Photo: Tom Moore

She continues:

The Salmond test requires a conclusion that the sexual assault of a child is an unauthorized mode of parenting. The unique features of sexual assault cases require a contextual approach that permits courts to examine the nature of the authority conferred on the employee and the likelihood that the conferral of that authority will increase the probability of a wrong occurring. (101)

She held as follows:

In my view, when the conferral of authority provides not mere opportunity, but the power over another that makes more probable a wrong, that employer should be vicariously liable for any such wrong that results from an abuse of that power. (93)

Although agreeing in the result,

Madam Justice Newbury expressed concern that an emphasis on the misuse of power or authority as a test for vicarious liability would "cast the net too widely" and that no vicarious liability should be found in the absence of a "close connection" between the employee's duties and his or her wrongful acts:

These include what I would call functional connection—whether the conduct in question was outwardly similar to authorized acts or duties; spatial connection—whether the conduct occurred at the employer's premises; temporal connection—whether it occurred during the employee's working hours; and (perhaps least useful) formal connection—whether the employer's "objectives" or "purposes" permitted or somehow encouraged the misconduct. (109)

She notes that the conferral of

authority always makes the abuse of power more probable:

I do not believe it is for us, in furtherance of policy considerations, however valid, to make a radical change in the nature of vicarious liability such that it becomes a substitute for the law of negligence but without the necessity of proof of the other elements thereof and without the protections given to defendants by that law. (109)

In an attempt to achieve consensus, Justice Hollinrake also agrees that the "Salmond test" is inappropriate for such sexual abuse cases, and that opportunity alone does not provide a basis for vicarious liability. He attempts to combine the tests set out by Madam Justices Newbury and Huddart as follows:

In cases such as this (sexual assault) the general proposition for the imposition of vicarious liability is that there must be sufficient nexus between the duties of the employee as such and his misconduct. Whether or not there is that sufficient nexus will depend on the nature of the power conferred on the employee by his employment and the likelihood that conferral of power will make probable the very wrong that occurred. I emphasize that this latter consideration does not, and as a matter of law, cannot include those cases where all that can be said in support of a finding of vicarious liability is that the employment and its corresponding duties provided the wrongdoer with the opportunity to commit the wrongful act. (110–111)

These factors—the type of authority conferred, and the nexus between the authority and the abuse—were key to the subsequent decision in *Griffiths*, considered by the same panel of the B.C. Court of Appeal.

Griffiths was Program Director from 1980 to 1992 for the Vernon Boys and Girls Club, a recreational club for children which offered a drop-in centre, conducted various outings, and had activities after school and on Sundays. There were two plaintiffs in the case. Mr. J. was assaulted by Griffiths in 1982, when the ten-year-old boy was invited to Griffiths' home (after working hours). Ms. J.S. was subject to several incidents of sexual abuse, which commenced with suggestive comments and touches. She was assaulted on one occasion on a bus where the two were sitting beside each other on a sporting or field trip to Edmonton, and Mr. Griffiths forced her to put her hand on his penis. When she was 14, Ms. J.S. and another friend visited Mr. Griffiths at his house, where he had intercourse with her. The trial judge found the Boys' and Girls' Club liable; this decision was overturned on appeal.

Madam Justice Huddart, for the majority, held that the Boys' and Girls' Club was not vicariously liable, as there was no abuse of job-created authority. She held that in his job Mr. Griffiths had no power or authority over children; the Boys' and Girls' Club did not stand in *loco parentis*; the boys and girls went home to their parents after every activity. Huddart states:

These incidents do not provide evidence of the abuse of job-created authority. I can see nothing in the nature of the objectives of the Club or the group activities it organized for boys and girls or, most importantly, in the powers that the Club bestowed on Mr. Griffiths that increased the probability of a wrong occurring beyond the risk ordinarily occurring in our community when adults and children come together to participate in common activities. (209–210)

Madam Justice Newbury, dissenting in part, would have found vicarious liability, but only with respect to

the abuse of the young girl on the bus trip. She concluded that with the exception of the assault on the bus, there was not a sufficiently close connection between Mr. Griffiths' duties and the misconduct to warrant the imposition of vicarious liability. She held that "the fact that Mr. Griffiths 'cultivated his victims' in the performance of his duties is not by itself sufficient."

