

Employer's Vicarious Liability in Sexual Assault Claims

BRETT RIDEOUT

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Origins of Vicarious Liability

- Legal principle whereby one person is held responsible for the conduct of another regardless of personal blameworthiness or fault.
- Instance of strict liability - liability that does not depend on actual negligence or intent to harm, but rather is based on a breach of a duty, regardless of intent.
- Strict liability will generally result merely because the act or omission took place .

Origins Continued

- **Fleming, The Law of Torts**
- the basis of the modern principle of liability for all torts committed by the servant 'in the course of his employment' originates in the earlier part of the 19th century.
- Originates from a compromise between two conflicting policies: on one end, the social interest in furnishing an innocent tort victim with recourse against a financially responsible defendant; on the other, a hesitation to foist any undue burden on business enterprise.
- Policy considerations - a person who employs others to advance their own economic interest should in fairness be placed under a corresponding liability for losses incurred in the course of the enterprise and that the employer is more likely to be in a position to compensate the tort victim.
- Accident prevention - Firstly, deterrent pressures are most effectively brought to bear on larger units like employers who are in a strategic position to reduce accidents by efficient organization and supervision of their staff. Secondly, historically the employees were not financially well off and could not satisfy judgments (judgment proof) so they were removed from them the spectre of tort liability as a deterrent of wrongful conduct. By holding the employer liable, the law furnishes an incentive to discipline employees guilty of wrongdoing, if necessary by insisting on an indemnity or contribution.

General Considerations

- Vicarious liability creates liability on an employer for the actions of its employee.
- The central link is the employment relationship.
- The “course of employment test” also known as the “Salmond test” has traditionally been the starting point.

Salmond Test

- Test involves the determination of three factors:
 1. Who is a person in respect of whom the principle can be applied?
 2. What kind of activity can be said to be authorized or unauthorized, as the case may be.
 3. Whether the conduct in question is reasonably related to authorized activity or is wholly outside it.

Salmond Test Considerations

- With respect to the first question, consideration must be given to whether any distinction is made between employees, independent contractors and volunteers.
- With respect to the second question, the issue is whether the consequences are different for negligent and intentional or criminal conduct, as well as for conduct which is both “onsite” and/or during working hours and that which is “offsite” and/or outside normal working hours.
- The third question involves both factual and policy considerations.

Key is Authorized Activity

- The mere fact that it is the employment which gives the employee the opportunity to commit the action in question is not enough to establish that it was committed in the course of his/her employment.
- Under the traditional approach one must review the precise terms of the authority conferred on the employee: the function, operation, type of activity to be done, specific instructions at the time, the place or the manner of doing the activity – are all relevant to whether the activity is “authorized” by the employer.
- A simple prohibition by and employer against an act does not necessarily take the act outside the course of employment. Therefore an employer can not always protect itself from vicarious liability simply by prohibiting certain activities.
- The question is whether the particular conduct of the employee was of such a nature as to be beyond that which could have been reasonably contemplated as occurring in the course of the employee doing their job.

New (Bazley) Test

- In 1999 the Supreme Court of Canada released 2 decisions dealing with vicarious liability in the context of sexual assault claims.
- The cases review the traditional test and create new test in relation to intentional torts.
- In *Bazley v. Curry*, McLachlin J. writes she considers the Salmond test to be inadequate as it focuses on the question of whether there is a sufficient connection between that which was done and that which the employer authorized to be done.
- In her view, this is problematic because it is often difficult to distinguish between an unauthorized “mode” of performing an authorized act that attracts liability and an entirely independent act that does not. As stated:
 - ...Unfortunately, the test provides no criterion on which to make this distinction. In many cases, like the present one, it is possible to characterize the tortious act either as a mode of doing an authorized act (as the respondent would have us do), or as an independent act altogether (as the appellants would suggest). In such cases, how is the judge to decide between the two alternatives?

