THE ENTERPRISE RISK THEORY: REDEFINING VICARIOUS

LIABILITY FOR INTENTIONAL TORTS

by

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ABSTRACT

This thesis examines the impact two recent Supreme Court of Canada decisions will have on vicarious liability and related doctrines. In the two cases, the court adopted the theory of "enterprise risk" to justify expanding the traditional scope of vicarious liability for intentional torts.

The thesis argues that liability based on enterprise risk rests on an independent ground, one which is premised on a proprietary theory of responsibility. From the plaintiff's perspective, the employer and employee merge into one entity which bears the liability although as between themselves, they retain rights of contribution and indemnity in some circumstances. The scope of the liability is no longer determined exclusively by the existence of an employment relationship between the parties but is broader, as it is circumscribed by the risks which are typical of the enterprise. As such, the thesis argues, the liability should extend to acts of non-employees.
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INTRODUCTION

It is a sad reality that many paedophiles and other like-minded criminals use opportunities created by their employment to find their prey. Criminals employed in sectors where a certain degree of contact with children and other vulnerable persons is inherent, are given a better-than-average opportunity to abuse of situations from which they can personally benefit. And while these individuals can be held criminally and civilly responsible to their victims, there is an emerging trend to also hold accountable their employers who expose victims to these sorts of risks, even if they do so unknowingly.

Increasingly therefore, victims of sexual abuse are trying to hold employers of the perpetrator responsible for their injuries. We are seeing an increasing number of these type of claims in Canada. Claims made against religious orders, residential facilities and the like, are making the headlines, not just in our newspapers but in our courts as well. These claims raise particularly difficult issues because the employers are otherwise not at fault for the wrongs suffered and are often nonprofit organizations serving a worthwhile purpose in the community. Should employment enterprises such as these be exposed to liability for their employees’ intentional torts, committed for purely personal reasons? Should the employer be held liable if the evidence reveals that the wrongdoer is in fact an independent contractor, not an employee? And if victims are allowed to recover from employers, should these employers be entitled to be indemnified by the tortfeasor? These are all, to a certain extent, interrelated questions. They are interrelated because whether and why the employer may be found vicariously liable will determine other questions such as for instance, whether it should be entitled to be indemnified by its employee.
Unfortunately, until some government action is forthcoming to assist victims and nonprofit organizations facing potential liability, courts are left having to deal with these claims within the confines of traditional tort principles. This has, until very recently, led to unpredictable and often, unsatisfactory results.

The claims made against employers are grounded on principles of vicarious liability which renders employers liable for the torts of their employees. Although Oliver Wendell Holmes observed over a century ago that "common sense is opposed to making one man pay for another man's wrong," the doctrine of vicarious liability remains an essential part of our tort system. There is little doubt that the doctrine of vicarious liability addresses a number of policy concerns, primarily, victim compensation and deterrence. And while the rule's purposes have never been seriously doubted, a satisfactory articulation of the principles underlying the rule has eluded most courts and scholars. Nevertheless, the doctrine of vicarious liability has gradually been expanded over time to include liability not only for acts of employee negligence but also, for intentional torts in some limited circumstances. There remains nonetheless a general reluctance to hold employers vicariously liable for their employees' intentional torts and especially, sexual torts.

Part of the problem therefore facing contemporary courts faced with claims that employers should be held vicariously liable for their employees' sexual torts, was that there was lacking, in academic texts and precedents alike, a clear articulation of the principles which underlie the doctrine of vicarious liability. It was difficult for courts to consider expanding the rule even further to allow recovery for sexual torts when it had no clear guidance as to the legal principles on which the rule was based. Another problem was that conventional tests, such as the Salmond test, developed to determine whether vicarious liability should be imposed, are inadequate to deal with situations involving intentional torts and in particular, sexual assaults.

These issues were put squarely before the Supreme Court of Canada in Bazley v. Curry and The

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1"Agency" 5 Harv. L. Rev. 1 at 14 (1891).
Children's Foundation\(^2\) and Jacobi v. Griffiths et al.\(^3\), both decided in 1999. The issues presented in both cases were identical: Should an employer be held vicariously liable for intentional torts committed by an employee? Although both cases dealt with sexual torts, the facts of the cases differed.

*Bazley v. Curry and The Children’s Foundation*

The plaintiff in *Bazley* was a resident of a home for troubled children, operated by the Children’s Foundation, a nonprofit organization. The Foundation, as a substitute parent, authorized its employees to act as parent figures for the residents. The employees were responsible for supervising all facets of the children’s lives, including intimate duties such as bathing and putting children to bed at night. The plaintiff alleged that Curry, an employee of the home, repeatedly seduced him and assaulted him while bathing him and tucking him at bedtime. Curry was subsequently convicted of 19 counts of sexual abuse, two of which concerned the plaintiff Bazley.

The main issue before the court was whether the Crown, as the employer of Curry, could be held vicariously liable.\(^4\) McLachlin J., who wrote the unanimous decision of the court, adopted a two-step approach to determining when an employer can be held vicariously liable for the intentional torts of its employees.

The first step involves a review of case precedents to determine if they provide any guidance. The court therefore started by reviewing previous cases where vicarious liability for intentional torts was imposed. It rationalized these cases on the basis that liability was imposed because the employer’s enterprise had created the risk that produced the tortious act. The common theme in these previous cases, the court indicated, “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

\(^2\)[1999] 2 S.C.R. 534, hereinafter referred to as *Bazley*.

\(^3\)[1999] 2 S.C.R. 570, hereinafter referred to as *Jacobi*.

\(^4\)The court was also asked to address the question of whether non-profit organizations should be immune from vicarious liability. The court held there was no such immunity. The issues related to immunity for non-profit organizations will not be addressed in this thesis.
vicariously liable for the employee's wrong." The court thus adopted what we will refer to as the "enterprise risk" theory as underlying the doctrine of vicarious liability.

Where case precedents offer no assistance, the second step must be undertaken. That step involves a consideration of whether policy would favour allowing recovery on the facts of the case. Generally, fairness allows recovery from an employer when the employer introduced the risk which resulted in the injury complained of:

"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 said that the person or organization that creates the enterprise and hence the risk should bear the loss. This accords with the notion that it is right and just that the person who creates a risk bear the loss when the risk ripens into harm."\(^7\)

The court held that on the facts of the Bazley case, the policies of compensation and deterrence which lie at the heart of tort law, would be advanced by allowing compensation. The goal of deterrence would be served because the employer is in a position to take steps to reduce the risk it has created. "Beyond the narrow band of employer conduct that attracts direct liability in negligence lies a vast area where imaginative and efficient administration and supervision can reduce the risk that the employer has introduced into the community." However, recognizing that fairness dictates that the enterprise not be saddled with all wrongs related to its enterprise, only those wrongs which are "strongly connected" with the enterprise should engage responsibility.

Justice McLachlin suggests that when considering whether an employer should be held vicariously liable for an employee's intentional tort, 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.

\(^7\)Bazley at 548

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

Courts dealing with these issues should therefore first consider whether there are any helpful precedents. There are however some problems inherent with this inquiry. There may be precedents which were wrongly decided or, failed to satisfactorily consider the policy considerations identified by the Supreme Court. Presumably, courts are not expected to blindly follow these precedents. If are no applicable precedents, then courts must determine whether the policy considerations would be advanced by a finding of vicarious liability.

The test adopted by the court is appealing since it seems adaptable to a vast array of situations. It does however leave a great deal of discretion in the hands of our judges. The problem which emerges from leaving such a degree of discretion is illustrated by the fact that in the companion case, the judges were unable to unanimously agree on the disposition of the case.

*at 560
The *Jacobi* case, which followed on the heels of the *Bazley* case, involved the same issue but different facts. There, the Vernon Boys' and Girls' Club operated a drop-in centre for children during after school hours and Saturdays. The Club provided group recreational activities to be enjoyed in the presence of volunteers and others, with the objective of providing "behaviour guidance and to promote the health, social, educational, vocational and character development of boys and girls." Griffiths was hired as its programme director. The plaintiffs, brother and sister, alleged he had sexually assaulted them. Griffiths cultivated a special friendship with the plaintiffs which eventually led to sexual assaults. All but one of the assaults took place outside the Club's premises, at Griffiths' home.

Binnie J., writing for the majority, analyzed the case by using the two-step analysis adopted in the *Bazley* case. In the first step of the analysis, Binnie reviewed previous cases on sexual assault and intentional torts and concluded that these cases show a "strong reluctance to impose vicarious liability for such deeply personal and abhorrent behaviour on the part of an employee." Indeed, Binnie concludes there is a historical reluctance to impose vicarious liability where the employment merely provides an opportunity for the acts to take place, even where the employment did provide "privileged" access to the victim. Reviewing the cases, including American cases, he notes that it is only where the employee was vested with a combination of power and intimacy that it could be said there was the required "strong connection" between the enterprise and the sexual assault. Job-created power is in his view, the most important source of "connectedness."

Binnie considered that the broad policy of victim compensation would not justify enlarging vicarious liability on the facts of that case. In *Jacobi*, the defendant was a not-for-profit corporation not operating in market conditions and according to Binnie, with little or no ability to internalize the cost of any judgment. Moreover, he also felt that imposing vicarious liability would not achieve
deterrence because it would not incite employers to take additional precautions since the criminal acts were unforeseen and unforeseeable. He acknowledged that when it comes to criminal conduct such as sexual assault, there is little the employer can do to deter such conduct, beyond what criminal sanctions can accomplish.13

Binnie viewed the employment in Jacobi as merely providing an opportunity for the acts to take place. The employer had not vested Griffiths with any meaningful authority over the children nor was any element of intimacy with the children contemplated as part of Griffith's employment. Because the acts were done for the employee’s personal gratification, they were too remote from the employer’s business to justify vicarious liability. Vulnerability of the victims did not, in and of itself provide the “strong link” required for vicarious liability to be imposed.

McLachlin wrote the dissenting opinion in Jacobi, with Justices L’Heureux-Dubé and Bastarache concurring. She was prepared to impose vicarious liability because the defendant’s enterprise injected into the community a very real risk that Griffiths would abuse the children.14 She felt that the acts arose from the risks created by the special situation of trust and respect fostered by the enterprise.15

The decisions of Binnie and McLachlin can be distinguished on two grounds. Although the plaintiffs were denied recovery in Jacobi, the reasoning used by Binnie would in fact allow for a slightly broader basis of liability. Binnie was prepared to impose vicarious liability on an employer who should have generally foreseen the events even if they could not have been avoided by the employer. McLachlin in Bazley, on the other hand, felt that liability was justified in part because the employer could have taken precautions to avoid the outcome. Secondly, the different results obtained in the two cases can be traced to the very different approaches taken on the facts of the cases. McLachlin was prepared to impose vicarious liability in Jacobi on what Binnie considered

13Binnie cites an American case: "...the sexual abuse of children by caregivers is rarely foreseen and is always surreptitious. Conventional incentives and disincentives used by enterprises simply do not work to deter compulsive sexual misconduct.” at 614

14at 581

15at 588
an insufficient connection between the risk created and the wrongs committed. Their assessment of the relationship between the employee and the victims differed.

This thesis will examine the impact these decisions will have on the doctrine of vicarious liability in Canada. To be sure, one of the implications of the decisions is that the scope of the liability has been expanded to include vicarious liability for sexual assaults in some circumstances. As well, the court developed a new test to guide lower courts in determining when the imposition of vicarious liability for an employee's intentional tort is appropriate. But the impact of the decisions goes beyond these facts. The adoption of the theory of enterprise risk is significant and will affect how the nature of an employer's vicarious liability is perceived which, in turn, will have repercussions on related issues.

Much of this thesis will be devoted to the question of an employment enterprise's potential liability to a plaintiff. Our theory is that from the plaintiff's perspective, the employer and employee merge into one entity which bears the liability, what we will refer to as the "employment enterprise." While the employment enterprise's potential liability to a plaintiff will be our primary focus, we will also consider whether other relationships within this triangle: employee, employer and plaintiff, will also be affected by the Supreme Court decisions.

In the first portion of this thesis, we will consider the nature of vicarious liability which rests on the concept of enterprise risk. We will demonstrate how, by adopting the theory of enterprise risk, the court has adopted a proprietary theory of responsibility as underlying the rule of vicarious liability. The thesis developed in this chapter and others to follow is that the adoption of a theory of responsibility based on enterprise risk creates an independent basis of liability on the employment enterprise, one which is based on a proprietary theory of responsibility. The enterprise owns any liabilities which flow from its activities by virtue of having engaged in a risky activity and having authorized its employee to engage in a certain activity in which the risk of injury to others was heightened. The liability is the enterprise's to bear because it owns it; it has not committed any fault but it nevertheless owns the liability. The enterprise as a whole and the activity engaged in, is the focus of liability.
This theory of responsibility consists of a departure from previously held views about the nature of the liability. Previously it was accepted, or at least assumed, that vicarious liability was truly vicarious in nature. Without recounting the rule’s history, it will suffice to describe the generally accepted modern view about the nature of vicarious liability as summarized by Fleming:

“According to the generally accepted modern view, the master’s liability is genuinely vicarious and not based on any ‘constructive’ fault of his own... His liability is not based on breach of any personal duty that he owed, but on his servant’s tort being imputed to him... The hallmark of vicarious liability, then, is that it is based neither on any conduct by the defendant himself nor even on breach of his own duty.”

This passage reflects the modern view held in Canada until the Bazley and Jacobi decisions. We will discuss the extent to which vicarious liability grounded on principles of enterprise risk, departs from these views about the nature of vicarious liability.

In the second part of the thesis, we will consider the impact these decisions will have on the scope of the rule. We will trace the origins and evolution of the rule in an attempt to ascertain whether in fact, the enterprise risk theory constitutes a substantial departure from previous authority. We will then outline the scope of the doctrine of vicarious liability in light of the Supreme Court decisions.

We will then, in the third chapter, consider whether one of the implications of expanding the scope of vicarious liability will also result in it being enlarged to include vicarious liability for non-employees. While this specific question was not directly addressed by the Supreme Court, we will argue that one of the implications of the decisions is that the scope of the liability for acts committed by non-employees will be expanded.

Up to then we will have reviewed the impact of the decisions on the employer’s vicarious liability. But there may be ramifications from other perspectives. Will the rights as between an employer and employee also be affected? If the employment enterprise is being held liable on an independent

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basis for undertaking a risk, then should it be barred from recovering contribution or indemnity from its employee? These questions will require that we consider the issues from a different perspective, from the point of view of the relationship between the employment enterprise and the putative employee. These issues will be examined in the last portion of the thesis.
Chapter 1: The Nature of the Liability

We begin our study of the doctrine of vicarious liability by considering the impact the adoption of the enterprise risk theory will have on how we perceive the nature of the liability. The nature of the vicarious liability imposed on employers has traditionally been viewed as truly vicarious, in that liability flowed to the employer by virtue of the employment relationship. While fault on the part of the employee was required before vicarious liability would be imposed, the employer would be held liable in the absence of any fault of its own. The liability was considered truly vicarious in nature because there was no independent basis for the employer’s liability other than the fact that the fault was committed by an employee, in the course of employment. The basis of the employer’s liability was also considered strict since the employer itself was in no way at fault.

Vicarious liability premised on the enterprise risk theory may constitute a departure from the conventional belief about the strict and vicarious nature of the liability. We will confront this issue in two stages. First, we will consider whether vicarious liability imposed on an employer for having created or exacerbated a risk which materialized into harm finds its basis, at least in part, on an independent ground of liability, the creation of risk? The thesis developed here is that liability based on enterprise risk creates an independent basis of liability on the employment enterprise, one which is based on a proprietary theory of responsibility, not one which is based on any fault committed by the employer. The liability can no longer be considered truly vicarious since the employer is held liable not merely because it employed the tortfeasor but also because it created and owns certain risks which materialized into injury to a third party. From the plaintiff’s point of view, the employer and employee merge into one whole entity which bears responsibility, an entity which we will refer to as the “employment enterprise.”

If we accept that the liability does indeed rest on an independent basis then, we must also consider whether it displaces the employee’s liability to the plaintiff altogether? Indeed, if there are independent grounds upon which to justify holding an employer vicariously liable and the employer is usually the party with funds, then, there may no longer be any reason to retain the employee as a defendant against whom the plaintiff can obtain judgment. As we will see however, there are
other substantial reasons why the employee/tortfeasor should remain subject to suit.

In the second portion of this chapter we will consider whether the employer’s vicarious liability is strict or, whether it is fault-based. The enterprise risk theory would impose vicarious liability on employment enterprises in part because it created certain risks. We will consider the interesting question of whether this can be viewed as the equivalent of imposing liability for negligence or some other type of fault.

1. Is the Liability Truly Vicarious?

There are essentially two paths that lead to employer liability for torts committed by its employees. The first is where the employer has a “non-delegable duty” of care to the plaintiff. If a duty exists, the employer cannot escape liability by alleging that performance of the duty was delegated to another. This sort of situation arises primarily where there is negligence on the part of an independent contractor who was retained to perform some or all of the duties imposed on the employer. Courts have imposed such duties in limited circumstances where the work to be done was inherently dangerous, where the employer was exercising statutory powers, or is subject to a statutory obligation. The cases in this area are far from being consistent and it seems arguable

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17 In this chapter I will refer to vicarious liability for “employee” torts. Vicarious liability is not so limited and employers can be held liable for torts committed by independent contractors, and principals for the torts of their agents. Those distinctions will be the subject matter of the third chapter.

18 These sort of duties are said to give rise to a third type of liability, “mixed liability”. See A. Barak, “Mixed and Vicarious Liability-A Suggested Distinction” 29 Mod. L. Rev. 160 (1966) who suggests that a separate category of liability should be recognized for those situations where the master has a duty which cannot be delegated, i.e. occupiers’ liability, the master acts through the instrumentality of the employee creating a mixed type of liability, a mix of personal and vicarious liability. See in agreement Carriere v. Schlaster, [1999] A.J. No. 446 (Alta Q.B.) “In those cases, the public policy reason for protecting the occupier from vicarious liability is absent, i.e. the occupier was not ‘innocent’ in that he or she was directly negligent as well as vicariously responsible for injuries suffered on the premises”.


21 Kennedy v. Waterloo County Board of Education (1999), 45 O.R.(3d) 1 (Occupiers’ Liability Act); Carriere v. Schlaster supra note 16 (occupiers’ liability)
whether the finding of a non-delegable duty only affects the potential liability of an employer for the negligence of independent contractors or, whether it would also affect liability for employees.\textsuperscript{32}

There is an argument to be made that in 

Bazley\textemdash the court was essentially imposing direct liability on the employer for breach of a non-delegable duty of care owed personally by the employer in its capacity as legal guardian of the children. Some have argued that in certain circumstances, the relationship between the parties is such that a special responsibility or duty is generated, what Fleming called a "special protective relationship."\textsuperscript{33} There is very little precedent for the finding of such a duty other than an Australian case where it was said by Mason J.:

"...when we look to the classes of case in which the existence of a non-delegable duty has been recognized, it appears that there is some element in the relationship between the parties that makes it appropriate to impose on the defendant a duty to ensure that reasonable care and skill is taken for the safety of the persons to whom the duty is owed . . . The element in the relationship between the parties which generates a special responsibility or duty to see that care is taken may be found in one or more of several circumstances. The hospital undertakes the care, supervision and control of patients who are in need of special care. The school authority undertakes special responsibilities in relation to the children whom it accepts into its care."\textsuperscript{34}

This type of argument was advanced in British Columbia courts on behalf of Crown wards who were sexually abused by an independent contractor to whom parental authority over the children had been delegated by the Crown.\textsuperscript{35} The case was eventually heard by the British Columbia Court of Appeal which chose not to deal directly with that argument, preferring to extend the reach of vicarious liability.\textsuperscript{36} It must be pointed out however that the basis of liability under the doctrine of

\textsuperscript{2}D.W. v. Canada (A. G.), [1999] S. J. 742 (plaintiff argued that the Crown owed him a non-delegable duty of care as its guardian, to protect him from harm. The argument was rejected by the court because the perpetrator had been an employee of the Crown, not an independent contractor).

\textsuperscript{3}Fleming at 435

\textsuperscript{4}Kondis v. State Transport Authority (1984), 154 C.L.R. 672 at 687

\textsuperscript{5}C.A. v. Critchley, [1998] BCJ No. 2587

\textsuperscript{6}Ibid. As one author has pointed out, the finding of a non-delegable duty of care may have been a preferable means of imposing liability. L. Klar, Tort Law, 2nd ed. (Scarborough, Ont.: Carswell, 1996) at 486-7
breach of non-delegable duty and under vicarious liability are entirely different and their scope is not coextensive. Liability for breach of non-delegable duty is essentially direct liability, not vicarious liability.

