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## **New Supreme Court Caselaw on Vicarious Liability: Has Anything Changed?**

**By Andrew B. Lister**

Vicarious liability arises where a party shares civil responsibility for the wrongful actions of another by virtue of their relationship with the wrongdoer. When a third party is wronged by an employee, they often sue the employer as well as the employee. Where appropriate, the court can find employers liable for employees' actions without fault on the employer's part.

Public policy reasons for this include the fact that the employer controls the employee, the employee acts on the employer's behalf, and that the party taking benefit from the work should share the risk. In *Bazley v. Curry*, [1999] S.C.J. No. 35, the Supreme Court of Canada stressed two public policy reasons for the doctrine of vicarious liability in employment situations above the others: it provides an adequate and just remedy for the wrong; and it has a deterrent effect. The employer benefits from the wrongdoer's actions and can better absorb the cost by spreading it between customers. As the party in charge of the workplace, the employer is presumably in the best position to prevent future incidents.

The application of the doctrine of vicarious liability is most contentious in cases of intentional torts. Before *Bazley*, the court commonly applied the *Salmond* test, which imposes liability for acts which are authorized by the employer as well as those which are not authorized by the employer but which are connected enough to be "modes" of doing authorized acts.

Employers rarely authorize intentional torts, so the jurisprudence mostly examines whether the employee's act is a "mode" of carrying out an authorized act. The court has historically focused on whether the act was within the "scope" of the employee's duties.

*Bazley* sought to clarify the "scope" test with a two-step analysis: examine previous decisions on similar facts; and determine whether vicarious liability should be imposed in light of the two chief policy rationales.

The court discouraged "semantic discussions" of the "scope" of employment or the "mode" of conduct because those analytical tools tended to obscure the public policy basis for vicarious liability. It did recognize that legal principles are still needed to make policy useful in practice. *Bazley* replaced the scope/mode discussion with a question: is there sufficient connection between the risk created by the employer's enterprise and the wrong committed by the employee?

In comparing the majority and minority decisions of the Supreme Court of Canada in *B. (E.) v. Order of the Oblates of Mary Immaculate* (British Columbia), 2005 SCC 60, it appears that the test is open to differing determinations on the facts.

In *B. (E.)*, the plaintiff was sexually assaulted while studying at a religious residential school. The assailant was a lay person who worked in the kitchen but who also did odd jobs around the school.

The trial judge found that the "operational characteristics" of the school created risk by placing power and opportunity in the hands of the employee while making students especially vulnerable. Students were isolated four hours by boat from Vancouver Island. Employees and students lived in close proximity. Students were expected to respect and obey all staff. There was evidence of contact between the employee and students in the kitchen and in other settings.

In reversing the trial decision, the Court of Appeal ruled that the trial judge focused on the operational features of the school at the expense of examining this employee's job duties. His only authorized contact with the children was on boat rides supervised by religious staff and his living quarters were in an area off-limits to students.

At the Supreme Court, the majority agreed that the trial judge did not look closely at the duties conferred on the employee in relation to the students. For the majority, it was key that the school limited his contact with and authority over students and separated his living quarters from them.

The minority found that the appeal and majority decisions ignored the trial judge's lengthy analysis of the facts. Loose supervision let the employee develop relationships with students, the school never strictly delineated his duties. He had some authority because children were punished for disobeying him. These factors satisfied the Bazley test.

Both agreed that the court should analyze the nature and extent of the connection between the employer's enterprise (including the duties and authority conferred upon the employee) and the wrong committed.

This idea is far from new. Previous decisions focus on the employee's duties, but the employer's enterprise is always present as a backdrop. Instead of examining the scope of the employee's duties or whether the act is a mode or an independent action, the question is reframed as whether the harm flows from a risk connected to the employer's operation?

Aside from articulating the underlying policy more clearly, B. (E.) does not appear to change employers' responsibilities: they remain liable for the tortious acts of their employees where the acts are sufficiently connected to the employment to justify vicarious liability. As usual, the outcome in this difficult area of the law will often depend on the particular facts of each case.

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