Bazley v. Curry [1999] 2 S.C.R. 534

Facts

- employer was the Children's Foundation a non-profit organization which operated residential care facilities for the treatment of emotionally troubled children.
- As substitute parent it practised total intervention in all of the aspects of the lives of the children for which it cared.
- The Foundation's employees would do everything a parent would do, from general supervision to intimate duties like bathing and tucking in at bedtime.
- Unbeknownst to the Foundation an employee in one of its homes (Curry) was a paedophile. Background checks had indicated that he was a suitable employee. After investigating a complaint about Curry, and verifying that he had abused children in one of its homes, the Foundation discharged him.
- Curry was subsequently convicted of 19 counts of sexual abuse, two of which related to Bazley, a resident of one of the Foundation's facilities.

Bazley Continued

- Bazley sued the Foundation for damages for the injuries he suffered while in its care.
- Court asked to determine whether the Foundation was vicariously liable for Curry's tortious conduct.
- The Supreme Court of Canada held in an unanimous judgment that vicarious liability should be imposed on the employer applying a two-step procedure and factors relevant to the determination of whether the defendant had created or enhanced the risk that sexual abuse would occur.
- In this case, the opportunity for intimate private control and the parental relationship and power required by the terms of employment created a special environment that nurtured and brought to fruition the sexual abuse.
- The Foundation's enterprise created and fostered the risk that led to the ultimate harm. While it performed a needed service on behalf of the community as a whole, it put Bazley in the intimate care of Curry and in a very real sense enhanced the risk of the former being abused by the latter.
- From Bazley's perspective, it was fair that as between him and the institution that enhanced the risk, the institution should bear legal responsibility for the abuse and harm that occurred.

2 Step Bazley Analysis

- Supreme Court determined a more appropriate analysis is a two-step procedure applied to the “second branch” of the Salmond test:
 1. Who is a person in respect of whom the principle can be applied?
 2. What kind of activity can be said to be authorized or unauthorized, as the case may be.
 3. Whether the conduct in question is reasonably related to authorized activity or is wholly outside it.

Bazley Test

- First, the court should determine whether there are precedents which unambiguously determine on which side of the line between vicarious liability and no liability the case falls.
- If prior cases do not clearly suggest a solution, the next step is to determine whether vicarious liability should be imposed in light of the broader policy rationales behind strict liability.
- Those policy considerations are:
 1. the provision of an adequate and just remedy, and
 2. deterrence.
- A court should avoid the semantic discussion of “scope of employment” and “mode of conduct” fostered by the Salmond test and, instead, should attempt to answer the following fundamental question:

...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.

Bazley Test

- The court explained that subsidiary factors may be considered in determining the sufficiency of the connection between the employer's creation or enhancement of the risk and the wrong complained of. With respect to intentional torts, the 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;
 - (e) the vulnerability of potential victims to wrongful exercise of the employee's power.
- The above is often referred to as the "enterprise risk" analysis.
- The governing theory is that the approach is more policy oriented and imposes an obligation on an employer to ensure that it does not introduce unnecessary risks into the work place or foster situations that can facilitate an employee engaging in wrongful acts.

Jacobi v Giffiths [1999] 2 S.C.R. 570

- In contrast, in *Jacobi v. Griffiths*, a divided court held the employer was not vicariously liable for a sexual assault committed by its employee.
- The Boys' and Girls' Club Program Director committed sexual assaults on two children.
- The Court held that there was no "strong connection" between the enterprise risk and the sexual assault.
- The Court was divided in its decision - Binnie J. for the majority held that in order to find a strong connection, there must be a material increase in the risk that harm would occur in the sense that the employment significantly contributed to the occurrence of the harm.