There is no discussion of non-delegable duties in Bazley and indeed, the discrete question for the determination of the court was whether the employer could be held vicariously liable. Had the issues presented to the court been broader then, it would have been open to the court to deal with the issue of non-delegable duties. The court however was not given that option and hence, the Bazley decision cannot be represented as authority for extending the scope of the liability for non-delegable duties in the factual circumstances of that and similar cases.

The other path which was traditionally recognized as leading to employer liability is true vicarious liability. The employer is held liable for an employee’s tortious conduct, not for any independent act of its own. Some authors suggested at one point however that vicarious liability is in fact direct liability which is imposed on the employer for breach of its own duty. The theory developed primarily by Glanville Williams in the 1950’s. “the master’s tort theory” argued that in certain cases, the master is the party who has the duty of care to the third party. The theory posited that the employee’s acts, not his fault were attributed to the employer, resulting in a finding of vicarious liability. This theory helped rationalize decisions such as Broom v. Morgan where vicarious liability was imposed on an employer even where the employee enjoyed immunity from suit.

27The “master’s tort theory is said to find its origins in the case of Twine v. Bean’s Express, Ltd. [1946] All. E. R. 202. In that case, Twine was fatally injured while a passenger in a vehicle owned by Bean’s Express and operated by their employee Harrison. There was an express prohibition against drivers taking on passengers which was included in a written notice posted inside the vehicle. The issue presented to the court was whether the employer owed a duty of care to Twine. The Court in Twine decided the case on the basis that given the express prohibition concerning passengers, the driver was acting outside the scope of his employment at the time. The employer could not have anticipated Twine being a passenger and thus, owed him no duty of care. One wonders why Twine was decided principally on the basis of duty of care and not rather, on issues related to whether the driver was acting in the course of employment. In Twine v. Bean’s Express Uthwatt J. stated that generally, the duty of the master and the servant are the same but that is coincidence and not a rule of law. This view does not represent the law. See Winfield & Jolowicz on Tort, 14th ed. (London: Sweet & Maxwell 1994) pp. 620-1

28[1953] I Q. B. 597. There, a wife and husband were employed by a common employer. During the course of his employment, the husband acted negligently which caused personal injuries to his wife. The husband was immune from suit because of legislation barring claims between spouses, but the wife’s action against the employer was nevertheless allowed despite the fact that the husband could not be sued. The Court of Appeal
The master's tort theory was explicitly rejected by the House of Lord in *Staveley Irons* and also recently rejected by the British Columbia Court of Appeal. In *Staveley Irons*, the Lords specifically overruled what Denning had suggested at the Court of Appeal level in that case, that the servant's acts were imputed to the master who was primarily liable, implying that the master could be held vicariously liable in the absence of any negligence on the part of the employee. The Lords rejected this possibility and restated their view of the law, that a servant's fault was imputed to the employer and that employee negligence, not his liability, was required in order to ground vicarious liability.

The issue in British Columbia decision in *Bluebird Cabs* was whether claims made against the employer of a cab driver accused of assaulting two individuals were covered under an insurance policy. The policy contained an exclusion for intentional acts. The insurer denied coverage on the basis that the employee's conduct must be attributed to the employer and hence, through attribution, the conduct was intentional on the part of the employer. The British Columbia Court of Appeal wisely rejected the insurer's argument, stating that it is not the act or fault of the employee which is attributed but rather, his liability. The court was correct in rejecting the idea that the act was not attributed but in my view, wrong in saying it was the employee's liability that was transferred. As we have seen, there are instances where the employer is held liable even when the employee is immune from suit. Hence, it must be the employee's fault which is attributed.

One can easily appreciate the problem with the master's tort theory which led these courts to reject it altogether. If the employee's act and not his fault was imputed to the master, the master could theoretically be held liable in the absence of employee negligence or fault. Courts have naturally

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29 [1956] 2 W.L.R. 479

30 *Bluebird Cabs v. Guardian insurance Co.,* [1999] B.C.J. No. 694. In that case, the issue was whether there was coverage under an insurance policy for the vicarious liability of a cab company for assaults committed by an employee. There was no coverage for the employee since there was an exclusion in the policy for intentional acts. The insurer argued that the conduct of the employee should be attributed to the employer, thereby excluding coverage. The argument was rejected.

31 Ibid
not prepared to extend the doctrine of vicarious liability in such a way.\textsuperscript{32}

Instead of looking at the problem as a composite tort with the duty resting in one place and the act elsewhere, it would be preferable to treat vicarious liability simply as a two-step operation. The first level of inquiry addresses the issue of whether a tort has been committed. The second step asks whether the employer should be liable for the tort. The inquiry then facing the courts is "whether liability can be fairly imposed on [the defendant] because the harm was typical for its activities, and thus calculable and reasonable insurable."\textsuperscript{33}

This approach differs from previously held views that vicarious liability was intrinsically tied to the employment relationship. Traditionally, in order for vicarious liability to be imposed, two conditions must be satisfied. First, there must be a relationship between the tortfeasor and the defendant, usually one of employment but not necessarily. Second, there must be a connection between the tort and the employment. The question raised by the second requirement is commonly referred to as the "course of employment" requirement. The most common test used to determine whether an act was "in the course of employment" is known as the Salmond test, which will be discussed in more detail in the subsequent chapter.

Under the Salmond test, the focus of the inquiry is what had been authorized by the employer. The scope of the liability is circumscribed by the employment relationship. Under the enterprise risk theory however, the scope of the potential liability goes beyond the employment relationship. The scope is determined by what "the measure of risks that may fairly be regarded as typical of the enterprise in question."\textsuperscript{34} The connection the wrong needs to have in order to engage vicarious liability is no longer exclusively linked to what the employee was authorized to do but rather, to the

\textsuperscript{32} The other problem with the master's tort theory is that it ignores that the employee will always have a duty of care to the third party. One cannot ignore the fact that the decision as to whether the employee committed negligence must be considered within the context in which the employee found himself, without any thought as to where the employer was at the time the tort was committed. The master's tort theory adds the inquiry as to whether the master also had a duty of care to the third party. It ignores the employee's duty and instead, parcels out the tort with the duty resting with the employer and the breach with the employee.

\textsuperscript{33} Ehrenzweig, A., "Negligence Without Fault" 54 Cal. L. Rev. 1422 (1966) at 1457

\textsuperscript{34} Fleming at 422, cited in Bazley at 558
nature of the enterprise itself and the risks it enhanced or introduced into the community.

Vicarious liability should therefore not simply be seen as a regime where the employer guarantees the employee’s primary liability. As Mr. Justice LaForest stated in London Drugs:35

"The regime responds to wider policy concerns than simply the desire to protect the plaintiff from the consequences of the possible and indeed likely incapacity of the employee to afford sufficient compensation. although obviously that concerns remains of primary importance. Vicarious liability has the broader function of transferring to the enterprise itself the risks created by the activity performed by its agents."

It is implicit in the above language that the enterprise as a whole, is being found liable for creating the risk, not only for employing the wrongdoer. In her decision in Bazley, Justice McLachlin also refers to the “employment enterprise” as the bearer of liability. Whatever separation there may be perceived between the employer and the employee, the enterprise risk theory makes it one whole entity for the purposes of attributing vicarious liability. The attractiveness of this proposition is compounded when you consider that when the employer is a corporation, it can only act through its employees.36

Hence, the employment enterprise is held liable for having created a risk and designed a workplace where the employee was authorized to perform duties related to the activity considered risky. The employer’s vicarious liability is not contingent on the employer having any degree of control or command over the employee. This is contrary to traditional concepts reflected in the maxim respondeat superior which was thought at one time to provide a rationale for the rule. Under that theory, the master was liable because he or she was superior, having control and command over the servant.37 The problem with this rationale has been that realistically, the master does not have control over all of the servant’s activities and sometimes, the master does not have the required

35Supra note 8 at 339

36We are not talking here about instances where the corporation authorized the tort which was done through an employee or agent. In those cases, the liability would clearly be direct liability. See G.H.L. Fridman, The Law of Agency (London: Butterworths, 1983) at 323

37G.H.L. Fridman, The Law of Torts in Canada (Toronto: Carswell, 1990), v. 2, at 315
skills in order to exercise any meaningful control over his employees. As was stated by Lord Wilberforce in Kooragang Ltd. v. Richardson & Wrench Ltd.:

"The manner in which the common law has dealt with the liability of employers for acts of employees (masters for servants, principals for agents) has been progressive: the tendency has been toward a more liberal protection of innocent parties. At the same time recognition has been given by the law to the movement which has taken place from a relationship, akin to slavery, in which all actions of the servant were dictated by the master, to one in which the servant claimed and was given some liberty of action."

But the theory of enterprise risk does not emphasize any degree of control the employer may or may not have over the employee. What it does is concentrate on the degree of control the employer has over the risk. The enterprise risk theory highlights that the employer, through its employees, engages in certain conduct which exposes others to risks. The activity itself is the focus of liability. Hence, the enterprise is held liable not only for employing the wrongdoer but also because it created the initial risk.

The Ontario Court of Appeal has recently recognized that the vicarious liability of an employer is not derivative in the sense that the liability of the employee is a precondition to finding the employer liable. This sort of distinction is helpful in those exceptional circumstances where for some reason

\[\text{\textsuperscript{18}}\text{For instance, employers who hired skilled workers and professionals.}\]

\[\text{\textsuperscript{19}}\text{[1981] 3 All. E. R. 65 at 68}\]

\[\text{\textsuperscript{20}}\text{As Gregory Keating puts it, a rule based on enterprise liability makes activities and not actors liable for injuries they occasion. The basis of liability is the creation or exacerbation of a risk with the potential of ripening into harm. This does not efface the employee's liability who remains liable for the tort he committed. "The Idea of Fairness in the Law of Enterprise Liability" 95 Mich. L. Rev. 1266, 1267 (1999)}\]

\[\text{\textsuperscript{21}}\text{P. Atiyah also felt that vicarious liability was based on an independent act of the employer. "There are many situations in the law in which the responsibility arises from the fact that the defendant has played some part in creating a risk which has, in point of fact, eventuated thereby causing loss to the plaintiff." Vicarious Liability in the Law of Torts (London: Butterworths. 1967) at 4 [hereinafter referred to as Atiyah]; others feel the rule performs a risk-regulating activity: see Robert Flannigan, "The Liability Structure of Non-Profit Organizations" 77 Can Bar Rev. 73(1998) at 75-7}\]

\[\text{\textsuperscript{22}}\text{Tutton et al v. Corp. of the Town of Pickering et al. (1999), 46 O.R. (3d) 503 (per Finlayson, J.). In that case, the Ontario Insurance Act provided immunity to the defendant's negligent servants. The court held that the statute also independently provided an immunity to the employer because it barred an action against any other person who was liable for damages caused by those immune from liability. Since the employer was not liable for a separate head of damages, the action against it was dismissed.}\]
or another, the employee is immune from action. Thus, statutes providing immunity to the employee do not necessarily bar an action against the employer. These cases however do not dilute the requirement that there be fault on the part of an employee.

If the enterprise as a whole is rendered liable under the enterprise risk theory then undeniably, decisions such as Broom v. Morgan and others where vicarious liability was imposed even where the employee could not be sued, can be much more easily explained. As well, we can rationalize imposing vicarious liability where more than one employee contributes to the commission of a tort and where the identity of the at-fault employee is unknown.

If we can rationalize finding the employer liable even where the employee is immune from suit, then perhaps the employer’s vicarious liability ought to displace the employee’s liability altogether. Indeed, we must consider whether this may be one of the implications of finding the enterprise as a whole liable for losses due to employee misconduct.

A. Should the enterprise’s liability displace the employee’s personal liability?

Fleming advocates in favour of employee immunity in cases where the master is held vicariously liable:

“As already noted, the master’s vicarious liability does not displace the servant’s personal liability to the tort victim. But this conclusion is neither self-evident nor beyond all objection. For one thing, ordinarily it is positively desirable that the master...

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42See note 28

43See i.e. W. B. Anderson & Sons Ltd. v. Rhodes Liverpool Ltd., [1967] 2 All. E. R. 850

44Cassidy v. Ministry of Health, [1951] 2 K.B. 343
absorb the cost as a matter of sound resource allocation rather than he be considered merely as guaranteeing the servant’s primary responsibility to any for damage. For another, to hold the servant liable will either tend to overtax his financial resources.... or require double insurance, covering both him and his employer against the same risk. For these reasons, there is now a growing momentum in many countries for ‘channelling’ liability to the employer alone; the employee freed altogether from claims by third parties and liable at most to his employer for a limited contribution when this is justified on disciplinary grounds. This mostly corresponds with our own practices—damages are rarely collected from employees by their tort victims or indemnity sought by their employers—except in South Australia and the Northern Territory, the popular notion that the primary responsibility should be the employer’s rather than the employee’s is as yet hardly reflected by the law in books.”

Fleming therefore argues in favour of an employee being immune from suit, subject to whatever internal disciplinary procedure to which the employee may be submitted. Some scholars have even gone so far as to suggest that this should occur in the case of intentional torts. The reasoning is that if the employer is held vicariously liable because it is the superior risk-bearer then, the employer’s direct liability should displace the employee’s liability. For Fleming, the possibility of the individual employee being ultimately responsible would subvert the equilibrium created by the imposition of vicarious liability. Thus, the reasons which justify imposing vicarious liability on the employer equally justify rendering the employee immune from suit.

The argument made by Fleming in favour of employee immunity from suit is partially convincing. If one accepts that vicarious liability is imposed because the employer created a risk and consequently “owns” any consequential liabilities, retaining individual personal liability gains nothing from the plaintiff’s perspective. And when the employer is incorporated, the argument in favour of immunity is more persuasive.

The problem with Fleming’s approach however, is that it puts too much emphasis on vicarious liability being imposed because the employer is the superior risk-bearer and loss distributor. As the recent Supreme Court of Canada decisions have recognized, the justifications which lie at the heart

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47 Fleming at 340-1

recent Supreme Court of Canada decisions have recognized, the justifications which lie at the heart of the doctrine of vicarious liability are not limited to considerations of loss distribution capabilities. Vicarious liability is justified on other grounds as well, including compensation of victims. The elimination of employee liability would not advance the goal of victim compensation. For that reason, in *London Drugs* Mr. Justice LaForest admitted that in the case of tortious conduct, employee liability to the plaintiff could not be eliminated:

“In my view, in what can be termed the ‘classic’ or non-contractual vicarious liability case, in which there are no ‘contractual overtones’ concerning the plaintiff, the concern over compensation for the loss caused by the fault of another requires that as between the plaintiff and the negligent employee, the employee must be held liable for property damage and personal injury caused to the plaintiff.”

It is clear that having the employee as a defendant against whom judgment could be obtained and collected from assures the plaintiff of compensation in the event that the employer, for some reason or another, is unable to pay any judgment. Otherwise, the plaintiff would be deprived of compensation which is one of the goals of the doctrine of vicarious liability. Similarly, if there

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49Relying on the approach taken by Fleming, Mr. Justice LaForest argued in favour of employee immunity in the contractual context in *London Drugs*, supra note 8 at 334 ff. The issue in that case was whether negligent employees could obtain the benefit of a limitation of liability clause. The contractual setting in which the facts arose were crucial to LaForest’s reasoning. LaForest was of the view that given the contractual setting, the fact that the plaintiff had chosen and known it was dealing with a limited company, the parties’ expectations were such that the plaintiff could not circumvent the limitation of liability clause by suing the employees in tort. Iacobucci, writing for the majority, came to a different conclusion. He felt the employees should be held liable to the plaintiff because they owed a duty of care to it. However, he felt the employees should get the benefit of the limitation of liability clause because insofar as the contractual obligations were concerned, there was an identity of interest between the employer and its employees. He held that the identity of interest which exists between an employer and its employees can be used as a defence but did not shield the employees from personal liability. The Supreme Court of Canada tackled seemingly similar issues in *Edgeworth Construction v. Lea & Associates*. There however, the court held that individual engineers who had affixed their seal to design documents for a construction tender, were not personally liable. The court found that in those circumstances, the employees did not owe a duty of care.


51This argument does not apply with equal force to Crown employees. There should never be any fear about the victim being able to obtain full compensation from the Crown and the arguments in favour of granting employee immunity are more persuasive. see K. Sandstrom, “Personal and Vicarious Liability for the Wrongful Acts of Government Officials: An Approach for Liability Under the Charter of Rights and Freedoms” 24 U.B.C. Law Rev.229 (1990); S. McCallum, “Personal Liability of Public Servants: an Anachronism” supra note 49. Indeed,
is any question about the employee's conduct implicating the employer's vicarious liability, it would be prudent to name the employee as a defendant to avoid leaving the plaintiff without any remedy whatsoever.\(^\text{52}\)

There are however other reasons why the employee's liability to a plaintiff should remain. Tort law is premised on the fault theory. As such, we have some difficulty in conceiving a situation where the party most at fault is not accountable to the injured party. For instance, there would be no question about retaining the employee's liability where an intentional tort or other independent tort was committed by the employee. As LaForest noted in \textit{London Drugs}, where an intentional tort has been committed, we want to concentrate liability on that individual as much as possible. The principle of individual responsibility militates in favour of retaining the plaintiff's right to name the employee tortfeasor as a defendant even if ultimately, any damage award will be paid by the employer.\(^\text{53}\)

When a tort is committed by an employee, a separate duty, his own, is breached. Whether or not the master's vicarious liability will be engaged, will depend on whether the risk of the conduct is strongly connected with the employer's activity. However, regardless of whether vicarious liability

\(^\text{52}\)Employee liability will remain whether or not the wrongful acts were done in the course of employment. See \textit{George v. Harris}, [1999] O.J. No. 639, leave to appeal dismissed [1999] O.J. No. 3011 (C.A.)

\(^\text{53}\)This is the case with the Crown who will assume liability for torts committed by its employees in the course of discharging official duties. Even so, the plaintiff retains the right to name the Crown employee as a defendant. \textit{Decock v. Alberta}, [2000] A.J. No. 419. "No matter the role of the tortfeasor, liability will always fall 'first and foremost' personally upon that individual": \textit{George v. Harris}, [1999] O.J. No. 639.
is imposed, this should not render the employee immune from liability.\footnote{See C. Gosnell, “English Courts: The Restoration of a Common Law of Pure Economic Loss” 50 U.T.L.J. 135 (2000) at 167} This is in essence the finding of the majority of the Supreme Court in \textit{London Drugs}.\footnote{Supra note 8} That case involved issues of employee negligence causing property damage. The individual employees owed a duty of care to the property owners and the duty was not negated by the fact that there was a contract between the employer and the property owner.\footnote{LaForest would have found otherwise. He was prepared to find that the fact that the property owners had contracted with a limited liability company would negate a duty of care. The owners had no expectation that the individual employees would be held personally liable.} In \textit{Edgeworth}, another recent Supreme Court decision on similar issues, the issue was whether a duty of care was owed by individual employees of a corporation. The circumstances of that case however were very different as the cause of action was based on misrepresentations leading to economic loss. I don’t want to address these complicated issues for fear of straying too far from the topic of this chapter except to say that the existence of a duty of care owed by the personal defendants was crucial to deciding whether there should be personal liability in both those cases.\footnote{In the contractual setting directors, officers and employees of corporations are protected from liability in most circumstances unless “it can be shown that their actions are themselves tortious or exhibit a separate identity or interest from that of the company so as to make the act or conduct complained of their own”. \textit{Scotia MacLeod v. Peoples Jewellers} 26 O.R. (3d) 485 (1995) at 491; see also \textit{Normart Mgt. Ltd. v. West Hill Redevelopment Co.} (1998) 37 O. R. (3d) 97 (C.A.). More recently in \textit{AGDA Systems Int. Ltd. v. Valcom Ltd et al.} (1999) 43 O.R.(3d) 101, the Court of Appeal reaffirmed the rule, emphasizing that employees acting in pursuance of the interests of the corporation are not immune from liability for their tortious conduct. Those employees, while they may be acting in furtherance of the employer’s objectives or performing the “very essence” of the employer’s contractual obligations to others, may nevertheless owe a duty of care to third parties. see also \textit{London Drugs v. Kuehne & Nagel Int.}, supra note 8 at 407-8 per Iacobucci J.; \textit{NBD Bank v. Dofasco Inc.}, [1999] O.J. No. 4749. The existence of a duty of care may ground a claim based on their personal liability.} 

In the straightforward tort case where there are no contractual overtones, there is no question about the individual employee not owing a duty of care to the injured plaintiff. Hence, to absolve the individual employee from direct liability to the plaintiff would cause us to substantially divert from basic tort principles.
Allowing employee immunity in these circumstances would also require a totally new approach to the doctrine of vicarious liability. The employer would be rendered primarily liable for employee torts. This is to be contrasted with our current understanding of the workings of the rule that the employer is only rendered vicariously liable if the employee is also liable.\(^{58}\)

Another possible reason to retain the personal liability of an employee is to reach the objective of individual deterrence. \(^{59}\) Without the threat of personal liability there is possibly insufficient incentive for the employee to take care. However, as authors have shown, the threat of individual liability may not achieve anything over and above what internal disciplinary sanctions would achieve. \(^{60}\) As well, a number of authors have suggested that while there may result underdeterrence if personal liability is abolished, this result would be less harmful than retaining personal liability which would result in overdeterrence. \(^{61}\) Thus, the issue of achieving an acceptable level of employee deterrence may not be a factor which will heavily weigh in the balance.

