The Children's Foundation, the Superintendent of Family and Child Services in the Province of British Columbia and Her Majesty The Queen in Right of the Province of British Columbia as represented by the Ministry of Social Services and Housing Appellants
v.
Patrick Allan Bazley Respondent

Indexed as: **Bazley** v. **Curry**

1999: June 17. **SUPREME COURT OF CANADA**

Present: L'Heureux-Dubé, Cory, McLachlin, Iacobucci, Major, Bastarache and Binnie JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

The appellant Foundation, a non-profit organization, operated two residential care facilities for the treatment of emotionally troubled children. As substitute parent, it practised "total intervention" in all aspects of the lives of the children it cared for. The Foundation's employees were to do everything a parent would do, from general supervision to intimate duties like bathing and tucking in at bedtime. The Foundation hired C, a paedophile, to work in one of its homes. The Foundation did not know he was a paedophile. It checked and was told he was a suitable employee. After investigating a complaint about C, and verifying that he had abused a child in one of its homes, the Foundation discharged him. C was convicted of 19 counts of sexual abuse, two of which related to the respondent. The respondent sued the Foundation for compensation for the injury he suffered while in its care. The parties stated a case to determine whether the Foundation was vicariously liable for its employee's tortious conduct. The chambers judge found that it was and the Court of

Appeal upheld that decision.

Held: The appeal should be dismissed and the matter remitted to trial.
Pursuant to the Salmond test, employers are vicariously liable for both employee acts authorized by the employer and unauthorized acts so connected with authorized acts that they may be regarded as modes (albeit improper modes) of doing authorized acts. In determining whether an employer is vicariously liable for an employee's unauthorized, intentional wrong in cases where precedent is inconclusive, courts should be guided by the following principles.

First, they should openly confront the question of whether liability should lie against the employer, rather than obscuring the decision beneath semantic discussions of "scope of employment" and "mode of conduct".

Second, the fundamental question is whether the wrongful act is sufficiently related to conduct authorized by the employer to justify the imposition of vicarious liability. Vicarious liability is generally appropriate where there is a significant connection between the creation or enhancement of a risk and the wrong that accrues therefrom, even if unrelated to the employer's desires. Where this is so, vicarious liability will serve the policy considerations of the provision of an adequate and just remedy and of deterrence. Incidental connections to the employment enterprise, like time and place (without more), will not suffice. Once engaged in a particular business, it is fair that an employer be made to pay the generally foreseeable costs of that business. In contrast, to impose liability for costs unrelated to the risk would effectively make the employer an involuntary insurer.

Third, in determining the sufficiency of the connection between the employer's creation or enhancement of the risk and the wrong complained of, subsidiary factors may be considered. These may vary with the nature of the case. When related to intentional torts, the relevant factors may include, but are not limited to, the following:

(a) the opportunity that the enterprise afforded the employee to abuse his or her power;
(b) the extent to which the wrongful act may have furthered the employer's aims (and hence be more likely to have been committed by the employee);
(c) the extent to which the wrongful act was related to friction, confrontation or intimacy inherent in the employer's enterprise;
(d) the extent of power conferred on the employee in relation to the victim; and
(e) the vulnerability of potential victims to the wrongful exercise of the employee's power.

Applying these general considerations to sexual abuse by employees, the test for vicarious liability for an employee's sexual abuse of a client should focus on whether the employer's enterprise and empowerment of the employee materially increased the risk of the sexual assault and hence the harm. The test must not be applied mechanically, but with a sensitive view to the policy considerations that justify the imposition of vicarious liability -- fair and efficient compensation for

wrong and deterrence. This requires trial judges to investigate the employee's specific duties and determine whether they gave rise to special opportunities for wrongdoing. Because of the peculiar exercises of power and trust that pervade cases such as child abuse, special attention should be paid to the existence of a power or dependency relationship, which on its own often creates a considerable risk of wrongdoing.

There should not be an exemption for non-profit organizations. While non-profit organizations perform needed services on behalf of the community as a whole, the Foundation's institution, however meritorious, put the respondent in the intimate care of C and in a very real sense enhanced the risk of his being abused. From his perspective, it is fair that as between him and the institution that enhanced the risk, the institution should bear legal responsibility for his abuse and the harm that befell him. It may also deter other incidents of sexual abuse by motivating charitable organizations entrusted with the care of children to take not only such precautions as the law of negligence requires, but all possible precautions to ensure that their children are not sexually abused.

Here the Foundation is vicariously liable for the sexual misconduct of its employee. The opportunity for intimate private control and the parental relationship and power required by the terms of employment created the special environment that nurtured and brought to fruition the sexual abuse. The employer's enterprise created and fostered the risk that led to the ultimate harm. Fairness and the need for deterrence in this critical area of human conduct -- the care of vulnerable children -- suggest that as between the Foundation that created and managed the risk and the innocent victim, the Foundation should bear the loss.

Madame Justice McLachlin:
Both parties agree that the answer to this question is governed by the "Salmond" test, which posits that employers are vicariously liable for (1) employee acts authorized by the employer; or (2) unauthorized acts so connected with authorized acts that they may be regarded as modes (albeit improper modes) of doing an authorized act. …

The common theme resides in the idea that where the employee's conduct is closely tied to a risk that the employer's enterprise has placed in the community, the employer may justly be held vicariously liable for the employee's wrong.