From these cases, we can take it that: (1) some Canadian courts have determined that the Salmond test is insufficient for analyzing sexual abuse and employer liability, while others accept the test; (2) there is a strong predisposition in the courts to reject mere "opportunity" as sufficient to found strict liability; and (3) the nature of the power/authority conferred and the nature of the employee's duties will form an essential component of any new test the Supreme Court of Canada may develop.

### Why vicarious liability?

Courts are reluctant to impose vicarious liability for intentional torts, and particularly sexual assault, in the absence of a clear connection to the employment context, and unless the abuse can be demonstrated to be clearly related to the actual or ostensible authority conferred by the employer. This stems from the fact that vicarious liability is imposed in the absence of any proof of fault. Regardless of the diligence of the employer in seeking to guard against such abuse, and even where the employee contravenes strict employer policies and practices, the vicariously liable employer will be liable for all the assessed damages. In the end, then, the decision as to whether or not liability should be imposed rests upon a clear policy decision: who should bear the cost of such wrongdoing? The innocent plaintiff? The corporation or institution which employed the wrongdoer, notwithstanding that they did everything they could to protect against that risk, and to that extent are innocent

as well? Doctrinally, in the absence of any proof of fault, knowledge, or negligence, this issue is a difficult one to decide.

I have set out below both sides of the leading policy justifications offered:

*Prevention:* One of the most compelling arguments is that vicarious liability enhances incentives for employers to exercise utmost due diligence: it will lead to the implementation of all possible mechanisms to prevent the occurrence of sexual assault. Many other courts, however, argue that the goal of appropriate prevention (as opposed to “overcorrection”) is met by making an employer liable for negligence, for failing to do that which it should have done.

There is also an argument that the imposition of vicarious liability will in fact lead to a decline in services offered due to an excess of caution by administrators. For example, the Supreme Court of California in *John R. v. Oakland Unified School District* was reluctant to place weight on the loss prevention argument, indicating that “untoward consequences” could flow from the imposition of vicarious liability on school districts. The issue in this case was assault by a teacher on a student taking part in a home-study program, at the teacher’s home. The program of home-study was approved by the school board. The Court stated:

... applying the doctrine of *respondeat superior* to impose, in effect, strict liability in this context would be far too likely to deter districts from encouraging, or even authorizing, extra-curricular and/or one-on-one contacts between teachers and students or to induce districts to impose such rigorous controls on activities of this nature that the educational process would be negatively affected. (438)

*Cost Internalization/“Externalities”:* The “law and economics” argument

is that sexual assault, like pollution, is an “externality,” or a cost of the enterprise. In order to ensure economic efficiency (and appropriate pricing of services), the “sexual assault” cost of an enterprise should be visited upon the enterprise causing the problem. Certainly the employer and the enterprise benefit from the proper provision of services; shouldn’t the enterprise also bear the cost of the improper provision of services? When dealing with certain social services (child care, policing, schooling), however, the answer is not to provide fewer services, or to increase the price of these services, which is how private enterprise deals with increased costs. As Madam Justice Huddart states in *B. (P.A.) v. Curry*:

[T]he enterprise of protecting children, like that of policing or teaching, cannot be expanded or contracted depending on the total cost of providing that service. A community’s moral obligation to children cannot be ignored. However, the cost internalization argument remains useful to the extent that it reminds us that the increased costs arising from the conferral of authority must be borne by someone else. (89)

It must be recognized that, particularly in an era of fiscal restraint, there is clearly a risk that the services provided will be reduced (or new services will not be provided) due to the costs of increased litigation and damages awards. Scarce health-care dollars are redirected from patient care; the volunteer sports organization in the community will fold; rather than additional child-care workers or new programs for nursing mothers, the Children’s Aid Society hires lawyers instead.