Jacobi v Giffiths [1999] 2 S.C.R. 570

- In this case, the Club's "enterprise" was to offer group recreational activities for children to be enjoyed in the presence of volunteers and other members.
- The opportunity that the Club afforded Griffiths to abuse whatever power he may have had was slight, given his particular position. The sexual abuse only became possible when Griffiths managed to subvert the public nature of the activities.
- The success of his agenda depended on his ability to isolate the victims from the larger group, and while the progress from the Club's program to the sexual assaults was a "chain of multiple links" none of them could be characterized as the inevitable or natural outgrowth of its predecessor.
- The court therefore held there was not enough to postulate a series of steps each of which might not have happened "but for" the previous steps. The chain of events constituted independent initiatives on the part of Griffiths for his own personal goals, and it was too remote from the Club's enterprise to justify imposing "no fault" liability on it.

Ivic v Lakovic [2017] ONCA 446

- In *Ivic v. Lakovic*, the Ontario Court of Appeal recently revisited employer vicarious liability for sexual assault.
- In *Ivic*, the lower court granted the employer (a taxi company) summary judgment dismissing a vicarious liability claim against it.
- On appeal, the Court of Appeal was required to examine whether the job duties required of a taxi driver materially enhanced the risk of sexual assault on a customer.

Ivic Analysis

- The Court agreed that the Bazley test was the appropriate analysis.
- The Court determined that the employer did not significantly increase the risk of harm to a customer by permitting someone to drive a taxi and dispatching him to customers to provide rides.
- In looking at the dynamic between parties, the Court stated:

[...] the taxi company did not confer any power on the driver in relation to the appellant. It dispatched the driver to drive the appellant. There was no evidence that the taxi company knew that it was sending the driver to collect a lone, intoxicated woman. The relationship between the driver and the appellant was that of adult driver and adult fee-paying passenger. Arguably, what power the driver had, he arrogated to himself through his own decisions.

Ivic Analysis

- The Court further stated:

The final factor – the vulnerability of potential victims to the wrongful exercise of the employee’s powers – is arguably an important factor in this case. Late in the evening, a lone, intoxicated woman is vulnerable. Sadly, however, she is prey not only to taxi drivers. The power the driver allegedly wrongfully exercised was not predicated on his employment. Moreover, as Binnie J. wrote for the majority in *Jacobi*, “vulnerability does not itself provide the “strong link” between the enterprise and the sexual assault that imposition of no-fault liability would require.”

- This led to the conclusion that the requisite strong connection between the risk created by the taxi company's enterprise and the sexual assault was not present, and that the sexual assault was only coincidentally linked to the activities of the taxi company.

Caution by Court of Appeal

- The Court of Appeal in Ivic provided a caution against imposing no-fault liability on employers specifically in the non-profit sector, reiterating the Supreme Court's statement in Jacobi:

...the imposition of no-fault liability in this case would tell non-profit recreational organizations dealing with children that even if they take all of the precautions that could reasonably be expected of them, and despite the lack of any other direct fault for the tort that occurs, they will still be held financially responsible for what, in the negligence sense of foreseeability, are unforeseen and unforeseeable criminal assaults by their employees. It has to be recognized that the rational response for such organizations may be to exit the children's recreational field altogether.

Considerations

- A list of factors to be considered in assessing whether the imposition of vicarious liability is warranted includes:
 1. the opportunity that the employer affords the employee to abuse their power;
 2. the extent to which the wrongful act may have furthered the employer's aims (and hence more likely to have been committed by the employee);
 3. the extent to which the wrongful act was related to friction, confrontation or intimacy inherent in the employer's enterprise;
 4. the extent of power conferred on the employee in relation to the victim; and,
 5. the vulnerability of potential victims to wrongful exercise of the employee's power.
- The factors must “not be applied mechanically, but with a sensitive view to the policy considerations that justify the imposition of liability”.

Policy Rationale

- As discussed by the Supreme Court of Canada in *Bazley v. Curry*, a policy rationale for imposing vicarious liability on an employer is ensuring compensation from a party who created or introduced the risk of harm.
- Imposing vicarious liability as a means of effective compensation must be fair. It may be justified if the employer created the risk that caused the harm.
- The second policy rationale is the deterrence of future harm. From this perspective, imposing vicarious liability is justified to encourage efficient administration and supervision by an employer to reduce the risk introduced into the community.