Thus, employees should remain answerable to these plaintiffs for their torts regardless of whether they or their employer will eventually pay for those torts. Vicarious liability should not displace the employee’s personal liability. Appellate courts to which the issue was presented, have refused to recognize employee immunity and with a few exceptions, there are no signs of courts wavering from that position in the absence of legislative intervention.

Hence, the enterprise risk theory renders the employment enterprise liable in part because it created or enhanced a risk. This constitutes an independent basis of liability and not one which is purely vicarious. And while that liability may be capable of standing alone and sometimes does (such as...

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\(^{58}\)With some exceptions such as *Broom v. Morgan* and other cases dealt with at note 43


\(^{60}\)B. Chapman, “Corporate Tort Liability and the Problem of Overcompliance” 69 S. Ca. L. Rev. 1679. But see Flannigan who suggested that if employer is directly liable under loss distribution then both the employer and the employee were primarily liable. The employee’s liability would remain primary to deter risky conduct.

\(^{61}\)Sandstrom suggests in the context of public officials, that holding Crown employees potentially personally liable for Charter violations will “chill vigorous decisionmaking”. K. Sandstrom, supra note 51 at 266
when the employee is immune from suit), the employer’s liability does not displace the employee’s liability to the plaintiff. Both the employment enterprise and the individual employee/tortfeasor remain liable to the plaintiff and they are considered joint tortfeasors. The fact that they are considered joint tortfeasors will impact whatever rights they have between themselves, as we will see in chapter 4. From the plaintiff’s perspective however, both remain liable.

3. Is the liability based on fault? o2

A. The employee’s liability
The concept of enterprise risk is not entirely new, although no Canadian court had before ventured so far as to expressly ground liability on that basis. o3 The theory of enterprise liability to justify imposition of strict liability in certain areas has long been endorsed by American scholars and courts. At the outset therefore, it seems important to point out what is no doubt an important distinction between the American version of enterprise liability and what was endorsed by the Supreme Court of Canada (and probably holds true for most commonwealth jurisdictions). An element of employee fault is required before vicarious liability will be imposed. This distinguishes, for instance, American product liability law which is premised on enterprise liability. There, plaintiffs need only show the existence of a defect in the product before the manufacturer can be held liable, in the absence of proof of any fault. This is not the sort of concept which was endorsed by the Supreme Court of Canada. It remains clear that an element of fault is an important requirement, although some scholars have argued that vicarious liability should be extended to cover all employment-related accidents, much like the workers’ compensation schemes. The fault requirement substantially narrows the scope of any potential liability which would have otherwise

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o2 I will assume at the outset that we are concerned here with businesses whose activities are not inherently dangerous. The choice of activity by itself does not attract any fault-based liability. I will also assume, as was in the cases of Bazley and Jacob, that there was no fault committed by the employer in the operation of the business.

o3 Some authors such as Flannigan, had suggested that vicarious liability was founded on employer risk-regulation and he too wondered whether vicarious liability was indeed “vicarious” at all. “Enterprise Control: The Servant-Independent Contractor Distinction” 37 U. T. L. J. 25 (1997)[hereinafter referred to as Flannigan—Enterprise Control]
existed under the concept of enterprise risk. 64

This was made clear by Justice Binnie who realized the possible implications of imposing liability for non-tortious acts. Indeed, this would result in rendering employers insurers of their employees’ conduct. Citing the following passage from a recent British Columbia decision, Binnie states that such matters are better left to the legislator:

“...The choice is whether to impose the burden of these damages on an innocent school board as opposed to leaving them lie with the innocent victim. It is not a proper policy choice to impose on the court. If school boards are to become insurers for all the actions of their employees then that is a policy choice that must be made by Members of the Legislative Assembly.”65

Imposing vicarious liability for non-tortious conduct would not achieve the goal of deterrence other than activity-level deterrence. As Binnie pointed out, employers facing the prospect of being held liable for all employee acts would “vote with their feet.” The doctrine of vicarious liability as we know it in Canada has always required there be some fault on the part of the employee before vicarious liability would be imposed.66 To reverse this line of cases and fundamentally change the nature of the doctrine would indeed require legislative intervention.

Courts may have to at some point determine what exactly consists of employee “fault” which could give rise to vicarious liability. As we have seen, there may be circumstances where the employee for one reason or another, is immune from suit. Some have suggested that the servant’s acts must

Those who maintain that imposing vicarious liability can be defended primarily by resorting to concepts of loss distribution agree that it would justify its extension for all accidents related to the enterprise, without proof of fault. Atiyah at 28; see also Schwartz, “The Hidden and Fundamental Issue of Employer Vicarious Liability” 69 So. Ca. L. Rev. 1739, 1756. Similarly, Fleming suggested that it was “anomalous” that the master’s liability was limited to torts committed by the employee, instead of making him liable for all injuries arising out of the business. Calabresi argued that theories of allocation of resources would rationalize holding the employer liable for all injuries resulting from the enterprise’s activities, not just those which were the result of negligent torts. He felt there was no answer to the question of why the employer’s liability was necessarily premised on fault, other than recourse to “broad justifications for the fault requirement”. “Some Thoughts on Risk Distribution” 70 Yale L. J. 499 at 543(1961).


66See cases cited at note 43.
consist of a "prima facie tort" before vicarious liability attaches67 whereas others maintain there
must be employee "fault." 68 The reality however is that these issues will arise in only exceptional
cases and will probably have no practical effect.

B. The employer's liability

The employer's vicarious liability, on the other hand, has been traditionally regarded as strict. No
matter what amount of care was taken by the master he or she could nevertheless be held liable for
a servant's tortious acts. If the employer committed an actionable act then, liability became direct
and was no longer vicarious.

Undoubtedly, if employee fault is a requirement for vicarious liability, we do not have "pure" strict
liability because liability is premised on some fault. However, as we have seen, liability based on
enterprise risk is premised not only on employee fault, but also on an independent basis of liability,
the creation or enhancement of risks. Is this a fault-based liability?

(i) Is it negligence?
Negligence is the failure to take reasonable care to avoid acts or omissions which can reasonably
be foreseen to injure others. "In the crowded conditions of modern life even the most careful person
cannot avoid creating some risks and accepting others. What a man must not do, and what I think
a careful man tries not to do, is to create a risk which is substantial." 69 Risks which should be
prevented are those which are probable to occur, although this a matter of degree which will depend
on the circumstances.

From a careful review of McLachlin's decision in Bazley, it appears that the vicarious liability she
had in mind was of the negligence kind. Quoting Cardozo J, she says that "the risk reasonably to

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68 Fridman, supra note 37 at 314; Fleming at 412
69 Lord Reid in Bolton v. Stone, [1951] A.C. 850 at 867
be perceived defines the duty to be obeyed . . . it is risk to another or to others within the range of apprehension." What should have been foreseen is not the precise harm from specific conduct but rather, that certain risks are “typical” of certain enterprises. For example, while the fact that Curry would sexually assault his victims was not foreseeable, the employer could have foreseen that generally, it was possible for an employee to commit an assault. Binnie refers to these as “the broad risks it may have contemplated.” However, McLachlin goes further and says that liability should be imposed where those risks could have been prevented. The ability to avoid those risks is clearly a requirement for vicarious liability according to McLachlin. She speaks of the unfairness in holding an employer liable for harms it could not have prevented.

What we have then is a risk which should have been (presumably) objectively foreseen and according to McLachlin, avoided. This resembles the negligence test established in Bolton v. Stone. Indeed, in Jacobi, Binnie was concerned about blurring the line between negligence and vicarious liability. He does not imply however, as does McLachlin, that the assaults should have been avoided. He acknowledges that when it comes to sexually deviant behaviour, no measures can realistically prevent its occurrence. “Conventional incentives and disincentives used by enterprises simply do not work to deter compulsive sexual misconduct.”

The avoidability factor is an important point of distinction between the reasons of Binnie and McLachlin. The latter contemplates that the employee’s torts are foreseeable and preventable, resembling a test for negligence, whereas Binnie acknowledges that acts of sexual misconduct can often be unpreventable. Binnie’s approach must be preferred because it acknowledges the special

70 McLachlin quotes from Fleming on the Law of Torts: “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”. Bazley at 558. McLachlin also rationalizes the “friction” and fraud cases as situations where the risk is expected to arise and is inherent in the enterprise.

71 See 555-6

72 [1951] A. C. 850

73 Binnie at 614 citing Ciarochi v. Boy Scouts of America, Inc., Alaska Sup Ct., unreported
nature of sexually deviant behaviour and the fact that little can be done to prevent it, short of constantly supervising staff members which is not a realistic proposition. It is because little can be done to prevent this sort of behaviour that Binnie insists there must be a close connection between the risks contemplated by the enterprise and the ultimate misconduct.

The risk that was inherent in Bazley can perhaps be regarded as exceptional but precedent ed, much like the risk that a batter playing cricket could hit a ball beyond the playing field and hit a passerby. The difference is that in Bazley, precautions would likely not have prevented the occurrence of the sexual misconduct. There is no duty to try to avoid risks which realistically cannot be avoided. If there was no obligation to avoid the risk, there should be no liability on a negligence basis.

(ii) Is it fault?

The Supreme Court emphasized that vicarious liability is connected with the risks undertaken by the enterprise. La Forest J. had previously noted in his dissenting opinion in London Drugs that the rule had the "broader function of transferring to the enterprise itself the risks created by the activity performed by its agents."74 There seems to be little doubt that the rule of vicarious liability is defined by the risks created by the enterprise.

Some have argued that imposing liability on actors who impose a certain level of risk on others imports an element of fault.75 The fault resides in the fact that the actor had some knowledge that the harm would occur, thereby rendering the act almost intentional.76 The actor need not have

74 Supra note 8 at 339

75 S. Perry, "The Impossibility of General Strict Liability" 1 Can. J. Law and Jur. 147 (1988) critiquing Richard Epstein's, "A Theory of Strict Liability" where Epstein says that to ground strict liability, it is not necessary that the actor know his actions would cause harm, but it is sufficient if he knew there was a risk that harm could ensue. Perry argues that Epstein's theory does not in fact support strict liability but rather, incorporates a conception of fault that looks to the level of risk which one person has imposed on another. Keeton, on the other hand argues that the "fault" lies in having enterprises engage in non-negligent risky conduct without compensating those who suffer harm as a result of its activities.

76 However, for Perry imposing a level of risk on another is not the only requirement to responsibility. The risk must be such that it should have been avoided before responsibility ensues. As he puts it, outcome-responsibility does not necessarily give rise to an obligation to compensate unless the risk was foreseeable and should have been avoided. S. Perry, "Responsibility for Outcomes", presented at the Legal Theory Workshops, University of Toronto, March 1996, pages 34-5; see also O. W. Holmes, "The Common Law" (Boston: Little
knowledge that harm would occur, but could have been aware that only a risk of harm was likely to occur.\textsuperscript{77}

In a similar vein, Keeton advocated in favour of “conditional fault.”\textsuperscript{78} It is the moral sense of the community that one should not engage in activities which pose a possibility of exposing others to risk, without compensating those who are harmed by such activities. The responsibility springs from the fact that the actor chose to act, knowing that the activities posed a risk to others.

Flannigan is also of the view that the doctrine of vicarious liability rests on a notion of responsibility which relies on a concept of fault. The employer’s vicarious liability is defined by its ability to control the risk created. If the employer has some control over the activity or operation being performed by the servant, then he should bear responsibility. Flannigan argues that the goal of vicarious liability is to regulate the employer’s risk-taking.\textsuperscript{79}

Several academics have suggested that the rule of vicarious liability performs a risk-regulating function, although this theory has not preoccupied many Canadian scholars.\textsuperscript{80} It was Smith who first publicized the idea of holding an employer liable on the basis of enterprise liability.\textsuperscript{41} He argued

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Brown, 1881) at 68. “The only possible purpose of introducing this moral element [foreseeability] is to make the power of avoiding the evil complained of a condition of liability.”


\textsuperscript{78}“Conditional Fault In the Law of Torts” ibid at 56. The Restatement (Second) of Torts § 822, expresses a similar basis of liability.

\textsuperscript{79}Indeed, Flannigan argues that a rule of strict liability is needed to avoid the difficulty a plaintiff would have in proving personal negligence of the employer. The rule of vicarious liability exists to make it easier for plaintiffs to prove employer fault. “The doctrine is premised on a notion of responsibility, a notion perhaps best described as undetected contributory fault”. Flannigan-Enterprise Control at 31-35


\textsuperscript{81}But others claim Holmes first articulated the principle. V. Nolan and E. Ursin, Understanding Enterprise Liability ( Philadelphia: Temple University Press, 1995) at 22-3
that the risk that third parties suffer losses which can fairly be regarded as an incident of engaging business, should be borne by the employer who created the risk and can include it as part of the cost of doing business. Similarly, James proposed "that the employer should be liable for those faults which may fairly be regarded as risks of his business whether they are committed in furtherance of it or not." And Atiyah suggested that the master should be liable for the torts which can be regarded as "reasonable incidental risks" to the business enterprise.

If the rule is to serve a risk-regulating function then, necessarily, avoidance of the risk must underlie the rule. Certainly, many of the academics who have suggested that the rule perform a risk-regulating function have identified risk avoidance as one of the goals of the rule. But if risk avoidance is one of the policies which the rule aims to advance, vicarious liability would not be imposed for inevitable accidents, those which could not have been avoided. If we accept Justice Binnie’s views regarding sexual deviant behavior and the fact that often, it cannot be prevented, then clearly, the rule cannot be justified on the basis that it performs a risk-regulating function.

The Supreme Court in Bazley and Jacobi adopted the enterprise risk theory which provides that an enterprise which creates a risk should bear the loss when the risk ripens to harm. To some extent, liability attaches because the enterprise has a certain degree of control over the risk. Its liability is not related to whatever degree of control it may or may not have over the employee. Rather, it placed the employee in a situation where he was authorized to perform certain duties where the risk of abuse was present. The connection between the risk and the wrongful conduct lies in what the employee was authorized to do as part of his/her employment duties. If the employee was authorized and in some cases, encouraged, to exercise a certain degree of power over potential

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82"Frolic and Detour" 23 Col. L. Rev. 716 (1923)

83Atiyah at p. 171. The American Restatement of Torts cited by Atiyah suggested liability for "normal risks". Judge Friendly in Ira Bushey & Sons v. United States, 398 F. 2d 167 (2nd Cir. 1968) said liability should include all "characteristic" risks.

84For it to be preventable assumes it can be controlled. "the relevance of the employer's control reveals the common law's assumption that employee negligence is to a certain degree 'controllable'". Schwartz supra note 64 at 1754. McLachlin's opinion in Bazley however, would seem to support the theory that vicarious liability serves a risk-regulating function. Indeed, as we have seen, she was inclined to impose vicarious liability in part because it would lead the employer to adopt risk-avoidance strategies.
victims, then the likelihood of the risk ripening to harm was exacerbated.

A theory of responsibility which relies on the creation and control of risks alone is not what was endorsed by the Supreme Court. Indeed, that would be a reasonable assumption to make in light of Mr. J Binnie's decision in *Jacobi* where he refused to impose vicarious liability although clearly, some risk had been created or exacerbated by the defendant. The creation of risks itself is not a sufficient basis for vicarious liability and Binnie required there be a strong connection between the risk and the damages sustained before vicarious liability could attach.

This points us to a theory which can explain the basis upon which vicarious liability is seemingly imposed. There is no negligence or fault committed by the employer. The employer has however created a risk but that alone is not a sufficient basis upon which to attribute liability to the employer. Had the creation of risks alone been sufficient then it could have been said that vicarious liability was in fact direct liability. We could have argued that responsibility from the creation of risks flowed to the employer. The same could have been said had the liability been restricted to risks which should have been avoidable, as seemingly suggested by McLachlin. Had liability been imposed because the employer should have avoided certain risks, then clearly, liability would have been of a direct kind.

But that is not what we have here. Vicarious liability is imposed for creating risks, even those which may lead to inevitable occurrences. If the employer retains control over the risk and there is a strong connection between the risk and what the employee was authorized to do, liability is imposed. This points to a proprietary theory of responsibility. The enterprise is being held liable because within a certain sphere of activity it is engaged in, it owns any risks and consequential

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85 This is to be contrasted with instances of "pure" strict liability such as was imposed in *Rylands v. Fletcher* (1866) LR 1 Ex 265, (1868) LR 3 HL 330. The creation of the risk alone grounded liability. It is an instance of "pure" strict liability because there was no fault whatsoever in the operation.

86 One could argue that the very fact that harm occurred proves that there was a risk.

87 Indeed, Flannigan who argues that the goal of vicarious liability is to regulate the employer's risk-taking activities also argues that in fact, it is direct liability and not vicarious. *Flannigan-Enterprise Control* at 35-6
damages which may flow. Risks which could have been contemplated, even if unavoidable, are the enterprise’s to bear. There is no fault on the part of the enterprise but the employee’s fault becomes that of the enterprise. It owns it.

We must conclude therefore that vicarious liability is a type of “mixed” liability which incorporates a fault-based liability and one which is strict. On the one hand, there must be a tort committed by an employee. On the other hand, the enterprise as a whole is held liable for the tort on a strict, no-fault basis.

In summary, we have identified a proprietary theory of responsibility as underlying the doctrine of vicarious liability. The employment enterprise as a whole is held liable for having engaged in an activity which carried inherent risks to others. The activity itself is the focus of liability. Creation of those risks alone is not however sufficient for imputing vicarious liability. There must be a relationship between the risks created and what the particular employee was authorized to do. There must be a relationship between the risk created and the employee’s duties.

This suggests that the scope of vicarious liability goes beyond the conventional scope of “in the course of employment.” If liability finds an independent basis in the creation of risks by an employment enterprise then presumably, liability would expand beyond the scope of the employment relationship. In the following chapter we will examine the rule’s scope in light of these new developments.
Chapter 2: Redefining the Scope of Vicarious Liability

From rather modest beginnings several centuries ago, the doctrine of vicarious liability has since flourished and established itself. It has undergone a number of changes throughout the years including the fact that its scope has been gradually expanded. There was never much doubt that a master could be held liable for the negligence of his servants but when it came to possible liability for a servant’s intentional torts however, the scope of the liability was not so clear. Traditionally, courts were reluctant to impose vicarious liability for intentional torts.

The two recent decisions in Bazley and Jacobi address the difficult issue of when vicarious liability should be imposed for intentional torts. These cases have in effect allowed for the scope of the liability to be expanded to include liability for a special kind of intentional tort, sexual assault. Prior to these cases, it was unclear whether the rule could be enlarged to include liability for such acts since the liability only encompassed wrongdoing done “in the course of employment.” Cases involving sexual assaults, a distinctive breed of intentional torts, have tested those conventional limits.

In this chapter, we will trace the rule’s origins and its evolution over time in England and Canada in an attempt to identify the impact these decisions will have on the scope of the rule.

1. The history and evolution of the rule

Wigmore traced the origins of the rule of vicarious liability to early Germanic law and Roman law. In both cases, the rule first developed around concepts of ownership. In Roman law, liability flowed from ownership of the “thing” which caused damage. Germanic law, on the other hand,

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*Magnet also traces the origins of the rule to Roman and Germanic law. In Roman law, the basis of responsibility emanated from the rule of noxal liability."
recognized early on the concept of personal lordship and responsibility for the harmful acts of his serf or domestic. In both cases, it was recognized that the master became liable because of the fact of ownership.