*Assurance of Compensation:* One of the primary reasons for seeking to affix liability to employers is to ensure that the victim receives compensation. In many cases, the perpe-

trator will not have the assets of the institutional employer. For example, in the *Mombourquette* case the priest entered no defence; equally, one can assume that he lacked the assets to pay any judgment.

However, the law has always been reluctant to affix an innocent party (here, as no negligence or fault need be proven, there is no moral blameworthiness attached to the employer) with the unforeseeable costs of intentional criminal acts by employees.

There are significant costs associated with the imposition of vicarious liability. There has been much debate in the American jurisprudence with respect to insurance implications of vicarious liability. For example, Justice Baxter, states in *Mary M. v. City of Los Angeles*:

In sum, the principles espoused by the majority have the potential to convert blameless public agencies into liability insurers for much, if not all, of the intentional misconduct committed by peace officers in their employ. Unlike commercial insurers, the innocent agencies can neither define the limits of their coverage nor collect premiums to finance it. (99)

He also states:

It is a truism to state that ensuring compensation weighs in favour of vicarious liability. The deeper the Defendant’s pocket, the easier the Plaintiff is compensated. If ensuring compensation were the only goal, vicarious liability should apply against all employers in all cases. However ... the sympathetic desire to compensate the injured is not a sufficient basis on which to impose vicarious liability.

As stated by Chief Justice McEachern of British Columbia, in *A.(C.) v. Critchley*, “many de-

fendants sought to be made liable cannot insure themselves against this kind of a loss, and certainly cannot raise taxes in order to spread the loss" (506).

Insurance is a real issue, particularly for small organizations, including sports teams, women's shelters, or volunteer boards. Many insurance policies exclude coverage for intentional criminal acts, or price prohibitively for sexual assault coverage. The American experience is instructive; as the number of sexual abuse claims has skyrocketed, the availability of coverage has declined while the price has dramatically increased. This increases the probability that desired services will not be provided if a strict liability regime is opposed.

In the case of criminal acts including sexual assault, there is a statutory scheme applicable to victims whereby they may receive very limited recompense for damages caused by criminal acts. The problem with this statutory scheme is, of course, the very limited sums of money which do not approach the damage and costs sustained by those who are victims of breach of trust or sexual assault. One of the answers, therefore, would be to increase amounts paid to victims of sexual assault to ensure fair levels of recovery, while spreading the costs.

### Feminist principles

Do feminist principles demand that the morally blameworthy employer, in all circumstances, should be liable for the sexual assault of its employees? Put aside institutions like Mount Cashel or Grandview. Assume, instead, that we are looking at the National Association of Women and the Law (NAWL). NAWL is explicitly founded on feminist and democratic principles; there is regular review, discussion, and awareness amongst employees, the Board, and members of issues of power, authority, and abuse; the historical and cultural roles of women and children, patriarchy, difference theory,

and oppression are central to the enterprise. When one of the employees violates the trust of members, should NAWL automatically be held liable? And what if NAWL's insurance doesn't cover intentional sexual acts? What if the judgment shuts down this organization?

From a feminist perspective, we are not searching for a hard and fast test that will apply in all circumstances: we should be analyzing every case contextually, and must be fully cognizant of all aspects of power relationships in institutions. To a certain extent, this calls for a more creative approach to the negligence aspects of employer liability for sexual assaults of employees. We should be more creative in the questions we ask:

What is the institutional treatment of women (children) really like? Are there any factors which indicate an unjustified difference which may have created the environment within which the assaults took place?

What is the relationship at issue? Is it a fiduciary relationship, or one which otherwise carries with it an aura of safety or trust? The safety and trust with which women approach a therapist or spiritual counsellor is different than that with which they approach a bank.