Recent Cases citing

- The approach in Ivic can be compared to recent decisions from the United Kingdom.
- In *Mohamud v WM Morrison Supermarkets PLC* (2016), the court imposed vicarious liability for “rogue” employee actions, which it found were sufficiently linked to activities carried out by the employer.
- The misconduct in this case was a physical attack on a customer (intentional tort).

Mohamud v WM Morrison Supermarkets PLC (2016)

- The plaintiff went to a petrol station and asked whether the garage could print off some images from a USB stick. The employee behind the counter responded with foul and abusive language and ordered the plaintiff to leave. When the plaintiff left, the employee followed him, telling him never to come back and physically assaulting him on the premises. The employee ignored his supervisor who had instructed the employee to cease his conduct.
- At trial and on initial appeal, it was held that the employer was not vicariously liable. Although the employee's job involved some interaction with customers, it involved nothing more than serving and helping them.

Mohamud v WM Morrison Supermarkets PLC (2016)

- The Supreme Court allowed the appeal holding the employer vicariously liable for the employee's actions. It considered the development of vicarious liability.
- Applying the "close connection" test, the court asked:
 - (1) what was the function or field of activities that had been entrusted to the employee, or in other words, what was the nature of his job; and
 - (2) was there a sufficient connection between the nature of his job and his attack on the plaintiff to make it right for the employer to be held vicariously liable?
- The Court found that the employee's job was to attend to customers and respond to their inquiries. His response and ordering the plaintiff to leave was inexcusable but within the "field of activities" assigned to him.
- There was no break in the chain of employment by the employee when he followed the plaintiff to his car. The employee had not metaphorically taken off his uniform when he stepped out from behind the counter - "it was a seamless episode."
- The Court noted that the employer had entrusted him to deal with members of the public and it was just that it should be responsible for his abuse of this trust.

Various Claimants v. WM Morrisons Supermarket PLC (2017)

- In this UK case, an employer was held vicariously liable at trial for an intentional data breach by an employee.
- The employee in this case, a senior IT auditor, had previously been sanctioned by the employer for another incident involving use of the employer's mail room to operate his personal business.
- After he was sanctioned for this activity, the employee sought revenge on the employer. On one assignment, the employee was assigned to collate payroll data requested by a third party auditor. The employee did not normally have access to this data, which was limited to a handful of users and stored securely.

Various Claimants v. WM Morrisons Supermarket PLC (2017)

- The employee intentionally committed a data breach (intentional tort) by disclosing the personal information of approximately 100,000 employees in a post on a sharing website. Those employees initiated a group action against the employer for the employee's breach of confidence and misuse of private information.
- In assessing the risk created by the employer, the court reviewed the "close connection" test (referring to *Bazley v Curry*) It found that the approach emphasised taking a broad view of the scope of employment where the employee had misused his position in a way which injured a claimant, such that it was just that the employer who put him in that position should be held responsible.
- The employer in this case had control over the employee's work as it was responsible for what work was done, where and when, under what systems and with what equipment, and who the clients were to be. Thus, the employer could theoretically design systems to prevent employees from engaging in wrongful conduct. The court found a sufficient connection between the position of the employee and his wrongful conduct, and the fact that he was put into the position of handling the data by the employer justified the employer being held vicariously liable.

Consideration from UK Cases

- These cases emphasise the risk that employers create.
- The analysis does not directly conflict with our court's in *Ivic*, however it arguably establishes a broader approach to assessing what risks an employer creates.
- Comments by the U.K. court regarding rogue conduct being within the “field of activities” assigned to an employee, and an unbroken chain of events or “seamless episode” of conduct makes it more difficult for employers to distance themselves from misconduct.
- Such an approach may have altered the outcome in *Ivic*. An analogy can be drawn between the actions of a rogue gas station employee and a rogue taxi driver. In both cases, the employees' job was to attend to customers' needs and the employees were entrusted to deal with members of the public. A driver's assault on a passenger during the course of a cab ride arguably could be considered part of a “seamless episode”.