The idea that vicarious liability was based on the concept of ownership slowly gave way to a theory of responsibility based on control or command. The master was only liable for those acts which he expressly commanded. In more modern times, the liability was expanded to include a theory of implied command and then, to a fiction of general command thus, *qui facit per alium facit per se.*

Vicarious liability was therefore first introduced through the concept of ownership, either ownership of property or slaves. With the freeing of slaves and the advent of servants, the theory was transformed into one which was based on control and command. Control served that situation well back then since most servants were indeed "controlled."

Most authors agree that the origins of the "modern" rule as we know it, that a master is liable for an employee's acts done in the course of employment, dates back to about 1700. The start of the modern line of cases is largely attributed to Lord Holt who wrote a number of ground-breaking decisions during that period of time. From the early 1700's it was accepted that a master could

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90 Wigmore supra note 88 at 330; Magnet at 209

91 Wigmore ibid at 332-4, Magnet at 210. Prior to that during the sixteenth and seventeenth centuries liability was imposed only where the master had commanded the acts. see Winfield and Jolowicz on Tort supra note 27 at 593 and the authorities cited therein.

92 Magnet at 210.

93 As Fleming points out, "in a preponderantly agricultural and primitive industrial society the master was usually at least the servant's equal in knowledge and experience..." Fleming at 414

94 See i.e Winfield and Jolowicz supra note 27 at 594; H. Laski, "The Basis of Vicarious Liability" [1916] Yale L. J. 105 at 106

95 There is a disagreement among scholars as to which of Lord Holt's decisions established the rule. Holmes suggested that *Turberville v. Stampe,* 91 Engl. Rep. 1072 (1697) was the first of those decisions. "Agency" 8 Harv. L. Rev. 345 (1891) at 362-3. Baty, on the other hand suggests that *Turberville* was not decided on grounds of vicarious liability but that liability was imposed on the employer as a landowner. Baty suggests that *Hern v. Nichols* (1709) 1 Salk. 289, is the earliest trace of the rule that a master is liable for his servant's acts done in the course of employment. The case of *Lane v. Cotton* (1701) 12 Mod. 489 (Lord Holt) is also occasionally cited as one of the first cases where the principle of vicarious liability was recognized.
be held liable for his servants' acts done in the course of employment, even if not authorized. Liability was imposed on the basis of a fiction that the employer had implicitly authorized or commanded the employee's acts. Thus, the doctrine of vicarious liability continued to thrive, at least in part, based on concepts of control. Holmes, however, suggested that liability on that basis was an extension of liability based on ownership. Holmes maintained that the principle originated as an extension of rules governing slavery and was generalized into modern times into a fiction that the agent and principal are one.

Even if it could be argued that the rule could be justified by reference to concepts of control, that foundation gave way when, in 1867, the rule of vicarious liability was enlarged to encompass a master's liability for prohibited acts. The concept of control or command could no longer sustain the rule. In *Limpus*, it was accepted that an employer could be held vicariously liable for an employee's intentional tort so long as the act was done in the course of employment, even if the act in question had been explicitly prohibited by the employer. The court justified the result on the grounds that if the act was done in the course of employment, it could be said that the employee had "implied authority" to act, even if the act was expressly prohibited. Although the outcome of the *Limpus* case can perhaps be justified, the use of the theory of "implied authority" in order to reach that result seems inappropriate. One can easily see how that fiction cannot be sustained in the case

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96 It is said that the principle was "firmly established" in *Brucker v. Fromont*, (1796) 6 Term. R. 659. See Baty supra note 94

97 Holmes, supra note 95 at 346-7

98 *Ibid* at 345, 350-51. Holmes thought the doctrine reflected a triumph of logic over common sense.

99 *Limpus v. Gen. Ominbus Co.* (1867) 1 H. & C. 526. Even prior to then some judges had accepted that mere disobedience on the servant's part while doing the master's would not excuse the master. See Smith Y., "Frolic and Detour" 23 Col. L. Rev. 444 (1923). Baron Parke is credited with having articulated the rule that a master is not liable for a servant's negligence while "on a frolic of his own" but remains liable if he took a detour while on the master's business. *Joel v. Morrison* (1834) 6 C & P 501

100a Certainly the argument that the master should be liable because he has control neither explains not justifies the distinction between frolic and detour since obviously the master has as much control or, to be more accurate, as little control in the one as in the other". Y. Smith *Ibid* at 455

101 Supra note 99
of intentional torts.\textsuperscript{102}

Subsequent to \textit{Limpus}, it therefore became accepted that vicarious liability could be imposed even where the employee was engaging in prohibited conduct, although the basis upon which the rule could be sustained remained unclear. The issue in those cases was whether the prohibition limited the scope of the employment or whether it limited the mode in which the employment duties were to be performed.\textsuperscript{103} As Fleming put it, "what is critical, therefore, is whether the order transgressed actually limited the sphere of employment or merely regulated his conduct within that sphere."\textsuperscript{104} The former would not engage the employer's liability whereas the latter would.

And so, the rule continued to be developed without any clear or logical basis. In fact, Holmes suggested at the turn of the last century that the rule of vicarious liability distinguished itself for being the result of a conflict between logic and common sense. It was a ship without an anchor.

Scholars who have attempted to identify a justification for imposing vicarious liability have commented the rule's "mysteriousness"\textsuperscript{105} and its elusiveness.\textsuperscript{106} The indeterminacy of the justification for the rule has been attributed to ever-changing political and social conditions\textsuperscript{107} as well as to an inconsistent application of the rule by different judges "who had different ideas of its

\textsuperscript{102}For a critique of the concept of "implied authority" see Laski supra note 94

\textsuperscript{103}An example seems to be in order. In \textit{Plains Engineering Ltd. v. Barnes Security} (1987), 43 C.C.L.T. 129, a security guard deliberately set fire to the building he was hired to patrol. Obviously, destroying the very property he was hired to protect was prohibited. The court did not impose vicarious liability on his employer because he was not performing any employment function. Had someone else set the fire because he was negligent in attending to his duties, the result could have been different.

\textsuperscript{104}\textit{Fleming} at 422

\textsuperscript{105}Laski supra note 94 at 108

\textsuperscript{106}"The hollowness of the usual explanations of vicarious liability has often been demonstrated, but this does not prevent them from continuing to be advanced." G. Williams, "Vicarious Liability and the Master's Indemnity" 20 Mod. L. Rev. 220 at 229

\textsuperscript{107}Salmond and Heuston on the Law of Torts (19th ed. Heuston and Buckley ed, Sweet & Maxwell 1987) at 507
justification or social policy, or no idea at all.” This uncertainty has continued, at least until the Supreme Court of Canada decisions.

The beginning of the twentieth century was marked by the avenue of workers’ compensation schemes which recognized that work-related injuries could properly be charged back to the enterprise. There emerged tort theories based on loss distribution and the shifting of losses. Authors revisited the doctrine of vicarious liability to re-inject some life into its theoretical basis. Baty for instance, offered nine possible reasons to explain the rule but concluded that the principle could not be firmly identified with any policy reason. Baty himself preferred the theory of deep pockets while Laski who wrote at about the same time, identified more complex reasons for the rule. Laski related the origins of the rule to the economic conditions prevailing at the time the rule was developed, an era marked by a departure from individualism to a growth in corporate enterprise. Laski thought the rule was justified because social order required there be a social distribution of profits and losses and that secondly, the master is better able to monitor his employees.

The idea that social policy justified the rule of vicarious liability was also adopted by Young Smith. He was of the view that social expediency favored the distribution of losses among a

108 G. Williams supra note 106 at p. 231

109 "B.C. Ferry Corp. v. Invicta Security Services. (1998) 167 D.L.R. 4th 193, citing Flannigan-Enterprise Control at 26-7: “Oddly enough, however, there is still uncertainty over just what modern public policy or policies it serves. There is no doubt as to the effect of the doctrine-there is only doubt as to its proper justification”.

110 The 9 reasons offered were control, profit, revenge, carefulness and choice, identification, evidence, indulgence, danger and satisfaction. See Baty supra note 88 at 148.

111 Baty has been severely criticised for his position. See R. Morris "Enterprise Liability and the Actuarial Process- The Insignificance of Foresight” 70 Yale L.J. 554 (1961) at 555. But others agreed with his view. See G. Williams, supra note 106 at 232: "However distasteful the theory may be, we have to admit that vicarious liability owes its explanation, if not its justification, to the search for a solvent defendant”.

112 supra note 94 at 113. He cites Dean Wigmore “a conscious effort to adjust the rule of law to the expediency of mercantile affairs”. 3 Select Essays in Anglo-American Law 536

113 See also Salmond & Heuston on the Law of Torts supra note 107 at 506-8

114 "Frolic and Detour", 23 Col. L. Rev. 444 at 456-60. Lord Pearce also said in I.C.I. Ltd v. Finlater [1965] A.C. 656, 686 that vicarious liability is based on “social convenience and rough justice
larger contingent of the community. This theory of loss distribution as constituting the primary justification for the imposition of vicarious liability found favor with most modern scholars. Atiyah, for instance proposed that loss distribution was the most rational justification. Fleming James advocated that vicarious liability was desirable because it fulfilled goals of victim compensation, deterrence and loss distribution. Others have advocated that the rule of vicarious liability is economically efficient for employment-related wrongs. But theories based on economic efficiency and loss-distribution capacity have never entirely explained the rule especially in Canada where employee fault remains a condition to finding vicarious liability.

Despite the fact that no one theory could be identified as justifying its basis, the rule of vicarious liability continued to flourish. Courts seemed to accept that vicarious liability is an essential element of tort law and any idea of repealing it would be inconceivable. A number of different justifications for the rule continued to be offered by tort theorists. To a certain extent, the notion

115 Salmond & Heuston, supra note 107 at 622. opine that because most employers today are large institutions, placing liability on the employer achieves distribution of losses which are ultimately borne in small and unnoticeable amounts.


117 Calabresi for example admits that economic theories do not explain why vicarious liability is limited to instances of employee negligence and why the doctrine of extra-hazardous activities in the US is limited. To explain these inconsistencies he points to the "broad justification for the fault requirement". "Some Thoughts on Risk Distribution" supra note 70 at 545. Bruce Feldhusen suggests that the concept of 'social responsibility' supplants economic theory: it is just that enterprises, not randomly selected innocent victims, bear the costs. "Vicarious Liability for Sexual Torts" in Torts Tomorrow: A Tribute to John Fleming, Mullany and Linden eds. (Sydney: LBC Information Services, 1998)

118 Indeed, the Supreme Court of Canada in Bazley did not impose vicarious liability primarily on the basis that the employer in that case was the superior loss bearer and distributor. Rather, theories of loss distribution merely buttressed the proposition that it is fair and just that the person who creates the risk should bear the loss. See i.e at 558

119 Most notably, Fleming summarizes them: Despite the frequent invocation of such tired tags as 'respondeat superior' and 'qui facit per alium facit per se', the modern doctrine of vicarious liability cannot parade as a deduction from legalistic premises, but should frankly recognized as having its basis in a combination of policy considerations. Most important of these is the belief that 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; that the master is a more promising source of recompense than his servant who is apt to be a man of straw without insurance; and that the rule promotes wide distribution of tort losses, the employer being a most suitable channel for passing them on through liability insurance and higher prices. The principle gains additional support for its admonitory values in accident prevention. In the first place, deterrent pressures are most
that the employer would be held liable because it exercised some control over its servant, continued to play a part in the equation, particularly when it came to determining whether the employer should be liable for independent contractors.\(^{120}\) Nevertheless, courts did not concern themselves with explaining the rule but rather, focussed on delineating its scope.

2. The Traditional Scope of the Rule

In order for vicarious liability to be imposed, generally two conditions must be satisfied. The same test was applied whether the wrongful act was of the negligence kind or consisted of an intentional tort. First, there must be a relationship between the tortfeasor and the defendant, usually one of employment but not necessarily\(^{121}\). Second, there must be a connection between the wrongful act and the employment. The question raised by the second requirement, that the act be done “in the course of employment” has plagued courts for at least a century. Several tests have been proposed but by far, the one which seems to have attracted the most approval is known as the “Salmond test.”

The test obtained recognition in *Lockhart v. Stinson and CPR*\(^{122}\) where the Privy Council considered Canadian law on this issue. The court adopted the test:

>“It is clear that the master is responsible for acts actually authorized by him: for liability would exist in this case even if the relation between the parties was merely one of agency and not one of service at all. But a master, as opposed to the employer

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\(^{120}\) This topic will be dealt with in depth in Chapter 3.

\(^{121}\) This is the subject matter of Chapter 3

\(^{122}\) [1942] 3 D.L.R. 529. In that case, an employee took his personal vehicle on a work-related errand, contrary to company instructions. The CP had issued orders prohibiting employees from using their own vehicles in the course of employment unless insured. The evidence revealed that while the order had been brought to the attention of employees, no steps had been taken to ensure its compliance. Vicarious liability was imposed in *Lockhart* because the employee was acting in the course of employment even if he was wrongly doing something he was in fact authorized to do.
of an independent contractor is liable even for acts which he has not authorized, provided they are so connected with acts which he has authorized that they may rightly be regarded as modes-although improper modes- of doing them. In other words, a master is responsible not merely for what he authorizes his servant to do, but also for the way in which he does it...On the other hand, if the unauthorized and wrongful act of the servant is not so connected with the authorized 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 employment, but has gone outside of it.\footnote{ibid at 536 citing Salmond on Torts (9th ed.) at 95}

It was held in \textit{Lockhart} that the fact that an employee disobeyed an order did not necessarily sever the employment connection as the issue was not whether the act was authorized but rather, whether the act was done in the pursuance of employment duties. As Lord Duff said, an act of disobedience may well give rise to issues between the master and the servant but a third party should not be denied a remedy.

The Salmond test was subsequently adopted by the Supreme Court of Canada in \textit{W. W. Sales v. City of Edmonton}.\footnote{[1942] S.C.R. 467} More recently, the test gained approval by Madam Justice McLachlin in \textit{Bazley}. The parties in \textit{Bazley} had agreed that the test governed the case but there was disagreement as to its meaning. It is not difficult to see how a disagreement could arise given the difficulty in applying the test especially when it comes to intentional torts. Nevertheless, Madam Justice McLachlin did not suggest the test should be discarded.\footnote{As we discussed above, in the \textit{Bazley} case the court developed a two-prong test. Other than mentioning the test at the outset of its reasons, the court never attempted to interpret the test to the facts of the case and never mentioned it again. The two-step test adopted is capable of standing alone and need not be seen as an incident of the Salmond test.}

The problem with the Salmond test is that it is ill-suited to situations which involve intentional torts, particularly sexual torts. It is difficult to conceive of any situation where an intentional deviation from employment duties, such as in situations involving sexual assault, could be considered a mode of performing authorized duties. Courts have been struggling with those type of situations for the last century and have traditionally shown great reluctance in imposing vicarious liability for an
intentional tort. This would stem from the perceived unfairness of holding an employer liable for acts which were clearly unconnected with the business enterprise. Some cases of clear deviation from the course of employment posed no difficulty to courts. Other cases were not so clear, particularly when the employment had in essence created an opportunity for the wrongful act to take place. Nevertheless, courts faced with the question of whether vicarious liability should attach for intentional torts, have gradually expanded the rule to include employee fraud, assaults and finally, sexual assault.

A. Fraudulent/dishonest employees

It was difficult for courts to conceive that an employee’s fraud could be considered to be done in the course of employment and thus, engage the employer’s vicarious liability. It was one thing to impose vicarious liability when the employee was furthering the employer’s aims, but when the act was done solely to benefit the employee, imposing vicarious liability was difficult to justify.\footnote{See i.e. Cheshire v. Bailey, [1905] 1 K.B. 237 where the court stated that no vicarious liability should flow from an employee’s crime unless it could be shown that the crime was due to the employer’s negligence or that the master had benefited from the act.}

That is where the law stood until the ground-breaking case of Lloyd v. Grace, Smith & Co.\footnote{See Barwick v. English Stock Bank, (1867) L.R. 2 Ex. 259 where Willes, J. stated that no vicarious liability could be imposed if the employee was acting solely for his own benefit.} A law firm’s clerk defrauded a client from her property while purporting to act of the firm’s behalf and handling transactions for her. The client assumed the clerk was a member of the firm and when asked to sign certain documents she naturally complied, unknowingly transferring her property to the clerk. The court imposed vicarious liability on the grounds that the scope of the clerk’s employment could be extended to his ostensible authority.\footnote{[1912] A.C. 716}

Prior to Lloyd it was thought that a master could be held liable for such fraudulent acts only if he

\footnote{It was later said in Armagas Ltd. v. Mundogas S.A., [1986] A.C. 717 that there must be some statement or conduct by the employer on which the plaintiff relied upon to believe the employee was acting within his authority.}
benefited from those acts. The master had clearly not benefited from the clerk's fraud in Lloyd but the Privy Council nevertheless found the firm liable under the premise that a master is responsible for the fraud of an authorized agent acting within his authority.130

The Lloyd case emphasized that a master could be held liable for an employee's fraud if at the time, the employee was doing something he was supposed to be doing. On that reasoning, it was appropriate in Queen v. Levy Brothers 131 for instance, to find the Crown liable for a theft of a parcel by a post office employee. The theft had occurred in the course of employees handling the parcel, thus engaging the employer's liability.

Although the Salmond test provided some guidance, the question of where to draw the line between independent acts and those done in the course of employment continued to challenge courts. Seemingly, acts done by employees for motives unconnected to the employment, such as vengeance, were deemed to invoke vicarious liability in some cases132 but not others133. This was to be contrasted with using excessive force while performing job-related duties which would engage the employer's vicarious liability.

B. Assault cases

It is not too difficult to justify imposing vicarious liability on employers when some use of force is expressly or implicitly authorized in order to perform employment duties. For instance, "bouncers" and persons authorized to repossess property are expected to use some measure of force in

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130Although the court did not explicitly say so in Lloyd, the effect of its decisions was to overrule Cheshire v. Bailey, supra note 126. It did later overrule it in Morris v. C.W. Martin, [1966] 1 Q.B. 716


132See i.e. British Columbia Ferry Corp. v. Invicta Security Service Corp., (1998) 167 D.L.R. 4th 193 where vicarious liability was imposed on the employer of a security guard who deliberately set fire to the property he was hired to protect.

performing their duties. In those cases, the employer’s liability is said to be very broad.\textsuperscript{134}

In that context, negligent acts and those performed by overzealous employees will most certainly engage the employer’s liability.\textsuperscript{135} Intentional acts such as assault may also engage the employer’s liability “as long as the surrounding circumstances indicate the necessary connection with what the servant or agent was employed to do on the employer’s behalf.”\textsuperscript{136}

(i) sexual assault

Cases involving allegations of sexual assault were practically unheard of until the 1970’s and have since been appearing at an alarming rate. Sexual assault, as an intentional tort, presents particular problems to courts perhaps because of its morally reprehensible nature. Most of the early cases did not succeed on the basis that the acts were of a purely personal nature and were insufficiently connected with job-related duties.\textsuperscript{137} Courts, while recognizing that the employment provided for an opportunity for the wrongful act to take place, would usually find that the assault constituted an independent act, not an unauthorized mode of performing job-related duties.\textsuperscript{138} This would seem to follow from the fact that one would never expect an employee to have real or apparent authority to sexually abuse another.

At one time the Nova Scotia Court of Appeal suggested that the fact that the act was antithetical to

\begin{itemize}
  \item \textsuperscript{134} See Rose, “Liability for an Employee’s Assaults” 40 Mod. L. Rev. 419 (1977) at 423
  \item \textsuperscript{135} Fridman, \textit{The Law of Torts in Canada} supra note 37 at 332
  \item \textsuperscript{136} Ibid
\end{itemize}
the employment, mitigated against finding that it was done in the course of employment. That approach was wisely discarded although the antithetical nature of the act may be relevant in considering the risks associated with the enterprise.

In the last few years some courts have shown a limited willingness to find employers vicariously liable for their employee’s sexual assaults. All of these cases have dealt with situations where the victim was a child and the perpetrator was a person with “parental-like authority.”