What are the actual power relationships in the institution? Are there women in positions of authority? What is the actual practice of anti-sexism? Is this an institution where cultural infantilization and exploitation *vis à vis* women and children are acceptable? Is this an institution which appears to put on numerous anti-harassment programs, but turns a blind eye to that which really goes on (the U.S. navy would be a good example).

What are the real power dynamics at issue? Has the employer carefully analyzed and protected against the risks given the real (not superficial) power issues in play?

We must remember that feminist principles must be based on whole women. We are mothers who want

to ensure there are recreational clubs and extra-curricular activities in our communities. We run caring organizations, like sexual assault centres, community health centres, and homeless shelters, and we run our own private businesses. We sit on boards of organizations which are underfunded and lack insurance coverage. And we are also victims of sexual assault. From a principle of whole women, we must carefully look at all the implications.

Given the concerns with the imposition of strict liability, regardless of context, perhaps we should be placing more weight on the difficult work of pushing the boundaries of negligence—so that contextual and subtle examinations of what institutions can and should be doing continue. Extending the jurisprudence for breach of fiduciary duty and breach of trust, and a real examination of power relationships is another route. We must make this form of inquiry acceptable and necessary in Canadian courtrooms.

### Where are we going?

The Canadian and American courts which have considered this issue have been careful in extending vicarious liability for sexual assault to require that the abuse relates directly to the nature of the job-created authority conferred on the abuser, and that it also has a clear connection with duties of employment. The B.C. Court of Appeal decisions indicate, however, how restrictive their proposed test is in its application. They found liability in the case of Curry, who stood *in loco parentis* in relation to the young children in his care and whose employment duties extended to intimate care and hygiene. They were unwilling to impose vicarious liability, however, where the recreational club program director was placed in a position where he had constant and daily contact with young boys and girls. The distinguishing feature, in the end, is likely the lack of work-related time and



place connection in the *Griffiths* case, and the more limited authority conferred on the recreational program director.

American cases have also been quite stringent with respect to the definition of the kinds of employment in which liability will be found; a major concern would be the failure to truly recognize the nature of the job-conferred authority in question, and a real insensitivity to power dynamics. In *John R.*, for example, it was held that a school district could not be held vicariously liable for the actions of a teacher. In *Mary M.*, however, the Court did hold liable the employer of a police officer who raped a woman whom he had apprehended. The California court held that a police officer, empowered by his badge to detain and apprehend, clearly had the kind of "authority" which the court held did not apply between a school teacher and his student. A recent California Supreme Court ruling in the case of *Lisa M. v. Henry Mayo Newhall Memorial Hospital* further limits vicarious liability. In this case, an ultrasound technician assaulted a pregnant woman in the hospital by inserting the scanning wand in her vagina, and fondling the patient while telling her he "needed to excite her to get a good view of the baby." The Court rejected vicarious liability of the hospital, stating "If... the assault was not motivated or triggered off by anything in the employment activity, but was the result of only propinquity and lust, there should be no liability" (301). They indicated vicarious liability should only apply to injuries that are "as a practical matter sure to occur in the conduct of the employer's enterprise," and inherent to or engendered by the working environment. To the extent that the nature of "job-conferred authority" becomes a key aspect of the test, lawyers will have to ensure they are building the appropriate evidentiary record. We must locate experts to testify about theories of control, compulsion, vulnerability, trust, and authority. We must

be ever-vigilant with respect to developing theories of negligence as well.

A cursory review of the American jurisprudence reveals the broad range of cases in which vicarious liability is sought to be imposed. Many of the employers/institutions in these cases are composed of women who are deeply concerned with the welfare of their clients and patients, who strive hard to create a work environment which is safe for all employees and clients. They are shocked at the transgressions which may occur, particularly when they took all possible care to avoid such occurrences. Affixing liability in the absence of fault may drive the local women's shelter to close its doors, or may end the provision of girl's soccer in your local community. Although I have not set out any answers, I hope I have painted a picture of the kinds of difficult questions which this issue raises.

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