Potential extension to “non-employees”

- There has been an effort to expand vicarious liability beyond the traditional employer-employee relationship in a few cases involving sexual assault.
- The U.K. Supreme Court in *The Catholic Child Welfare Society v The Institute of the Brothers of the Christian Schools* (2012) cited a Canadian SCC case *Blackwater v. Plint* when addressing whether the defendant, the Institute, was vicariously liable for alleged acts of sexual and physical abuse of children by member brothers, who were contractually employed by another defendant, the Diocese.
- The school in which the brothers taught the children was founded and controlled by the Diocese. However, the member brothers were assigned to schools by the Institute.

Extension to “non-employees”

- Noting vicarious liability is “on the move” the Court held that the first element of vicarious liability can be based on a relationship that - while not arising under a formal contract of employment - is sufficiently “akin to that between an employer and an employee.”
- In this case the following factors allowed the Court to impose vicariously liability notwithstanding the individual responsible for the sexual assault was not an employee of the one defendant:
 - the teaching activity by the brothers was directed by the Institute and in furtherance of the Institute’s mission
 - the brothers were obliged to conduct themselves in accordance with the Institute’s rules
 - a necessary close connection was found between the relationship, and the alleged wrongful act - that is, the abusing brother had done something in the course of his position, in which he enjoyed both physical proximity to the victims and the influence of authority as part of his relationship with the Institute.

Further cases re “non-employees”

- Two additional U.K. decisions where vicarious liability was imposed on employers for sexual assaults committed by employees who were more akin to independent contractors.
- Various Claimants v. Barclay Bank PLC (2017) , a group action was issued against Barclay Bank that arose out of a series of sexual assaults perpetrated by a doctor who was hired by the Bank between 1968 and 1984. The Bank hired the doctor to assess the medical fitness of prospective employees. The examinations took place at the doctor’s home. He carried out similar medical examinations for other organizations.
- The court found that there was a sufficiently close connection between the assaults and the relationship between the doctor and the Bank. The doctor committed the assaults in the course of medical examinations which he was instructed to carry out by the Bank. The Bank dictated the content and nature of the examinations. It was relevant that prospective employees were not given a choice of doctor and were required to attend the examinations by the Bank as a pre-condition to employment. The examinations furthered the Bank’s business purposes, i.e. of employing staff to enable it to be profitable, and the doctor was integrated into the Bank’s business.
- Thus, the court found that the Bank had ‘created the risk of tortious activity’ by the doctor and should be held vicariously liable for his actions.

Further cases re “non-employees”

- The second case is *Armes v Nottinghamshire County Council* – 2017 U.K. Supreme Court.
- The case involved child sexual abuse by foster parents. The 2017 U.K. Supreme Court reversed the trial court and Court of Appeal and found the local authority vicariously liable for the misconduct by foster parents.
- The analysis focused on how the foster parents were selected and supervised by the local authority in a manner similar to independent contractors. The placement in the foster home by the authority created a risk of abuse to the children. The abuse was committed in the course of an activity that was carried on for the benefit of the local authority. The local authority exercised a significant degree of control over the foster parents, including screening and approval of foster parents, inspection of the households, and supervision of the premises and removal of the children. From a policy perspective, the local authority had the means to pay damages and there was no evidence that imposing liability would discourage local authorities from continuing to use foster parents.

Cases where employer found liable

- K.L. v. 1163957799 Quebec Inc., 2015 ONSC 2417 (Calypso).
- Held on summary judgment motion that the employer could be sued for vicarious liability.
- K.L. alleged that she was assaulted by her supervisor at Calypso Water Park. The alleged assault happened during an end-of-season staff party hosted on the grounds of the park. The Court held that Calypso's choice in hosting a party at the workplace with unrestricted alcohol and without adequate supervision were factors that could lead to a finding of vicarious liability.