The first of those decisions was the trial decision in Bazley v. The Children’s Foundation, where the issue of whether an employer should be held vicariously liable for an employee’s sexual misconduct was put squarely before the court. The trial judge imposed vicarious liability by applying the traditional Salmond test. He found that Curry was using an unauthorized mode of conducting himself while performing employment duties. Lowry, J. had difficulty distinguishing this case from cases involving a postal clerk’s theft (Queen v. Levy Brothers) and a solicitor’s clerk’s fraud. If vicarious liability could be imposed in those situations, why could it not be when the wrong involved molesting a child?

The Jacobi v. Griffiths case quickly followed Bazley. The trial judge there imposed vicarious liability on the basis that although the acts had not taken place at work or during work hours, the wrongful acts occurred as a direct result of Griffiths misusing his employment with the Club. Applying the Salmond test, he found that Griffiths had been doing wrongfully something he had

139 McDonald v. Mombourquette (1996) 152 N.S.R. (2d) 109 where priest accused of sexually abusing child; see also D.C.B. v. Boulianne. [1996] B.C.J. No. 2183 where a drug and alcohol counselor sexually assaulted a patient. The court adopted the reasoning of the Nova Scotia court and refused to impose vicarious liability on his employer because acts of sexual assault were contrary to his obligations as a counselor.


141 But see J.L. v. Canada (Attorney General), [1999] B.C.J. No. 1306 where the court equated the power a military officer has over civilians, to parental authority thereby grounding a claim for vicarious liability of the employer.


143 The issue was brought by way of special case. The sole question to be answered by the court was whether the employer was vicariously liable.
been hired to do, namely, looking after and caring for children.

While the trial judge in *Jacobi* did purport to apply the Salmond test, it is clear from his decision that policy considerations were upmost in his mind:

"If the scourge of sexual predation is to be stamped out, or at least controlled, there must be powerful motivation acting upon those who have control of institutions engaged in the care, protection and nurturing of children. That motivation will not in my view be sufficiently supplied by the likelihood of liability in negligence. In many cases evidence will be lacking or have long since disappeared. The proof of appropriate standards is a difficult and uneven matter."

Both *Bazley* and *Jacobi* were appealed to the British Columbia Court of Appeal. In *Bazley*, the Court of Appeal upheld the finding of vicarious liability although four concurring decisions were rendered. Huddart, J. rejected the Salmond test on the basis that it was incapable of being applied to sexual assault cases. She also found that the power which had been vested in Curry by the employer made the assaults more likely to occur and hence, the employer should answer for creating that situation. Madam Justice Newbury felt that the test proposed by Huddart, J. based on a conferral of job power, would cast too wide of a net. In her opinion, a certain degree of "connectedness" between the acts and the employment duties was required in order to impose vicarious liability, although she admittedly was unable to articulate any kind of test to assess the connection required.

In an effort to bridge the gap between the tests offered by Huddart and Newbury, Mr. Justice Hollindrake suggested that the two tests be combined. He felt that in order to impose vicarious liability, there must be a sufficient nexus between the employment duties and the acts, a degree of "connectedness" mentioned by Madam Justice Newbury. The sufficiency of the nexus will depend on the nature of the power conferred on the employee by virtue of the employment. Finch, J. however was loathed to endorse any test, advocating for a case-by-case approach. He nevertheless was of the view that both Huddart's "conferral of authority" test and Newbury's "close connectedness" test could be useful tools.

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144 at 30-31
The Court of Appeal, Huddart J. dissenting, allowed the appeal in *Jacobi*. Since all but one of the impugned acts had taken place outside of Griffiths' work hours and not on employer premises, the acts lacked a sufficient degree of connectedness to the employment duties. Moreover, Griffiths' employment duties largely did not include any touching of the children that would take the case beyond "mere opportunity."

Leave to appeal the Court of Appeal decisions was granted by the Supreme Court of Canada. In the intervening period, the B.C. courts had several opportunities to consider issues relating to vicarious liability.

In *C.A. v. Critchley* for instance, the Court of Appeal held the Crown vicariously liable for the improper acts of Critchley who had been hired to operate a wilderness group home to house teenage Crown wards. Other decisions were handed down by British Columbia trial courts imposing vicarious liability on employers who had vested their employees with quasi-parental authority over children.

That was where the law stood until the Supreme Court of Canada decisions in 1999. The Supreme Court essentially upheld the decisions of the B.C. Court of Appeal but on different grounds. The significance of the *Bazley* and *Jacobi* decisions lies in part in the fact that the court has expanded the doctrine of vicarious liability to include liability for sexual assaults.

3. The Scope of the Liability - after *Bazley* and *Jacobi*

At the outset, it seems important to point out that the test articulated in the *Bazley* case is said to

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145 With the exception of the finding regarding the assault which took place during a field trip.


apply for intentional torts only. Other types of wrongdoing would presumably continue to be decided according to the Salmond test with a particular focus on the scope of the employee’s authority.

In order to engage vicarious liability for intentional torts, the wrongful conduct must be related or connected with the risks created by the enterprise. The risks typical of the enterprise circumscribe the scope of the liability, not the scope of the servant or agent’s authority or ostensible authority.

Previously, some judges for instance, had suggested the inquiry should be focussed on what is “characteristic” or those risks which are normal. Others have suggested that vicarious liability should be imposed for those torts which arose from acts within the employer’s “sphere of control” or those which are “foreseeable and insurable.” And scholars concerned with economic efficiency have proposed that the scope include those activities whose cost would promote the allocation of resources theory.

The focus is now on what risks are created by the enterprise. Only risks which can be regarded as typical of the enterprise will give rise to liability. We are not however here referring to risks which are necessarily foreseeable. Atiyah put it as follows:

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148 Para. 41

149 Although the two are related as will be seen below.

150 Judge Friendly in *Ira Bushey & Sons, Inc. v. United States*, 398 F. 2d 167 (2nd Cir. 1968)

151 Sykes adopted the “zone-of-risk” analysis, stating that the scope of liability should be restricted to normal risks. Sykes, supra note 116

152 Morris, R., “Enterprise Liability ad the Actuarial Process-The Insignificance of Foresight”, 70 Yale L. J. 554 (1961); see also *Flannigan- Enterprise Control* at 36 who advocates that the scope of the employer’s enterprise should be determined by the element of control.

153 A. Ehrenzweig, “Negligence Without Fault” 54 Cal. L. Rev. 1422 (1966) at 1457. Ehrenzweig refers to this as the “typicality” test.

154 Calabresi, supra note 64

155 In *British Columbia Ferry Corp. v. Invicta Security Service Corp.*, (1998) 167 D.L.R. 4th 193, the B.C. Court of Appeal suggested that vicarious liability should attach where the wrongful conduct “was one of the normal risks of the employer’s enterprise”.
"But it must be stressed that here again a broad perspective is required. One is not looking here at a particular incident and asking whether that could have been foreseen, in the way that the law does when questions of negligence are in issue. For the law of negligence is concerned with the question whether reasonable precautions could and should have been taken to avoid a particular accident. But from the broader point of view it must be recognized that, whatever precautions are taken to avoid particular events, and however much care and skill is used in carrying on an enterprise, certain types of accident are more or less inevitable. And where, from this broad point of view, such accidents are foreseeable, policy would seem to point strongly in favour of holding the employer liable."\textsuperscript{156}

For instance, the risk that an employee commits a tort such as sexual assault is not typical of many enterprises. Indeed, I would suggest based on the Supreme Court decisions, that it can only be considered typical of those enterprises which vest its employees, agents or contractors with a certain degree of job-created power and intimacy.

In \textit{Bazley}, the nature of the relationship between the victims and the defendant was distinctive, although not treated as a fiduciary one.\textsuperscript{157} The operator of the residential home assumed a special relationship vis-à-vis the residents, described as a quasi-parental one. It was a relationship based on trust where intimacy was fostered. The creation of this type of relationship would be inherent not only in residential schools but as well, in the hospital setting and between religious advisors and their devotees, etc.

It is the type of relationship that existed between the defendants and the victims that distinguishes the \textit{Bazley} case from the \textit{Jacobi} case from a factual perspective. Mr. Justice Binnie makes that clear in his reasons in the \textit{Jacobi} case. According to Justice Binnie, in \textit{Bazley}, the employer set out to create between its employees and the children a quasi-parental relationship "with all the authority and intimacy of such relationships."\textsuperscript{158} In \textit{Jacobi} on the other hand, Griffiths, the perpetrator/employee had not been placed in "a special relationship of trust with respect to the

\textsuperscript{156}Atiyah at 172

\textsuperscript{157}The question never arose in \textit{Bazley} since the special case submitted to the court asked whether vicarious liability could be imposed. Similarly, that question was not considered in \textit{Jacobi} either.

\textsuperscript{158}at 589
children's 'care, protection and nurturing." Justice Binnie further says that "[i]t was the job-created parent-like relationship that attracted vicarious liability in [Bazley]." Similarly, in Bazley, Madam Justice McLachlin emphasizes the fact that the employee was placed in a position of power and intimacy over the children. This is what distinguishes the outcomes in the two cases. As Binnie points out, the relationship established by the employer in Bazley envisaged an element of intimacy which he thought was lacking in Jacobi. McLachlin, on the other hand was prepared to find on the facts in Jacobi that the relationship created by the employer involved or at least encouraged intimacy.

Given the emphasis placed on the special type of relationship fostered in Bazley, one wonders whether liability was being imposed on the employer for an abuse of that relationship or, whether vicarious liability was being as an extension of the traditional test of course of employment. In my view, the nature of relationship established does not impose direct liability on the employer but rather, defines the risk created by the employer. If the employer fosters relationships which involve power and intimacy, the risk of sexual abuse is greater.

In the United States, there is apparently a trend toward finding vicarious liability for sexual assaults where the employee vested its employees with significant power and authority. American courts

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159at 594
160at 606
161at 618
162at 583-4

163This position has been adopted by some Canadian courts under the guise of imposing vicarious liability. For example, in Boothman v. R. (1993) 49 C.C.E.L. 109 (Fed. Ct.), the employer placed a supervisor in a special position of trust and authority. He abused os that position by intentionally inflicting emotional harm and assaulting an employee under his supervision. The court imposed vicarious liability because "when an employer places an employee in a special position of trust, he or she bears the responsibility of ensuring that the employee is capable of trust. That is the rationale behind the vicarious liability of an employer". at 136. The liability imposed there was in fact direct liability for failing to ensure the supervisor was "capable of trust".

164See generally, R. Weber, "'Scope of Employment' Redefined: Holding Employers Vicariously Liable for Sexual Assaults Committed by Their Employees" 76 Minn. L. Rev. 1513 (1992)
have for example imposed vicarious liability where police officers raped a resident¹⁶⁵ and where therapists have abused their relationships with their patients¹⁶⁶, to provide only a few examples. Those courts emphasize the existence of job-created power.

Both Justices McLachlin and Binnie however emphasized not only job-created power but as well, the fact that the employment duties involved a certain level of intimacy with the children. The existence of intimacy in the relationship is but one factor recited by McLachlin in Bazley which courts are to take into consideration when determining whether liability for intentional torts should be imposed. She does not imply that intimacy is necessarily a requirement for a finding of vicarious liability, but considers it one of many other factors. Job-created power, on the other hand, is highlighted. At the risk of reading her list of factors too literally, the presence of job-created power seems to be isolated as an important factor, almost a prerequisite. In that context, one wonders whether the presence of job-created intimacy is a factor which is important only in situations involving sexual assault.

The presence of intimacy should be identified as an important factor in sexual tort cases. Indeed, the existence of job-created intimacy makes sexual assault more likely to occur. Perhaps this is the element which Binnie considered was lacking in the facts surrounding the Jacobi case. In Jacobi, there was very little opportunity for intimacy with the children in the operation of the drop-in centre. In fact, all but one of the assaults took place outside of the work environment which is a fact that distinguishes that case from the Bazley case. In Bazley, the assaults had taken place during the course of employment while Curry was attending to his duties. In Bazley, a certain degree of intimacy was inherent in the employment.

It is interesting to note however that in the recent case of V.P. v. A.G.¹⁶⁷ which was decided after the Supreme Court of Canada decisions, vicarious liability was imposed for sexual assaults, without

¹⁶⁵Mary M. v. City of Los Angeles, 814 P. 2d 1341 (Cal. 1991)

¹⁶⁶Simmons v. United States, 805 F. 2d 1363 (9th Cir. 1986); Doe v. Samaritan Counselling Ctr., 791 P. 2d 344 (Alaska 1990)

there being any evidence of intimacy between the perpetrator and his victim. The perpetrator, Starr, held an administrative position at a residential home for children. There was no evidence that his duties involved any element of intimacy with the residents, other than the fact that he was in charge of disciplining the children. The court felt that the disciplinary power Starr had over the children was "meaningful" power which was to be equated with "parent-like" power. The fact that Starr was empowered to discipline the residents by the employer was sufficient to attract vicarious liability under the test developed in Bazley. This precedent may open the door for courts to accord less importance to the requirement of intimacy in sexual assault cases.

Generally however, in cases of intentional torts, there must therefore be a relationship or connection between the risks which should have been contemplated by the enterprise and the authority vested in the employee. As we will see in the following chapter, vicarious liability is not imposed on the enterprise solely for having engaged in an activity with certain inherent risks. There must be a connection between those risks and the employee's duties. The employer puts the employee in a situation where he was vested with job-created power which made the wrongdoing more likely to occur.

By adopting the enterprise risk theory the court has allowed for the scope of the rule to be expanded. As we have seen, the traditional reluctance on the part of courts to allow vicarious liability for intentional torts has been gradually eroded. Moreover, the scope of the liability is no longer exclusively bound by considerations of the employee's authority, whether it is expressed or implied. The Supreme Court has recognized the obvious fact that when it comes to the commission of sexual torts, an employee is almost never authorized to engage in such conduct. To impose vicarious liability for such torts, the basis of liability must therefore be broader than strict consideration of what authority was vested with the employee. With the adoption of the enterprise risk theory therefore, the court has finally opened the door for claims of sexual assault to give rise to vicarious liability. This is the obvious impact of the Supreme Court of Canada decisions.

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168See also J.L. v. Canada (Attorney General), [1999] B.C.J. No. 1306 where the existence of job-related power and authority alone without evidence of intimacy, was sufficient for the court to find the employer of a military officer vicariously liable for sexual assaults committed by the officer. That case however was decided prior to the Supreme Court decisions being released.
But the impact of the decisions, as we will see, go beyond the obvious fact that the scope of vicarious liability for intentional torts has thereby been expanded. We will suggest in the following chapter that another repercussion of adopting the enterprise risk theory is that the scope of the liability has been expanded not only with respect to intentional torts but as well, for acts of non-employees. Traditionally, the rule has been that there could be no vicarious liability for independent contractors but the soundness of that rule must be questioned in view of the Supreme Court decisions.
Chapter 3: Liability for Non-Employees

In the introduction to this thesis, we began by observing that gradually over time, the doctrine of vicarious liability has been expanded. We saw in the previous chapter how the scope of the liability has been slowly expanded to include liability for intentional torts. One of the obvious implications of the Supreme Court decisions is to further expand the doctrine to include liability for sexual torts.

The other direction in which the doctrine of vicarious liability has been expanded relates to the persons for whose acts an employment enterprise could be held liable. Cases have traditionally distinguished between liability for servants and independent contractors. The Supreme Court in Bazley and Jacobi did not tackle these issues since in both cases, the wrongdoer was an employee. Nevertheless, I will argue that one of the consequences of the Supreme Court decisions is that liability for non-employees has been expanded. By endorsing the enterprise risk theory and rendering the enterprise as a whole liable for employee torts, the Supreme Court has adopted an approach which will no longer require that a distinction between servants and independent contractors be made for the purposes of attributing vicarious liability. As will be seen below, this approach is in line with developments in the case law with respect to vicarious liability for independent contractors. Recent decisions have demonstrated a willingness on the part of courts to expand the scope of vicarious liability for independent contractors. The adoption of the enterprise risk theory is yet another step in that direction.

In the first section of this chapter, I will review how courts have historically distinguished between servants and independent contractors. This will lead to a review and discussion of how independent contractors have been treated for the purposes of vicarious liability. In the last part of this chapter, I will try to reconcile these trends with the enterprise risk theory adopted by the Supreme Court.
1. Distinguishing between servants, agents and independent contractors

The law in this area has been wrought with confusion for some time. There is a natural tendency among authors and judges to distinguish between servants, agents and independent contractors. The distinction was required because the scope of the liability of an employer/principal differed according to the way in which its relationship with the wrongdoer was classified. The general rule is that masters are liable for the torts of their servants whereas, employers are not generally liable for torts committed by independent contractors. However, despite the general recognition that distinctions were required, at least between servants and independent contractors, there is a lack of a consensus as to how this might be accomplished.

Another problem lies in the confusion over whether servants and agents should be distinguished or treated equally for the purposes of tort liability. Much would appear to depend on how the term "agent" is defined. As Fleming points out in the following excerpt, different meanings have been attached to the term, compounding the confusion over how to treat vicarious liability for agents:

"Some difficulty arises from the several meanings attached to the term 'agent'. It is frequently used either in the sense of a comprehensive category encompassing the two species of servant and independent contractor or to describe servants, properly so-called, whose employment is casual rather than more or less continuous.

At other times, the term 'agent' crops up to designate someone through whose instrumentality the defendant has committed a tort of his own, as when he has authorised an 'agent' to commit a tort or ratified it afterwards. It also includes situations 'where the function entrusted is that of representing the person who requests performance in a transaction with others, so that the very service to be performed consists of standing his place and assuming to act in his right and not in an independent capacity'.\(^*\)\(^{169}\)

Fridman, on the other hand, distinguishes between servants, agents and contractors.\(^*\)\(^{170}\) For him, an agent is different from an employee or independent contractor and is one to whom the principal has transferred limited legal powers. A servant has broader powers and has general authority. The

\(^{169}\)Fleming at 413

\(^{170}\)Fridman on Agency, supra note 36 at 303-12
principal’s liability for the acts of the agent will depend on the scope of the agent’s authority, whether express or implied. He sees a definite difference in the juridical nature of the relationships established between the employee and agents and their principals on the one hand, and the independent contractor on the other hand. Salmond and Heuston take a different approach and consider that an agent is one who is employed to do work for another and that there are two kinds of agents: servants and independent contractors. 171

The indecision about how to treat agents is also evident in English cases where courts have wrestled with trying to determine whether servants and agents should be treated differently with respect to vicarious liability for their torts. 172

Whether the term agency is treated as a classification of its own or as a comprehensive class which includes servants and independent contractors will, in practice, make very little difference when it comes to deciding whether vicarious liability should ensue. While admittedly the juridical nature of relationships between agents and principals and masters and servants may be different as suggested by Fridman, it seems unnecessary to distinguish between them for the purposes of attributing vicarious liability for their torts. 173 Indeed, recent cases in this topic make no attempt to distinguish between agents and servants for it seems now accepted that vicarious liability for the torts of either is treated in the same fashion, i.e., whether they were committed in the course of employment. 174 The law does, however, make a definite distinction between agents and servants,

171Salmond and Heuston on the Law of Torts, supra note 107 at 511-2

172In Lloyd v. Grace, Smith & Co., [1912] A.C. 716 for instance, they were equated. In Heatons Transportation Ltd. v. Transport and General Workers’ Union, [1971] 2 All. E.R. 1214, the House of Lords made it clear that there was no distinction. The only difference between servants and agents is that generally, servants has broader power. On this issue, Atiyah mentions that the state of the law in establishing a general rule for the treatment of agents is “doubtful” but he wrote in the 1960's.

173Except in some special circumstances as for example, where the tort committed was fraudulent misrepresentation or deceit where the status of the person making the representations matters. See on this issue, Fridman on Agency supra note 36 at 308-12

174See for example the recent Ontario Court of Appeal decision in 671122 v. Sagaz Industries Canada Inc., (2000) 40 O.R. (3d) 229 where a company had been retained to represent another. The companies were separate legal entities and there was never any question about one being the employee of the other. The court focussed its attention on deciding whether the wrongdoer was an independent contractor or one for whom vicarious liability could attach. The court was prepared to us the traditional Salmond test to determine whether the wrong was
on the one hand, and independent contractors.

2. Liability for Servants and Independent Contractors Compared

In tort law, the general rule is that there is no vicarious liability for independent contractors. One of the reasons why the rule was established was that "the contractor is likely to be a person of substance, with machinery and plant that if necessary be sold to satisfy the judgment debt." If so, there seemed to be no reason why the liability of the employer should be extended for independent contractors.