"[T]he vicarious liability regime is best seen as a response to a number of policy concerns. In its traditional domain, these are primarily linked to compensation, deterrence and loss internalization." Fleming has identified similar policies lying at the heart of vicarious liability. In his view, two fundamental concerns underlie the imposition of vicarious liability: (1) provision of a just and practical remedy for the harm; and (2) deterrence of future harm. While different formulations of the policy interests at stake may be made (for example, loss internalization is a hybrid of the two), I believe that these two ideas usefully embrace the main policy considerations that have been advanced.

First and foremost is the concern to provide a just and practical remedy to people who suffer as a consequence of wrongs perpetrated by an employee. Fleming expresses this succinctly: "a person who employs others to advance his own economic interest should in fairness be placed under a corresponding liability for losses incurred in the course of the enterprise". "One of the most important social goals served by vicarious liability is victim compensation. Vicarious liability improves the chances that the victim can recover the judgment from a solvent defendant.

However, effective compensation must also be fair, in the sense that it must seem just to place liability for the wrong on the employer. Vicarious liability is arguably fair in this sense. The employer puts in the community an enterprise which carries with it certain risks. When those risks materialize and cause injury to a member of the public despite the employer's reasonable efforts, it is fair that the person or organization that creates the enterprise and hence the risk should bear the loss.

Fixing the employer with responsibility for the employee's wrongful act, even where the employer is not negligent, may have a deterrent effect. Employers are often in a position to reduce accidents and intentional wrongs by efficient organization and supervision.

Failure to take such measures may not suffice to establish a case of tortious negligence directly against the employer. Perhaps the harm cannot be shown to have been foreseeable under negligence law. Perhaps the employer can avail itself of the defence of compliance with the industry standard. Or perhaps the employer, while complying with the standard of reasonable care, was not as scrupulously diligent as it might feasibly have been. Holding the employer vicariously

liable for the wrongs of its employee may encourage the employer to take such steps, and hence, reduce the risk of future harm. A related consideration raised by Fleming is that by holding the employer liable, "the law furnishes an incentive to discipline servants guilty of wrongdoing".
At one time the law held masters responsible for all wrongs committed by servants. Later, that policy was abandoned as too harsh in a complex commercial society where masters might not be in a position to supervise their servants closely. Servants may commit acts, even on working premises and during working hours, which are so unconnected with the employment that it would seem unreasonable to fix an employer with responsibility for them. For example, if a man assaults his wife's lover (who coincidentally happens to be a co-worker) in the employees' lounge at work, few would argue that the employer should be held responsible. Similarly, an employer would not be liable for the harm caused by a security guard who decides to commit arson for his or her own amusement: see, e.g., Plains Engineering Ltd. v. Barnes Security Services Ltd. (1987), 43 C.C.L.T. 129 (Alta. Q.B.).

A wrong that is only coincidentally linked to the activity of the employer and duties of the employee cannot justify the imposition of vicarious liability on the employer. To impose vicarious liability on the employer for such a wrong does not respond to common sense notions of fairness. Nor does it serve to deter future harms. Because the wrong is essentially independent of the employment situation, there is little the employer could have done to prevent it. Where vicarious liability is not closely and materially related to a risk introduced or enhanced by the employer, it serves no deterrent purpose, and relegates the employer to the status of an involuntary insurer.

Underlying the cases holding employers vicariously liable for the unauthorized acts of employees is the idea that employers may justly be held liable where the act falls within the ambit of the risk that the employer's enterprise creates or exacerbates. Similarly, the policy purposes underlying the imposition of vicarious liability on employers are served only where the wrong is so connected with the employment that it can be said that the employer has introduced the risk of the wrong (and is thereby fairly and usefully charged with its management and minimization). The question in each case is whether there is a connection or nexus between the employment enterprise and that wrong that justifies imposition of vicarious liability on the employer for the wrong, in terms of fair allocation of the consequences of the risk and/or deterrence.

Where the risk is closely associated with the wrong that occurred, it seems just that the entity that engages in the enterprise (and in many cases profits from it) should internalize the full cost of operation, including potential torts. On the other hand, when the wrongful act lacks meaningful connection to the enterprise, liability ceases to flow. As Prosser and Keeton sum up, when the harm is connected to the employment enterprise:

The losses caused by the torts of employees, which as a practical matter are sure to occur in the conduct of the employer's enterprise, are placed upon the enterprise itself, as a required cost of doing business. They are placed upon the employer because, having engaged in an enterprise which will on the basis of all past experience involve harm to others through the torts of employees, and sought to profit by it, it is just that he, rather than the innocent injured plaintiff, should bear them, and because he is better able to absorb them, and to distribute them, through prices, rates or liability insurance, to the public, and so to shift them to society, to the community at large.