Cases where employer found liable

- Doe v. Avalon East School Board [2004] Nfld. And Labrador, Trial Court.
- Plaintiff was a student.
- Employee was computer course teacher who instructed the student to attend another room where assault occurred.
- Court held that the employer was vicariously liable as the employer's responsibility was to educate young people and this was directly connected to the teacher being authorized to place the student in a different room alone with the teacher.

Cases where employer found liable

- Langstaff v Marsdon [2014] Ontario Court of Appeal
- Employer (school board) found vicariously liable for employee (teacher) as a result of sexual assault involving a student.
- Teacher running “mini-zoo” after hours at school as part of science class.
- After hours access to school was granted by the employer for this purpose.
- After hours access was unsupervised (by employer) and no additional terms imposed by employer on employee re after hours access.
- Case overturned on different grounds – judicial bias.

Cases where employer not liable

- Robertson v. Manitoba Keewatinowi Okimakanak Inc. et al., 2011 MBCA 4
- the plaintiff, Robertson sued her boss Richard Hart, and their mutual employer, Manitoba Keewatinowi Okimakanak Inc. ("MKO").
- Robertson was Hart's executive assistant and on her birthday she accepted his invitation to a celebratory dinner at a restaurant. Following the dinner, Robertson alleged that Hart sexually assaulted her at his home. Robertson subsequently complained to MKO and the company fired Hart after obtaining a report from its independent investigator.
- The Manitoba court held that MKO could not be held vicariously liable. While providing a shared workplace undeniably played some role, it was not viewed as significantly contributing to the risk of the assault which took place outside of work hours and the workplace. As such, this case stands for the proposition that merely being employed together, without more, does not create the sort of risky enterprise that can result in an employer's liability.

Cases where employer not liable

- E.D.G. v Hammer [2003] Supreme Court (Trial 1998, B.C. Appeal 2001)
- School janitor committed sexual assault on student over course of 2 years – assaults occurred on school grounds during school hours
- Trial court held the employer (Board) was not vicariously liable for the actions of the employee as the actions were not “closely connected” to the employee’s janitorial duties
- None of the janitor’s duties involved the care or support of students
- Court applied the Jacobi case analysis
- Trial court findings on vicarious liability were not appealed

Cases where employer not liable

- K.G. v B.W., 2000 Ontario Superior Court.
- Employee (teacher) became friends with student plaintiff and was invited over to student's home for sleepovers, dinners etc with student's parent's consent.
- Held that the employer (Board) was not vicariously liable as none of the acts had any connection to the duties assigned by the Board to the teacher.
- Also second teacher had knowledge of the amount of time the first teacher was spending with the student.
- Court held that the Board was not vicariously liable for the failure of teacher #2 to report these activities as there was no link between the teacher's failure to report and the scope of their employment with the Board.

HRTTO cases

- A.B. v. Joe Singer Shoes Limited et al, 2018 HRTTO 107.
- employee worked for Joe Singer for 28 years.
- employer was also the employees landlord.
- Tribunal found individual employer liable for sexual assault on plaintiff employee.
- HRTTO found company vicariously liable as well as the individual employer and ordered them to pay \$200,000 as compensation for injury to dignity, feelings, and self-respect.

- G.M. v. X Tattoo Parlour, 2018 HRTTO 201.
- The applicant employee alleged the employer engaged in unwanted sexual discussion and forced the applicant to engage in sexual acts.
- The HRTTO found the employer liable and awarded \$75,000 in general damages (the maximum that the applicant had requested).

Potential exposure for public entities

- Central question:
“whether the wrongful act is sufficiently related to conduct authorized by the employer to justify the imposition of vicarious liability.”
- General employees, schools, hospitals, museums, libraries, children’s services
- Particularly entities where power imbalance / authority figures present

Questions and (Hopefully) Answers

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