In recent times, however, there has been an increase in the subcontracting of work, particularly in certain sectors such as the construction industry. The use of subcontractors is becoming more common and often those types of arrangements are made to circumvent labour laws, tax obligations, etc. As well, in some cases, separate organizations are created and work contracted or subcontracted to them solely because they have no assets and are judgment-proof. Increasingly therefore, subcontractors are no longer "persons of substance" but, to the contrary, are often individuals or entities who are unlikely to be able to satisfy any judgments.

From a plaintiff's point of view, it will often be impossible to know whether one is dealing with an employee or independent contractor. There is no logical reason why plaintiffs injured by one purporting to act on behalf of an employer should have to distinguish between servants and independent contractors before commencing a suit. Similarly, there is no obvious reason why their remedy should be determined by that distinction.

For these reasons and probably many others, there is a trend evident in the case law to expand the

committed in the course of employment although it rested its decision on other grounds.

175 But see S. Chapman, "Liability for the Negligence of Independent Contractors" 50 L.Q.R. 71 (1934) who suggests that the rule has been misstated. There are so many exceptions to the rule that Chapman suggested that the rule should be stated positively.

176 G. Williams, "Liability for Independent Contractors"[1956] Camb. L. J. 180 at 195. This is to be contrasted with a servant "who is apt to be a man of straw without insurance". See Fleming at 410
scope of the employer’s vicarious liability for independent contractors.\textsuperscript{177} While the employer’s liability for independent contractors may be gradually expanding, it is nevertheless recognized that in certain circumstances, the employer should not be held liable for the acts of the contractor thereby perpetuating the need for the distinction.

It is clear the designation the parties may have chosen to describe their relationship is not of itself determinative of the issue.\textsuperscript{178} The parties may have chosen to characterize their relationship in a certain fashion to fit the requirements of labour or tax laws for instance. These characterizations are not necessarily connected with issues relating to vicarious liability.\textsuperscript{179} Moreover, there is no reason why such designations should be binding upon an innocent third party.\textsuperscript{180} This is an important point to make at the outset because the same tests traditionally used to distinguish between servants and independent contractors to determine issues relating to labour laws and tax obligations were also used to determine whether vicarious liability should be imposed. As will be seen below, courts have only very recently tried to develop an approach which would apply solely for the purposes of determining whether vicarious liability should be imposed.

A number of different tests were developed by the courts to distinguish between servants and contractors. The first of those was based on the degree of control the purported employer had over the worker. While that test is still in use, albeit in a more “modernized” version, other tests have

\textsuperscript{177}This trend was identified by some authors some time ago. See W. Friedman, “Liability for Independent Contractors” 6 Mod. L. Rev. 83 (1942); for a more recent observation see P. Atiyah, Accidents, Compensation and the Law, supra note 2 at 187-91 and Winfield and Jolowicz on Tort supra note 27 at 623.

\textsuperscript{178}In Weibe Door Services Ltd. v. MNR, [1986] 5 W.W.R. 450 at 453, McGuigan J. stated that “such an agreement is not of itself determinative of the relationship between the parties, and a court must carefully examine the facts in order to come to its own conclusion”. Followed in 671122 Ontario Ltd. v. Sagaz Industries Canada Inc., supra note 174; see also W.K. v. Pornabacher, [1997] B.C.J. No. 57 where the issue was whether the Church could be held vicariously liable for sexual assaults committed by one of its priests. The Church argued that it could not be held liable because its relationship with priests was a voluntary one, not an employment relationship. The court wisely rejected that argument noting that the Church had the power to select, control and dismiss, payment of wages, right to exclusive services, determination of place of work and hours of work.


\textsuperscript{180}See i.e Choi v. Sutton Group Realty, [1998] O.J. No. 269 where the employer tried to avoid liability based on its written contract describing the employee as an independent contractor. “Sutton [the employer] cannot hide behind the terms of its contract with Kim when those terms were not published to its potential customers”. at para. 35
been developed in order to supplant the control test which proved to be inappropriate in some circumstances.

A. Tests which focus on control

The conventional test for determining whether a master/servant relationship exists is known as the control test which originates from the mid-nineteenth century. Building on the premise that not every person who does work for another is an employee\textsuperscript{181}, courts of the time developed a test to distinguish between servants and independent contractors. Baron Bramwell is credited with having articulated the test which provides that "a servant is a person subject to the command of his master as to the manner in which he shall do his work."\textsuperscript{182}

While the early versions of the control test emphasized the master's right of control the manner in which the work was done,\textsuperscript{183} more modern versions incorporated other factors as well, such as whether the master had the power to select, suspend or dismiss the servant and whether the master paid the servant's wages.\textsuperscript{184} Other factors could also be considered but the point is that courts came to recognize that control over the method in which the employee carried on his/her duties could no longer be solely determinative, especially where the alleged employee exercised professional skills. Hence, the conventional control test was expanded to include consideration of whether the alleged employer exercised direct control and supervision in other spheres such as the "when" and "where."

\textsuperscript{181}Quarman v. Burnett, (1840) 151 E.R. 509

\textsuperscript{182}Yewers v. Noakes, (1880) 6 Q.B.D. 530 at 532-3

\textsuperscript{183}Sisters of St. Joseph of the Diocese of London v. Fleming, [1938] S.C.R. 172: "the test is whether the master exercises sufficient control over the servant in such a way that the master can direct the servant in how to perform the work"; Hôpital Notre Dame de l'Espérance v. Laurent, [1978] 1 S.C.R. 605: "The essential criteria of employee-employer relations is the right to give orders and instructions to the employee regarding the manner in which he is to carry out his work." at 128, citing Quebec Asbestos Corp. v. Couture, [1929] S.C.R. 166.

\textsuperscript{184}Marine Pipeline & Dredging Co. Ltd. v. Canadian Fina Oil (1964), 46 D.L.R. (2d) 495 at 502, referring to Short v. J. and W. Henderson, (1946) L.T. 417

Casting the relationship between an employer and a professional employee in terms of control became an exercise in futility. Cases dealing with the vicarious liability of employers for the negligence of a professional illustrate this difficulty. Moreover, if one views the scope of vicarious liability as defined by the risks created or exacerbated by the enterprise, one realizes that control is no longer determinative.\(^\text{186}\) “Clearly the ambit of risk cast by enterprise is broader than situations where management exercises control over the manner of doing work.”\(^\text{187}\)

Hence, a broader basis of liability needed to be recognized or, as Magnet put it, “the trigger must be wider.”\(^\text{188}\) Douglas is credited with being the first author to recognize that control could no longer be solely determinative. He put forward a different test, “the entrepreneur test” which includes the following elements:

\begin{itemize}
  \item[a.] Control: the ability to formulate and to execute policies, i.e., to make decisions in respect to the production or marketing functions
  \item[b.] Ownership: the legal (or equitable) title to the property used in the performance of the production or marketing functions
  \item[c.] Losses: the investment which is staked on the success of the venture
  \item[d.] Profits: the chance to receive a monetary gain from the transaction.\(^\text{189}\)
\end{itemize}

Shortly thereafter, the Privy Council recognized that in modern times, control over the employee was not always conclusive. In \textit{Montreal v. Montreal Locomotive Works}\(^\text{190}\), Lord Wright suggested

\[^{186}\text{But Flannigan, ibid, suggests yet another test, the enterprise control test. For Flannigan, exercise of non-nominal control is the fundamental consideration in identifying whether the worker is an employee or independent contractor. The objects of the control are the performance of the work and the assets required to perform the work. If control is exercised over those two elements in such a way that the worker has a chance to profit from his/her work, then the worker is operating an independent business. The chance of gain is a consequence of the worker having control and control is indicative of being in a position to take risks.}\]

\[^{187}\text{Magnet at 219}\]

\[^{188}\text{Ibid at 219}\]

\[^{189}\text{“Certainly, the person who has all four of the earmarks is an entrepreneur”. Douglas, “Vicarious Liability and Administration of Risk I” 38 Yale L. J. 584 (1929) at 595-6}\]

\[^{190}\text{[1947] 1 D.L.R. 161 (H.L.)}\]
a new test whose goal was to determine whether the worker was carrying on a business for himself. He suggested a fourfold test which is essentially a shorter rendition of Douglas' test, based on 1) control, 2) ownership of tools, 3) chance of profit, and 4) risk of loss.

The entrepreneur test therefore shifts the emphasis from the question of the employer's control over the employee, to the question of whether the employee is in fact conducting his own business. The basis of liability under the entrepreneur test has more of a proprietary basis and is aimed at determining whether, from the purported employee's perspective, he or she was carrying on his or her own business. Whose business is it? That question was relevant in the context of the Montreal case because the issue there was whether the defendant was subject to business taxes or whether it was conducting operations as part of the City's business which would exempt it from taxes. The test developed in the Montreal case however has gained modest attention in cases involving vicarious liability and is considered to have been enlarged by the "organization" test subsequently articulated by Lord Denning.

B. The organization test

It is interesting that the entrepreneur test is considered to have been enlarged by the organization test because as we will see shortly below, these tests ask entirely different questions. The entrepreneur test is concerned with whether the putative employee is self-employed. The test would be relevant to considerations of whether the employee should be subject to business taxes, etc. which was the issue in the Montreal case. But for the purposes of imposing vicarious liability, the issue is not so much whether the employee is conducting his own business but rather, whether the employee is part of the employer's enterprise and that is the question addressed by the organization

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191 An almost identical situation arose in Re Delta Parking Systems Ltd. and Tp. Toronto (1964) 48 D.L.R. (2d) 130 where the issue was whether Delta which operated a parking lot on Crown land, viz. the airport, was subject to business taxes.

192 See Mayer v. Conrad (1980), 27 O.R. (2d) 129 at 132 (C.A.) "This test has been enlarged by the more recent 'organization test' which was approved by Spence J. in Co-operators Ins. Ass. v. Kearney..." see also McCrindle v. Westin (1985), 35 C.C.L.T. 183 where the court outlines both tests. The court in McCrindle did not chose one over the other but rather, decided that on the facts of the case, both tests were satisfied. The court in W.R.B. v. Plint (1998) 161 D.L.R. (4th) 538 (B.C.S.C.) did the same thing, stating that no matter which of the two tests was used, vicarious liability would follow.
test. And so, it seems that courts which have looked upon the entrepreneur test as having application to issues of vicarious liability have really been asking the wrong question.

The organization test is said to originate from the following speech of Lord Denning in *Stevenson Jordan & Harrison Ltd. v Macdonald & Evans*:<ref>

"As my Lord has said, it is almost impossible to give a precise definition of the distinction. It is often easy to recognise a contract of service when you see it, but difficult to say wherein the difference lies. A ship’s master, a chauffeur, and a reporter on the staff of a newspaper are all employed under a contract of service; but a ship’s pilot, a taxi-man, and a newspaper contributor are employed under a contract for services. One feature which seems to run through the instances is that, under a contract of service, a man is employed as part of the business, and his work is done as an integral part of the business; whereas, under a contract for services, his work, although done for the business, is not integrated into it but is only accessory to it."

According to Flannigan, there have been two interpretations given to Lord Denning’s dicta:<ref> The first, more narrow interpretation, asks whether the worker’s duties are integral to the business, whether they are part of the main functions of the employer. In that context, one would have to try to distinguish between the employer’s main activities and those which are merely accessory.

The second, broader interpretation, asks whether the putative employee is part of the employer’s business. The inquiry there relates to whether the worker is operating a separate business or one which is part of the employer’s. Or as Fleming put it, “was his work subject to co-ordinational control as to the ‘where’ and ‘when’ rather than the ‘how’?” So long as the worker is subordinated to the employer’s organization and is expected to obey the employer’s orders from time to time, he or she will be deemed to be an employee.<ref>
The organization test has been used to determine whether the employee was part of the employer's business or, whether he was conducting his own. If he was part of the business, vicarious liability would follow.

The Ontario Court of Appeal has recently endorsed the organization test in 671122 Ontario Ltd. v. Sagaz Industries Canada Inc. There, AIM had been retained by Sagaz to market its products to Canadian Tire. While doing so, AIM's principal bribed a Canadian Tire employee which resulted in Sagaz obtaining Canadian Tire's business at the expense of the plaintiff company. One of the issues before the Court of Appeal was whether Sagaz should be held liable for AIM's wrongful acts. To determine that issue, the Court adopted the organization test and imposed vicarious liability on Sagaz. It considered the facts in the context of whether AIM functioned as part of Sagaz' organization and whether its work was done as an integral part of Sagaz' business.

The facts in Sagaz revealed that AIM and its employees worked under the direct supervision and direction of Sagaz and exercised no independent discretion in the performance of its duties. Vicarious liability was imposed because AIM functioned as integrated elements of Sagaz' organization. Moreover, the wrongful acts were committed within the scope of AIM's mandate and in furtherance of Sagaz' objectives.

What is interesting about the Sagaz case is that the Court of Appeal did not use the organization test to determine whether AIM should be broadly characterized as an independent contractor. Rather, it used the test to determine whether the nature of the relationship between the parties was such that Sagaz should be vicariously liable for the acts of AIM. It imposed vicarious liability because for a specific purpose, i.e., to get the Canadian Tire account, AIM acted as part of Sagaz' organization. AIM was otherwise a separate legal entity.

Had the court utilized the entrepreneur test, likely the result would have been different. AIM was

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co-ordinational control over the day care provider.

197 Supra note 174; see also Shapiro v. Canada (M.N.R.), [2000] T.C.J. No. 305 where the Tax Court of Canada adopted the organization test.
clearly a separate legal entity operating its own business. But with respect to particular function it performed on behalf of Sagaz, it was deemed to be part of Sagaz's organization.

Courts previously focussed on characterizing the relationship between the putative employer and worker. If a certain degree of control over the putative employee was exercised by the employer, the worker would be described as an employee for all purposes relevant to vicarious liability. The problem with this approach is that there is no attempt made to isolate the risk which gave rise to the wrongdoing. Take for example the facts in Bazley but instead of being a dormitory supervisor, Curry was a cleaner engaged under contract by the residential home. The contract described the cleaner as an independent contractor but as we have seen, courts will go beyond the wording of the contract. Assume that the operator of the home exercised a sufficient degree of control over the cleaner that he is characterized as a servant. The employer had control over the when, how and where the work was to be performed. If the cleaner sexually assaults a resident/child, will the employer be found liable? One would think not because there is an insufficient relationship between the cleaner's duties and the assaults. Hence, using a test to determine whether the cleaner is an independent contractor or employee adds no value to the inquiry. What should occur instead, is that courts should isolate the risk involved, i.e., sexual assault, and determine whether there was any degree of job-related power vested with the cleaner which made the assaults more likely. Thus, whether the relationship between the operator and the cleaner can broadly be characterized as one in which control exists should have no bearing on the issue of whether the employer should be held vicariously liable.

In the specific context of vicarious liability, courts have recently recognized the fact that in some cases, status characterization in a broad sense is not determinative. As the Sagaz case illustrates, courts have started moving away from using the conventional tests and instead, focussing on the specific risk created and the relationship between the parties with respect to that risk and that risk alone.

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C. The true nature of the relationship

Recent cases have put the role of the recognized tests into question. In C.A. v. Critchley\textsuperscript{199}, the issue facing the British Columbia Court of Appeal was whether the Crown, which operated a wilderness home for delinquent minors, should be held vicariously liable for sexual assaults committed by the operator of the home, Critchley. Under his contract with the Crown, Critchley was designated as an independent contractor. Speaking on behalf of the majority of the court, McEachern J. dealt with the issue as follows:

"The question is whether the Crown should be liable, as a matter of law, for the early wrongs of Mr. Critchley in the circumstances of this case, keeping in mind that his designation as an independent contractor may not be a significant factor in the modern law that tends to look not at traditional classifications but rather at the true nature of the relationship."\textsuperscript{200}

McEachern went on to hold the Crown vicariously liable because 1) the Crown had conferred parental authority to Critchley, 2) the Crown had the power to control the operation of the home and 3) there was a close connection between the authority conferred on Critchley and the wrongs committed.

Mr. Justice McEachern did not address the issue of whether there existed an employment relationship between the Crown and Critchley. Rather, he isolated factors which established that a certain degree of authority was vested with Critchley which created a risk that the wrong occur and there was a connection between the two. This is in essence the test developed by the Supreme Court in Bazley.

McEachern’s statement about discovering the “true nature of the relationship” was subsequently

\textsuperscript{199}[1998] B.C.J. No. 2587

\textsuperscript{200}At para 107. Emphasis added. The trial judge had focussed on the “total and actual relationship of the parties”. 35 B.C.L.R. (3d) 234 at 283-4 per Allen J. The trial decision was followed in W.R.B. v. Plint, (1998) 161 D.L.R (4th) 538 where the court had to decide as to whether the Crown or the Anglican Church was the employer of lint who had sexually assaulted residents of an Indian residential school. The court held that if one considers the total circumstances, both the Crown and the Anglican Church had control over the activities of the Indian residential school.
approved by the Supreme Court of Canada in *Jacobi* \(^{201}\) and in other decisions\(^{202}\). For example, in *K.L.B. v. British Columbia*\(^{203}\), the issue was whether the Crown should be liable for abuse perpetrated by foster parents into whose care a number of children were placed. The court, while acknowledging that foster parents could not be regarded as employees in the traditional sense, nevertheless proceeded to determine the nature of the relationship established to see if it could attract vicarious liability. The court found that there existed a contractual arrangement whereby children were placed into the care of foster parents. The Crown representatives approved the homes, could remove the children at any time, controlled funding for the home and supervised the home through social workers. Hence, the court considered factors relevant to the modern "control test." But the court also considered the organization test. It found that the Crown could not have discharged its responsibilities as guardian of the children without the assistance of foster parents.

What the *K.L.B.* court did was to consider the control test and the organization test to determine the nature of the relationship between the parties for the purposes of attributing vicarious liability. The court was not concerned with whether the foster parents could be considered employees of the Crown and in fact, it admitted that the foster parents could not be employees in the "traditional" sense. The court nevertheless found the Crown vicariously liable for the acts of the foster parents. The same type of approach was adopted by the Ontario Court of Appeal in *Sagaz* which involved issues relating to whether an agent could engage vicarious liability of its principal.\(^{204}\) The court

\(^{201}\) At para 58 per Binnie

\(^{202}\) The trial decision in *Critchley* held that the nature of the relationship itself was crucial. (1997) 36 C.C.L.T. (2d) 224; The trial decision was followed in *K.L.B. v. British Columbia* (1998), 51 B.C.L.R. (3d) 1 where the Crown was held vicariously liable for the acts of foster parents. The court in *K.L.B.* acknowledged that the foster parents were not employees of the Crown in the traditional sense. However, that did not preclude the finding of vicarious liability because it was the true nature of the relationship which determined that question. See also *M.B. v. British Columbia*, [2000] B.C.J. No. 909 (May 3, 2000); and in 671122 v. *Sagaz* supra note 174. But see *contra M.D. (guardian ad litem of) v. B.C.*, [2000] B.C.J. No. 915 where the issue was also whether the Crown could be held liable for the acts of a foster parent. The court did not refer to *Critchley* but instead, determined whether the Crown exercised any control over the manner in which the foster parent carried out her function. There existed some control which was indicative of a "near employment relationship".

\(^{203}\) Ibid

\(^{204}\) The same sort of approach was recently taken by the Newfoundland Supreme Court in *Doe v. Bennett*, [2000] N.J. No. 203. The 36 plaintiffs alleged they had been sexually assaulted by a priest. The court found the Church and three of the Bishops vicariously liable. The court referred to the "true nature of the relationship" between the priest and the bishops to hold the bishops "vicariously liable" because they were in essence the priest's
focused its attention on determining whether the wrongdoer was an independent contractor or, one for whom vicarious liability could attach.

Both the Critchley and K.L.B. cases preceded the Supreme Court decisions in Bazley and Jacobi. However, both cases are referred to with approval by Binnie in Jacobi who refers to them as examples of cases where there had been delegation of parental authority which attracted vicarious liability.

The issues presented in Critchley and K.L.B. were revisited in the recent case of M.B. v. British Columbia. There, the plaintiff claimed to have been sexually assaulted by a foster parent. The court found that the facts were indistinguishable from those two precedents and imposed vicarious liability on the Crown for the acts of the foster parents. In its discussion of this issue, the court acknowledged that the Crown should not be liable for every harm done by foster parents. "There must be a degree of effective control over the foster parent to justify vicarious liability." The court described the control which the Crown had in Critchley and K.L.B. as "administrative control." which was also present in M.B.