The connection between the tort and the employment is broad. To say the employer's enterprise created or materially enhanced the risk of the tortious act is therefore different from saying that a reasonable employer should have foreseen the harm in the traditional negligence sense, making it liable for its own negligence. As Fleming explains:

“Perhaps inevitably, the familiar notion of foreseeability can here be seen once more lurking in the background, as undoubtedly one of the many relevant factors is the question of whether the unauthorised act was a normal or expected incident of the employment. But one must not confuse the relevance of foreseeability in this sense with its usual function on a negligence issue. We are not here concerned with attributing fault to the master for failing to provide against foreseeable harm (for example in consequence of employing an incompetent servant), but with the measure of risks that may fairly be regarded as typical of the enterprise in question. "The inquiry is directed not at foreseeability of risks from specific conduct, but at foreseeability of the broad risks incident to a whole enterprise." [Emphasis added.]

Therefore, "mere opportunity" to commit a tort, in the common "but-for" understanding of that phrase, does not suffice: Morris v. C.W. Martin & Sons Ltd., [1966] 1 Q.B. 716 (C.A.) (per Diplock L.J.). The enterprise and employment must not only provide the locale or the bare opportunity for the employee to commit his or her wrong, it must materially enhance the risk, in the sense of significantly contributing to it, before it is fair to hold the employer vicariously liable. When the

opportunity is nothing more than a but-for predicate, it provides no anchor for liability. When it plays a more specific role -- for example, as permitting a peculiarly custody-based tort like embezzlement or child abuse -- the opportunity provided by the employment situation becomes much more salient.

Reviewing the jurisprudence, and considering the policy issues involved, I conclude that in determining whether an employer is vicariously liable for an employee's unauthorized, intentional wrong in cases where precedent is inconclusive, courts should be guided by the following principles:

(1) They should openly confront the question of whether liability should lie against the employer, rather than obscuring the decision beneath semantic discussions of "scope of employment" and "mode of conduct".
(2) The fundamental question is whether the wrongful act is sufficiently related to conduct authorized by the employer to justify the imposition of vicarious liability. Vicarious liability is generally appropriate where there is a significant connection between the creation or enhancement of a risk and the wrong that accrues therefrom, even if unrelated to the employer's desires. Where this is so, vicarious liability will serve the policy considerations of provision of an adequate and just remedy and deterrence. Incidental connections to the employment enterprise, like time and place (without more), will not suffice. Once engaged in a particular business, it is fair that an employer be made to pay the generally foreseeable costs of that business. In contrast, to impose liability for costs unrelated to the risk would effectively make the employer an involuntary insurer.
(3) In determining the sufficiency of the connection between the employer's creation or enhancement of the risk and the wrong complained of, subsidiary factors may be considered. These may vary with the nature of the case. When related to intentional torts, the relevant factors may include, but are not limited to, the following:
(a) the opportunity that the enterprise afforded the employee to abuse his or her power;
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(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.

Applying these general considerations to sexual abuse by employees, there must be a strong connection between what the employer was asking the employee to do (the risk created by the employer's enterprise) and the wrongful act. It must be possible to say that the employer significantly increased the risk of the harm by putting the employee in his or her position and requiring him to perform the assigned tasks. The policy considerations that justify imposition of vicarious liability for an employee's sexual misconduct are unlikely to be satisfied by incidental considerations of time and place. For example, an incidental or random attack by an employee that merely happens to take place on the employer's premises during working hours will scarcely justify holding the employer liable. Such an attack is unlikely to be related to the business the employer is conducting or what the employee was asked to do and, hence, to any risk that was created. Nor is the imposition of liability likely to have a significant deterrent effect; short of closing the premises or discharging all employees, little can be done to avoid the random wrong. Nor is foreseeability of harm used in negligence law the test. What is required is a material increase in the risk as a consequence of the employer's enterprise and the duties he entrusted to the employee, mindful of the policies behind vicarious liability.

What factors are relevant to whether an employer's enterprise has introduced or significantly exacerbated a risk of sexual abuse by an employee? (Again, I speak generally, supplementing the factors suggested above.) It is obvious that the risk of an employee sexually abusing a child may be materially enhanced by giving the employee an opportunity to commit the abuse. There are many kinds of opportunity and the nature of the opportunity in a particular case must be carefully evaluated in determining whether it has, in fact, materially increased the risk of the harm that ensued. If an employee is permitted or required to be with children for brief periods of time, there may be a small risk of such harm -- perhaps not much greater than if the employee were a stranger. If an employee is permitted or required to be alone with a child for extended periods of time, the opportunity for abuse may be greater. If in addition to being permitted to be alone with a child for extended periods, the employee is expected to supervise the child in intimate activities like bathing or toiletting, the opportunity for abuse becomes greater still. As the opportunity for abuse becomes greater, so the risk of harm increases.

The risk of harm may also be enhanced by the nature of the relationship the employment establishes between the employee and the child. Employment that puts the employee in a position

of intimacy and power over the child (i.e., a parent-like, role-model relationship) may enhance the risk of the employee feeling that he or she is able to take advantage of the child and the child submitting without effective complaint. The more the employer encourages the employee to stand in a position of respect and suggests that the child should emulate and obey the employee, the more the risk may be enhanced. In other words, the more an enterprise requires the exercise of power or 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.