These cases raise the issue of where to draw the line in imposing vicarious liability for the acts of independent contractors. The courts in those cases recognized the danger in extending, without limits, the scope of vicarious liability for independent contractors. In all three cases, the justification for imposing liability on the Crown rested, at least in part, on the fact that the Crown had retained a certain degree of "administrative"control over the operation of the homes, the level of which varied according to the complexity of the operation. This type of control varies from the control factor traditionally used to determine whether a worker was an employee or independent contractor. As we have seen above, in determining whether someone was an employee or not, courts focussed

employers and knew or should have known about the assaults. There was really insufficient evidence to allow the court to reach the opinion that the bishops were employers and it seems obvious that they were in reality being held directly liable for having known about the assaults. Nevertheless, the case raises an interesting issue about the definition which should attach to "employer".

305 Supra note 202

306 Ibid at para 222
on whether the employer exercised control over the worker. This differs from a consideration of whether the employer controlled the operation. 207

The case of *F.S.M. v. Clarke* 208 is instructive on this point. Clarke was hired as the dormitory supervisor for an Indian residential school operated by the Anglican Church. The Crown has entered into an agreement with the Church to operate the home in order to fulfill its duties under the Indian Act. The Crown retained some supervisory authority over the home and admitted that it was vicariously liable for the acts of Clarke, but argued that the Church was equally liable.

Prompted by a decision of the Canadian Labour Relations Board, an agreement had been reached classifying employees of the home as federal employees. Notwithstanding their designation as such, the federal government argued that employees of the home and specifically, Clarke, were also employees of the Church because the Church retained control over the discharge of his duties. The court found the Church liable because it “maintained control over the structure and direction of the school, including the duties of Clarke...[t]he Church remained a recognized institutional component.” 209

The element of control in this context goes to the issue of who owns the risk and consequential liabilities. **Control becomes an indicia of ownership.** The enterprise creates the risk and puts things into motion. Once the risk ripens into harm, it is rendered liable no matter whether the damages could have been avoided or not, so long as there was a sufficient connection between what the wrongdoer was authorized to do and the wrongdoing. This is the import of Mr. Justice Binnie’s decision in *Jacobi*. Liability is premised on a notion of ownership and not one of responsibility in the sense that the enterprise is rendered liable because it failed to take adequate precautions to avoid

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207 See also *Tucker v. Asleson*. [1991] B.C.J. No. 954 (B.C.S.C.). The issue there was whether the Crown could be held vicariously liable for the negligence of an employee of the contractor it retained to perform highway maintenance. The Crown argued that the contractor was an independent contractor. The court decided that the contractor was not an independent contractor. Although the contractor had the right to hire and dismiss the employee, the Crown trained, directed, instructed and supervised the employee. It therefore retained an administrative type of control over the activity, although it had no direct control over the employee.

208 (1999) 11 W.W. R. 301

209 At para 153
the injury.

The notion of employer "control" in this context therefore acts as a stepping stone to a finding of vicarious liability. It would be incorrect to suggest however, as some authors have, that employer control is the basis of liability. Establishing that the employment enterprise exercises a certain element of control over the operation which is related to the wrongful conduct on the part of an employee is proof of ownership. Cases such as Critchley have emphasized that what is required is control over the operation, not over the employee. I would go further and suggest that control should be exercised over the activity which was related to the risk and wrongful conduct and not, control in a general manner. There must be a connection between the control exercised by the employer and the wrongful conduct.

Indeed, it is the strength of the connection between the wrongdoing and the employer’s business which determines liability. Tests such as the control test and the organization test are still relevant but only to the extent that they may assist in determining whether there is a strong connection between the wrong and the activity, not to determine the existence of an employment relationship. This was the approach taken by the Court of Appeal in Sagaz.

The designation of the wrongdoer as an employee or independent contractor therefore seems to be losing importance. In fact, I would suggest that given recent developments, the distinction should be abolished when it comes to deciding whether vicarious liability should be imposed. The scope of the liability should not be determined according to whether the employer had control over the wrongdoer or, whether the wrongdoer can be characterized as an employee. Rather, the scope should be circumscribed by the risk-creating activities of the enterprise. A test such as the organization test is helpful in identifying the boundaries of the enterprise. Whose business is it? Whose risk is this? So long as the wrongdoing was a broadly foreseeable consequence of the enterprise’s activities, it belongs to that enterprise.

This may display a trend toward abolishing the traditional rule that an employer is not liable for the
acts of an independent contractor it may have hired. Although that was the general rule, a number of exceptions applied. The primary exception to the rule relates to non-delegable duties. The factual circumstances under which a court will find a non-delegable duty of care remain from clear. Non-delegable duties have been imposed on entities carrying out statutory obligations and those who are subject to statutory obligations. Non-delegable duties have also been imposed where the employer hires an independent contractor to carry out an obligation which is intrinsically dangerous or could have serious consequences if performed negligently.

The issue of liability for non-delegable duties should not be confused with vicarious liability. There are two possible grounds on which to distinguish the employer’s liability under vicarious liability and for breach of a non-delegable duty. First, the two types of liability have been distinguished on the basis that where the employer is held liable for breach of its own duty, the resultant liability is personal, not vicarious. Secondly, the scope of the liability which results from being held liable for breach of a non-delegable duty is much narrower than an employer’s liability for the acts of servants.

It is said by some authors that the employer’s liability for breach of a non-delegable duty is personal,

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210 The rule was established in Quarman v. Burnett, (1840) 6 M. & W. 499 and has since been followed. See i.e. The City of St. John v. Donald, [1926] S.C.R. 371 and Yepermian v. Scarborough General Hospital (1980), 28 O.R. (2d) 494 (Ont. C.A.)


213 According to the leading case on this issue “intrinsically dangerous” means acts which by their very nature, involve special danger to others. Honeywill v. Larkin Bros., [1934] 1 K.B. 191 at 197

direct liability as opposed to it being vicarious. In other words, the employer is held directly liable for a breach of its own duty whereas traditionally, it was thought that vicarious liability was truly "vicarious" in nature. The distinction may have a practical effect when considering whether the parties are joint tortfeasors or not and whether there arises any right of contribution or indemnity between them. Courts which have dealt with these issues in the context of non-delegable duties have held that the employer and the independent contractor, while the basis of the claims against them differed, were nevertheless to be considered joint tortfeasors.

3. Reconciling the New Developments with the Bazley and Jacobi decisions

The apparent trend toward abolishing the distinction between contractors and employees for the purposes of vicarious liability can be rationalized with the Bazley decision. It is clear from the Critchley case and those which have followed in its footsteps that, for the purposes of determining whether vicarious liability should be imposed, adherence to traditional classifications of independent contractors, agents and servants is no longer determinative. Courts are expected to examine the relationship between the parties to determine whether liability should be imposed. In K.L.B. for example, it was clear that the foster parents could not be considered servants of the Crown. The court did not attach any importance to this fact and instead, concentrated on the nature of the relationship between the foster parents and the Crown.

Both the Bazley and the Jacobi cases dealt the issue of vicarious liability for the torts of employees, not those of independent contractors. The court however clarified the basis upon which vicarious liability can be imposed and the approach adopted can easily be reconciled with the evident trend toward expanding liability for the tort of non-employees. The Supreme Court endorsed the "enterprise risk" approach to vicarious liability where liability is imposed because the employer engaged in an activity which carried certain risks, i.e., the risk that an employee could abuse of its

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215 Klar on Torts supra note 26 at 486, Fridman on Torts, supra note 37 at 341, but see Fleming at 434 who describes the liability as a "disguised form of vicarious liability". Atiyah on the other hand maintains that whether the liability is personal or vicarious depends on the type of duty imposed on the employer. If the duty is strict then the liability is personal but otherwise, it is vicarious. Atiyah at 338

job-created power. The finding of liability depends not on traditional notions of whether the wrongful conduct was done "in the course of employment," but rather, on whether there was a sufficient connection between the conduct and the risk created by the enterprise. The activity itself is the focus of liability.

The connection between the initial risk created by the employer and the wrongdoing perpetrated by the employee lies in what the employer authorized the employee to do. This is consistent with the Salmond test which, it may be recalled, imposed liability on an employer where the wrongful conduct was connected with acts the employer had authorized so as to render the wrongdoing a mode, albeit an improper mode, of doing something that was authorized. In Bazley for instance, liability flowed from the fact that there was job-created power vested in Curry. The employer had created a situation where the risk of sexual assault existed. By conferring job-created power and intimacy to its employee, Curry, it became vicariously liable for Curry's actions. Whether Curry was an employee or an independent contractor would have made no difference. Curry was vested with the power over the children which presented a risk and when the risk materialized, the employer would be found vicariously liable no matter what its relationship was with Curry. This was the outcome of Critchley, which considered that question prior to Bazley.

As we have seen, the employer in Critchley was held vicariously liable because it had control over the operation of the home and had delegated some authority to Critchley which made the assaults more likely. The risk that the assaults take place was directly related to the conferral of authority over the children which the employer, in this case the Crown, had delegated to Critchley.

The suggested approach is also consisted with the test we proposed in the previous chapter for determining whether vicarious liability should be imposed. The approach suggested included a two-step analysis. At the first level of the inquiry, the issue is whether a tort has been committed. The second step asks whether the employer should be liable for the tort. Liability for the tort does not depend on whether the wrongdoer was an employee, agent or independent contractor. Rather, the risk must be isolated and it must be determined whether the employer maintained any administrative control over it. The court must assess the true relationship between the parties in an effort to determine whether there is a strong connection between job-related duties, i.e., what was authorized,
and the misconduct. The fact that the employer retained a certain element of control over the risk will be important. In addition, there must be a connection between the activity being performed by the wrongdoer which led to the misconduct and the wrongdoing.

Expanding the scope of the liability for independent contractors will no doubt increase the burden on enterprises who retain the services of contractors. This, unfortunately, is one of the consequences of the Supreme Court's decisions. Enterprises who hire independent contractors must ensure themselves that those contractors carry liability insurance. The enterprise may nevertheless be held liable to third parties but as between the employer and the contractor, the employer should be able to obtain contribution or indemnity from the contractor at fault.\(^{217}\)

The issue of contribution and indemnity is in fact the subject matter of the next chapter. So far, we have dealt with the question of whether the victim of an intentional tort should be entitled to recover from the employer of the wrongdoer. Whether the tortfeasor was an employee or a contractor retained by the employer. What we have not yet dealt with is the fact that although the employer may be found liable to the plaintiff, the employer may not necessarily bear the burden of the loss. Indeed, cases have held that the employer has a right of indemnity against the wrongdoer. While the right of indemnity may prove to be a hollow one more often than not, it does deserve some consideration as no discussion of vicarious liability would be complete without considering where, in reality, the burden of the loss eventually falls.

\(^{217}\)but if the employer is held vicariously liable for the independent contractor would the contractor not be considered an unnamed insured under the employer's policy? If so, how could rights of indemnity and contribution be worked out? These problems are addressed in the following chapter.
Chapter 4: The rights of contribution and indemnity between employer and employee

We have so far been concerned with the right an injured party may have against the wrongdoer and his/her employer under the doctrine of vicarious liability. We have seen that from the plaintiff’s perspective, the employer and employee merge into one entity which bears the liability for employee negligence and in some cases, for intentional torts. However, both remain liable to the plaintiff and they are considered joint tortfeasors. As between themselves, should the employer and the employee have rights of indemnity and contribution? This begs the question of who should ultimately bear the loss.

While theoretically, both an employer and an employee can be held liable to a plaintiff, in practice, any judgment will be paid by the employer either because it has the “deeper pocket” or it has access to insurance. As we will see below, cases have recognized that the employer, in those circumstances, may be entitled to be indemnified by the employee for losses incurred because of the employee’s tortious conduct.

In this chapter, we will examine the relationship between the employer and employee for two purposes. First, should there be rights of contribution and indemnity between those parties? Secondly, should those rights be treated differently according to whether the employee committed negligence or an intentional tort?

It may appear inconsistent with our theory of vicarious liability to even consider these questions. A consideration of the parties’ rights against each other may oblige us to abandon the fictional enterprise created for bearing vicarious liability. If the enterprise is one whole entity capable of bearing vicarious liability then, the enterprise should incur the loss and that should be the end of the inquiry. But the matter is not so simple. When we reviewed issues relating to vicarious liability, we were considering whether an injured party had a remedy against the employer. We were looking at the situation from the plaintiff’s point of view. We were ignoring the fact that there was in reality
three parties to the equation: the plaintiff, the employer and the employee. It seemed logical to allow the plaintiff to recover from both the employee and the employer for the employee's misconduct. After all, the plaintiff has no knowledge of any contractual arrangements made between the employee and employer. The purported employee may be an independent contractor for all the plaintiff knows. That should not bar the plaintiff from recovering from the employer. As well, the parties to the employment relationship may not have expected the loss to fall on the employer and may have provided otherwise by way of contract. The parties to the employment relationship may have rights against each other which would not affect the plaintiff's remedies.

As we have seen, prior to the Supreme Court endorsing the enterprise risk theory, the basis of the employer's vicarious liability and that of the employee's liability had a different basis, although they were considered joint tortfeasors. The employee was held liable for the tort he or she committed. The employer's vicarious liability was considered truly vicarious in the sense that it had committed no actionable independent act and was held liable merely because it employed the wrongdoer. Under that theory of liability, it was at least arguable that a master who was held vicariously liable for the torts of his servant was entitled to be indemnified by the servant. But if, as we have seen, the employer's liability is of a "mixed" type which includes an independent basis of liability, i.e., the creation of risks, then it might seem inappropriate to allow the employer to recover full indemnity. Indeed, it could be said that the most an employer would be entitled to claim is contribution from its employee or, that it is the employee who should be entitled to indemnity.

The position I will develop in this chapter is that in certain circumstances, it makes no sense, both from a practical and theoretical point of view, to allow the master to claim indemnity or contribution from its employee. The law as it stands today in Canada allows for such rights although the cases on this point are far from being cohesive, mainly it seems because some Canadian courts have reluctantly adopted the English cases allowing the master's right of indemnity whereas others have attempted to restrict their application. As we will see, the cases do not establish a clear line of authority. Moreover, no matter how these cases have been decided by courts, it is incontrovettible that in practice, the right of indemnity is rarely exercised. Hence, the whole area needs to be reexamined, especially in light of the recent Supreme Court of Canada cases which discuss at length the theory of vicarious liability and its justifications.
1. The Right to Indemnity

The issues raised by these questions have not been considered by our Supreme Court\(^{218}\) and as will be discussed below, there is a paucity of Canadian cases on this topic. The current law in this area is controversial for several reasons. Cases have recognized that an employer who is held vicariously liable is entitled to be indemnified by an employee guilty of wrongdoing. The decision as to whether the master should be entitled to pursue a right of indemnity involves balancing two policy considerations. On the one hand, there is a belief that justice requires that the person who caused the damage should be called upon to pay.\(^ {219}\) On the other hand, vicarious liability is imposed on the employer because at least in part, it is the most efficient loss distributor. If vicarious liability is based on a conscious risk-allocation and fairness principles, it would subvert the equilibrium created by allowing the employer to recoup its losses from the employee. These two policies will obviously lead to conflicting results in some cases, particularly where one or both of the parties are insured.

There are three grounds upon which a right to indemnity can arise on behalf of an employer. The right may arise from a contractual term, express or implied, it may be statutory or, arise from the common law.\(^ {220}\)

A. Implied Contractual Term

It is said that the master's right of indemnity from an employee has been part of the common law since at least the mid-eighteenth century but that the rule was not clearly laid down until the House

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\(^{218}\) Although there is some mention made of the issue by LaForest in *London Drugs* supra note 8.


\(^{220}\)This right of indemnity is based upon the principle that every one is responsible for his own negligence, and if another is, by a judgment of a court, compelled to pay damages which ought to have been paid by the wrongdoer, such damages may be recovered from the wrongdoer. I am also of opinion that such right of indemnity exists independently of statute, and whether or not contractual relations exist between the parties, and whether or not the negligent person owed the other a special or particular legal duty not to be negligent.” *McFee v. Joss*, 56 O.L.R. 578 at 584-5.
of Lords decision in *Lister v. Rumford Ice and Cold Storage* in 1957.\(^2\) Until *Lister*, the basis upon which a master was entitled to recover indemnity from an employee whose acts rendered the employer vicariously liable was unclear. If the employer was itself directly negligent, there was no real issue that the most it was entitled to was contribution.\(^2\) Where however, the employer was not itself at fault, the issue was whether a common law right arose for breach of an implied term of the employment contract, or whether the employer was restricted to its remedies under the legislation applicable to tortfeasors.\(^3\)

The issue came to be decided by the House of Lords in *Lister*. There, the appellant was employed as a lorry driver by the respondent company. During the course of his employment, the appellant negligently reversed a lorry, injuring a fellow employee who also happened to be his father. The father claimed compensation from the employer which was held liable for its employee’s negligence. The negligent employee was not sued. The employer’s insurer then commenced a subrogated action against the appellant, seeking indemnity for the amount it paid to the injured worker.

There were essentially two issues before the House of Lords. The first was whether there was an

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\(^{2}\) [1957] A.C. 555: The same rule was established in the U.S. by Cardozo, J. in *Schubert v. Schubert Wagon Co.*, (1928) 249 N.Y. 253 where he recognized the master had a right of indemnity from the servant; J. Jolowicz in “The Right to indemnity Between Master and Servant” [1956] Camb. L.J. 101 at 104 says: “It is therefore submitted that it has been part of the common law since the mid-eighteenth century at the latest, that a master, who has become liable to pay damages for an injury caused by the negligent act of his servant, has a right of action over against the servant”.

\(^{3}\) In *Jones v. Manchester Corporation*, [1952] 1 T. L. R. 1589 (C.A.), a hospital and one if its doctors were held liable for the death of a patient. Both defendants were held responsible to the plaintiff and each sought indemnity from the other. The Court of Appeal denied both requests for indemnity but allowed the parties to recover contribution and for that purpose, 80% liability was attributed to the hospital, and the remaining 20% to the doctor. The hospital was found to be independently liable to the plaintiffs. Lord Singleton seems to have found the hospital directly negligent whereas Lord Denning found the hospital had breached a non-delegable duty of care. Hodson L.J., dissenting, would have allowed the hospital to recover full indemnity from the physician on the basis that the physician had breached an implied term of her contract, to use reasonable skill.

\(^{2}\) In *Semtex Ltd. v. Gladstone*, supra note 219, the employer sought to recover from its negligent employee, sums it had been found vicariously liable to pay to those who sustained damages as a result of the employee’s negligence. The arguments put to Finnemore J. were two-fold. First, the employer argued it had a common law right to indemnity because the employee had breached his duty to use reasonable skill. The second argument was based on legislation which created the right of contribution between tortfeasors, at the court's discretion. Finnemore allowed the claim and held that under either argument, the employer was entitled to succeed.
implied term in the employment agreement that the employee would use all due care in performing his duties. The House of Lords was unanimous in finding that such a term could be implied and that the breach of that duty entitled the employer to be indemnified by the employee.

The second, more difficult issue on which the House of Lords was divided 3-2, was whether it could be implied that the employee would obtain the benefit of insurance obtained by the employer. The appellant had argued that an implied term of the employment was that the employer would indemnify him for any act done by him in the course of his employment and that he would benefit from any insurance obtained by the employer. The majority of the court refused to imply such a term.

The *Lister* case was subsequently accepted as authority that a master is entitled to indemnity from a servant for whose negligence the master was found liable to pay damages to a third party. However, it was quickly realized in Britain that the decision would have a serious adverse impact on employee and employer relations. A Committee was established to study the implications of the decision and came to the following conclusion:

"The decision in the *Lister* case shows that employers and their insurers have rights against employees which, if exploited unreasonably, would endanger good industrial relations. We think that employers and insurers, if only in their interests, will not so exploit their rights." 224

Following receipt of the report, the British insurers entered into a "gentleman's agreement" that they would not institute proceedings against employees of insureds in respect of death or injury to a fellow employee. Other jurisdictions such as Australia have resorted to legislative solutions to overrule the possible effects of the *Lister* case. 225

The impact of the *Lister* decision was further restricted by a subsequent decision of the Court of


225 *FAI Insurance Co. Ltd. v. A R Griffiths & Sons* (1997) 7 A.L.J.R. 651 (Queensland C.A.); *Fleming* at 299-300
Appeal in *Morris v. Ford Motor Co.* There, Lord Denning refused to allow a subrogated claim against an employee of a firm with whom the plaintiff had contracted. The plaintiff company argued it should be subrogated to the employer's right to claim indemnity from its negligent employee. The outcome rested primarily on the interpretation of an indemnity agreement between the two companies and on principles of subrogation. Nevertheless, Lord Denning made a point of saying that as a matter of principle and despite *Lister* which he described as "an unfortunate decision," it was not equitable to allow recovery from the employee where clearly, the expectation was that the damage would be covered by insurance. In concurring reasons, James L.J. stated that to allow such rights of subrogation in an industrial setting would be unacceptable and unrealistic.

The *Lister* case was recently followed by the English Court of Appeal reaffirming that *Lister* stands for the general proposition that a master is entitled to indemnity from a negligent employee. Other courts had not been so willing to accept the *Lister* case as authority on that basis. In *Harvey v. O'Dell Ltd. et al* for example, McNair J. rejected the idea that *Lister* was to be read as laying down a general proposition. Rather, McNair was prepared to narrow the scope of the *Lister* decision to instances where the employee, while performing the very tasks he was hired to do, implicitly agrees to indemnify his master for any acts of negligence. The breach of an implied term of the employment agreement could not be the basis of an action for indemnity where the negligence

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226See note 224

227"If the man himself is made to pay, he will feel much aggrieved. He will say to his employer 'Surely this liability is covered by insurance'. He is employed to do the master's work, to drive his master's trucks, and to cope with situations presented to him by his master. The risks attendant on that work- including liability for negligence-should be borne by the master. The master takes the benefit and should bear the burden. The wages are fixed on that basis. If the servant is to bear the risk, his wages ought to be increased to cover it." ibid at 798


229[1958] 1 All. E.R. 657

230Note that McNair refers to the implied term as one where the employee agrees to indemnify the employer whereas in *Lister*, the implied term was that the employee would use reasonable skill while performing his duties. There is a difference between the two since the breach of an implied term to use reasonable care may not necessarily give rise to an obligation to indemnify.
pertained to a task the employee was not specifically hired to do. The Harvey decision was criticized for its attempt at narrowing the scope of the Lister case. Evidently, judging from the fact that the Lister case has since been followed, the soundness of the Harvey decision remains doubtful.

The Lister decision was first adopted in Canada in Texada Towing Co. Ltd. v. Minette and then followed in the leading Canadian case of D.H. Overmyer Co. of Canada v. Wallace. In Overmyer, the majority of the Court of Appeal adopted the Lister and Texada cases without much discussion, simply saying that the employee had failed to exercise reasonable care and as a consequence, was liable to his employer.

The dissenting judgment of Justice Seaton offers a more detailed analysis of the issues raised. More important, it also illustrates the strong reluctance on the part of judges to recognize a general rule which would allow the master to claim indemnity. Seaton rejects the possibility that Lister established a general rule that all employees are liable to their employers when they fail to exercise care. In his view, the impact of the Lister decision must be restricted on two bases. First, it must be limited to situations where the employer’s claim arises out of a situation where it was held vicariously liable to a third party. “It is vicarious liability not employment that is the basis for liability.” Secondly, relying in part on the Harvey case, it should be restricted to liability for a

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231 McNair did however allow the employer to recover indemnity under a statutory right.

232 J. Jolowicz, “The Master’s Indemnity-Variations on a Theme” 22 Mod. L.R. 71(1959)


234 (1975) 65 D.L.R. (3d) 717 (B.C.C.A.) The issue before the court in that case was whether the employer of a general manager could recover losses due to the latter’s negligence. The losses in question were not sustained as a result of the employer being held vicariously liable to a third party, but rather, were rental payments owing by the employer as a result of the general manager failing to give notice of the termination of a lease as he should have.

235 At 721. Canadian courts have not followed this suggestion. Cases have allowed employers to obtain indemnity from their employees for other losses as well, i.e. Petrone v. Marmot Concrete Services, [1996] A.J. No. 104; Sira Holdings v. Hudak, [1995] S.J. No. 759; Canadian Packers Inc. v. Kennedy, 27 Sask. R. 201 (employee held liable to employer for the loss of money he was holding on behalf of employer) and see also Wiebe v. Lepp (1974) 46 D.L.R. (3d) 441 where it was found that an employee to whom property had been entrusted by the employer could be held liable to the employer if he was negligent. see also Ozmun Holdings Ltd. v. Young, [2000] S.J. 18 where the court was not prepared to imply a term that the employee would indemnify the employer for his
tort committed in the exercise of a “skilled job or art or profession” for which the employee was hired. 236

Seaton’s judgment contains a discussion of why the master’s right of indemnity should not be accepted as a general rule in Canada. Seaton stated that an employee’s duty to take reasonable care is not absolute. Even where a term to use reasonable care can be implied in the employment relation, not all breaches of the duty will necessarily give rise to a right of indemnity. He says:

“In the event of injury to a stranger it is reasonable that the person who causes that injury ought to bear the loss even if his error be only slight. But the same reasoning is not applicable to the employer-employee relationship. If by the slightest error an employee causes loss, that is one of the risks of the enterprise that the employer accepts. No employee is infallible and the employer allows for that. He takes it into account when he insures and when he supervises that employee and when he estimates his costs. Losses due to employee error are one of the expenses of the business.” 237

This reasoning has been followed by other courts and this shows a growing trend evident among the very few recent cases reported on this issue, to recognize that not all employee errors give rise to a right of indemnity 238. In Ozmon for instance, the court specifically limited the remedy to instances where the employee had been reckless, wilful or where there was evidence of a fraudulent loss or collusion in the absence of implied or express contractual terms. As Fleming put it, “carelessness negligence. In that case, the employee had been involved in various motor vehicle mishaps. The English cases are to the same effect; see Salmond and Heuston on Torts. supra note 107 at 542 and cases cited therein.

236 The right to claim indemnity from an employee has been, in some cases, restricted to employees who possess special skills for which they were hired: see Christie, Employment Law in Canada (Toronto: Butterworths, 1980) at 475; Kleinhasser v. Alexander. [1994] S.J. No. 434 (farm labourer did not possess special skills or training); Petrone ibid (supervisor had special skills); Dominion Manufacturers v. O’Gorman (1989), 24 C.C.E.L. 218 (Ont. Sup. Ct., Lissaman J.) (Accountant); Programmed Communications v. Ludgate, [1999] R.R.A. 187 (Que.S.C.) (accountant); Cole v. Lockhart, [1998] N.B.J. No. 377 (farm labourer). In order to imply a such a term, courts have held that there must be evidence that particular skills or qualifications were required on the part of the employee, see i.e. Lynch v. U.S. Fidelity & Guaranty et al.,[1971] 1 O.R. 28 (Ont. H.C.)

237 At 723. He adopted the trial judge’s reasoning that in this case, “the degree of negligence falls far short of the negligence that is required before a young and inexperienced manager...can be held liable to his own employer”. at 726

238 Ozmon supra note 235; Cole v. Lockhart supra note 236. In Cole, the court went one step further and found that the employer had voluntarily assumed the risk of an employee committing a minimal error. The employer takes the risk and must account for this in insurance, supervision and costs.
by employees is now a recognised element of the employer's business risk.\textsuperscript{239}

B. Common law right of indemnity

Historically, it was accepted that there could be no contribution or indemnity between tortfeasors.\textsuperscript{240} It is also accepted that an employer who is held vicariously liable for the acts of an employee, is together with the employee, a joint tortfeasor\textsuperscript{241}.

The bar against there being any contribution or indemnity between joint tortfeasors was relaxed where a party who was not responsible for the damages sustained, was held vicariously liable for the loss\textsuperscript{242}. Cases such as \textit{McFee v. Joss}\textsuperscript{243} established that in those circumstances, there was an implied right of indemnity in favour of the party compelled to pay damages on account of someone else's negligence. This exception to the recognized rule would apply in the absence of any relationship between the parties. Thus for instance, in \textit{McFee v. Joss}, the owner/lessor of a vehicle who was held liable to an injured third party was allowed to recover from the driver of the vehicle who was the employee of the lessee.

\textsuperscript{239}\textit{Fleming} at 300

\textsuperscript{240}The rule originates from the ancient case of \textit{Merryweather v. Nixan}, (1799) 8 T.R. 186

\textsuperscript{241}Most authorities accept this proposition. See authorities cited by Jolowicz, supra note 221. In at least one English case however, the merit of that proposition was doubted. In \textit{Semtex v. Gladstone}, supra note 219, Finnemore J. said he could not understand why they were treated as joint tortfeasors. In Ontario, section 1 of the \textit{Negligence Act}, R.S.O. 1990, c. N.1 states that "where two or more persons are found at fault or negligent, they are jointly and severally liable". In the case of employers being held vicariously liable, it was accepted that the liability was strict and was not imposed for any independent fault or negligence on behalf of the employer. Unfortunately, courts in Canada have not addressed this inconsistency and work on the questionable but longstanding assumption that they are joint tortfeasors. In \textit{McFee v. Joss}, supra note 220 however, the owner of a vehicle was found vicariously liable for damages caused by its driver, pursuant to statute. The court did not find the owner and driver joint tortfeasors but nevertheless held that the owner was entitled to obtain indemnity from the driver.

\textsuperscript{242}\textit{Boryczko v. Board of Education of City of Toronto} [1962] O.R. 600 (C.A.) (party held liable under the \textit{Occupiers' Liability Act} because of independent contractor's negligence entitled to indemnity). \textit{Creasy v. Sudbury}, [1999] O.J. No. 4843 (Ont. C.A.) where the right was acknowledged but was not applicable on the facts of that case.

In *Fenn v. Peterborough et al.* 244 an agent was held liable to indemnify its principle for damages caused by its negligence. In its decision, the Ontario Court of Appeal stated:

"The City’s claim against the commission . . . rests on the common law right of a principal who is found vicariously liable to a plaintiff by reason of the negligence of its agent in the performance of its authorized duties to be indemnified by the agent. It is not a right which has been pursued frequently, but its existence is clear . . . The principal asserting the right must himself be without fault in the occurrence which caused the damage." 245

The Court of Appeal’s statement on the rights of contribution and indemnity between tortfeasors is quite troubling. It seems clear that the right to indemnity from a tortfeasor is necessarily conditional upon the party seeking to be indemnified not being responsible for the damages. 246 Nevertheless, if the party is partially at fault, there is no reason why it could not be entitled to contribution and this is recognized by section 2 of the *Negligence Act.* The Court of Appeal is silent in its reasons as to why the principal cannot be himself at fault in order to be at least, entitled to contribution from its agent and does not refer to the provisions of the *Negligence Act.* Nevertheless, despite failing to state any reasons why this should be so, at least one judge has subsequently followed the *Fenn* decision and refused to allow a claim for contribution where the employer was partially at fault. 247 The correctness of both those cases must be seriously questioned or at least, the correctness of the second decision even given the first.

The common law right to indemnity from the wrongdoer arises if the wrongdoer is an independent

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244 *C. C. L. T. 1* (1979)

245 Ibid at 64

246 This was the case in *Jones,* supra note 222, whether the hospital was found independently liable and fault was attributed to it in the order of 80%. The hospital could not recover indemnity but it was held it had a right to contribution. see also *Hosney v. Sykes and Leger* (1963). 37 D.L.R. (2d) 225 (Sask. C.A.) where occupier was denied indemnity from a negligent contractor because the occupier was also negligent. There was no discussion about the occupier being entitled to contribution.

247 *McCridle v. Westin Ltd.,* 35 C. C. L. T. 183 (1985) (O’Brien, J.). “I must confess some difficulty in understanding why there should be no contribution as between tortfeasors, as would be usual under section 2 of the Negligence Act, but in view of my understanding of the Court of Appeal decision, as Westin [the employer] was negligent it follows there is no claim over ...” But recently, Judge H. Sachs restated the proposition that employers who are contributorily negligent cannot claim against an employee. She cites *Fenn* but also a number of other decisions which have not held that at all. See *Felix v. Corbett* (1999), 44 O.R. (3d) 791.
If an employer is rendered vicariously liable for the acts of an independent contractor by virtue of owing a non-delegable duty of care to the injured party, the employer is entitled to indemnity.\textsuperscript{248} Evidently, although the employer is deemed to have breached a non-delegable duty of care, he is nevertheless entitled to indemnity. This is consistent with \textit{Fenn} which held that where an employer is also negligent and contributed to the damages sustained by the injured party, he is barred from recovering an indemnity. The two lines of cases can be reconciled on the basis that the breach of a non-delegable duty does not consist of an independent act of negligence.\textsuperscript{249} While the employer and contractor may be deemed to be joint tortfeasors from the plaintiff's point of view, as between themselves, the employer has committed no independent act and is entitled to be indemnified.

In this specific context, it might be appropriate to consider the impact the Supreme Court decisions in \textit{Bazley and Jacobi} will have. Recall that the Supreme Court stated that the employer's vicarious liability finds its basis in an independent ground, the employer's creation of a risk which materialized into harm. If that is the basis upon which the employer is held vicariously liable, should the employer be barred from claiming indemnity from its employee? Seemingly, if the above lines of cases are followed, the employer would retain its right to indemnity from the wrongdoer because it has not committed an independent tort. The basis for its liability is analogous to an employer who is held liable for breach of a non-delegable duty of care. A duty is owed by the employer but the wrongful act is committed by the employee, not the employer.

\begin{footnotesize}
\begin{enumerate}
  \item [\textsuperscript{249}] In order to claim indemnity, the employer must not have been independently negligent. If the employer is not merely vicariously responsible, his claim is for contribution, not indemnity. \textit{Daniel v. Rickett, Cockerell & Co.}, [1938] 2 K.B. 322 (employer found liable to the extent of 10% is entitled to contribution from the independent contractor)
  \item [\textsuperscript{250}] If there are separate acts of negligence it is quite clear, I think, on the authorities, that there can be no indemnity: \textit{Sutton v. Town of Dundas} (1908), 17 O.L.R. 556; \textit{City of Kitchener v. Robe & Clothing Co. Ltd.}, [1925] S.C.R. 106, [1925] 1 D.L.R. 1165, and \textit{City of Toronto v. Lambert} (1916), 54 S.C.R. 200, 33 D.L.R. 476. There can be little doubt that if the negligence of the municipality is different from the negligence of the (as here) contractor then the municipality is not entitled to be indemnified.\textit{"Alexandroff v. The Queen in Right of Ont."} [1967] 2 O.R. 625
\end{enumerate}
\end{footnotesize}
C. Statutory Rights

The bar against the recovery of contribution or indemnity from joint tortfeasors was removed by enactment of legislation which, in Ontario, is the *Negligence Act*, originally enacted in 1930.\(^{251}\) Section 2 of the *Act* provides as follows:

2. A tortfeasor may recover contribution or indemnity from any other tortfeasor who is, or would if sued have been, liable in respect of the damages to any person suffering damage as a result of a tort by settling with the person suffering such damage, and thereafter commencing or continuing action against such tortfeasor . . .

Under section 2, rights of contribution or indemnity arise between parties who are or, would have been liable to the plaintiff. Included in the category of tortfeasors are those who have committed acts of negligence and more broadly, those who are at fault. "It incorporates all intentional wrongdoing as well as other types of substandard conduct."\(^{252}\)

D. Summary

In summary therefore, under current law, the employer who is held vicariously liable for the acts of his employee and who is without fault, may be entitled to be indemnified by the employee. A common law right of indemnity arises in favour of an innocent employer in those circumstances and that right is not limited to cases of contract.\(^ {253}\) Additionally, the employee may be obligated to indemnify his employer if he breached a term of his employment, that he would use reasonable skill in the performance of his duties. Courts will imply such a term in an employment relationship if the worker was skilled and professed to have special skills. However, it seems, based on recent cases, that not all breaches will give rise to an obligation to indemnify and that only those more serious breaches will trigger the indemnity. Lastly, the employer would have the right to exercise its statutory right to claim indemnity since it is regarded as an innocent party obliged to assume a

\(^{251}\)S.O. 1930, c.27


\(^{253}\) *Proctor v. Seagram*, [1925] 2 D.L.R. 1112
liability which flows from someone else’s fault.

2. The exercise of the right of indemnity

Although a master’s right of indemnity is recognized, it is rarely if ever exercised.\(^1\) That is apparent from the fact that in Canada, there are very few cases dealing with this issue.\(^2\) There are a number of reasons why the right is almost never exercised:

1. In defending a claim brought against it and its employee, the employer will require the employee’s cooperation. Such cooperation would not be forthcoming if the threat of indemnity could be exercised.\(^3\)

2. The bringing of an indemnity claim would adversely affect the employment relationship.\(^4\) “An indemnity action that sends an employee into personal bankruptcy could send a signal to the workforce that the employer has little interest in the personal welfare of his employees, affecting morale and productivity adversely.”\(^5\)

3. The employer should recognize that it is the superior risk-bearer.\(^6\)

4. The employer is taken to want to encourage acts done to further its business. If the negligence arose in those circumstances then the employer should take that risk.\(^7\)

\(^1\)D. Ellis, “Fairness and Efficiency in the Law of Punitive Damages” 56 S. Ca. L. Rev. 1 at 69; G. Schwartz, supra note 70; Aitayah at 421 ff.

\(^2\)Fenn did not arise in the context of an employment relationship but rather, as between principal and agent.

\(^3\)Schwartz supra note 64 at 1764-66

\(^4\)Ibid

\(^5\)Sykes, supra note 116 at 570-71 (1988)

\(^6\)Ibid

\(^7\)Ibid
5. Frequently, the employee is without adequate assets.

6. Insurance considerations rarely allow for such rights to be exercised. The fact that the employer has liability insurance will likely affect the rights of the parties. Coverage obtained by the employer will more likely than not, include employees as "insureds" under the policy. If employees are insured under the policy, there can be no right of subrogation asserted against them for it is a basic principle of insurance law that subrogation cannot be obtained against the insured himself. 261

Another reason why the right to indemnity is rarely exercised is that most insurance policies will contain a waiver of subrogation in favour of the insured's employees. 262 Under such policies of insurance, the insurer agrees to provide coverage to the insured, i.e., the employer, and also agrees to waive any right to subrogation it may have against an employee of the company or persons insured. This is in effect, the Canadian solution to the Lister decision. The practical effect of having a waiver of subrogation is that insurance coverage is extended to employees, if not already done explicitly.

The right to obtain indemnity has also been restricted by statute in some cases. For instance, the Ontario Insurance Act bars the owner and insurer of a vehicle from obtaining contribution or indemnity from the driver at fault, for any losses incurred to third parties. 263

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261 Commonwealth Construction Co. v. Imperial Oil, [1978] 1 S.C.R. 317. That case also quotes the following passage from Agnew-Surpass Shoe Stores v. Cummer-Yonge (1975) 55 D.L.R. (3d) 676 (S.C.C.): "When a building in construction is insured for the joint benefit of the owner and contractor, certainly the latter is not expected to be held liable for loss caused by the negligence of his workmen."

262 See for example in Commonwealth Construction ibid, where there was such a clause.

263 This is because the driver is considered an insured under the policy and the insurer cannot sue its insured (expect for property damage). See Comairco Equipment Ltd. v. Breault (1989) 69 O.R. (2d) 130. On a similar note, article 2474 of the Civil Code of Quebec prohibits insurers from advancing a subrogated claim against members of the same household as that of the named insured. The policy behind the bar is to prevent insurers from advancing claims which clearly, their insureds would not. It is not clear however whether the bar would apply where the member of the household carries separate insurance. See generally A. Guérard-Kerhulu, "L'Affirmation de l'action directe du tiers léssé en assurance de responsabilité" 27 R.D.U.S. 171 at 275 ff. (1996-97)
3. Should the master's right of indemnity be abolished?

Allowing the employer to exercise a right of indemnity runs counter not only to current practice, but as well, to the justifications which underlie the doctrine of vicarious liability. As we have seen, vicarious liability is imposed on the enterprise, at least in part, because the enterprise created a risk which materialized into harm. The enterprise as a whole and the activity engaged in, is the focus of liability. The enterprise owns any liabilities which flow from its activities by virtue of having engaged in a risky activity and having authorized the employee to engage in a certain activity in which the risk of injury to others was heightened.

One could argue that the employer should be barred from claiming indemnity because it committed an act, i.e., the creation of risks, which contributed to the damages sustained. From this perspective, perhaps the employer is not innocent of wrongdoing. Hence, the same arguments which were advanced to sustain a finding of vicarious liability of the employer for intentional torts, would allow us to maintain that the employer should not be entitled to claim indemnity. After all, it created the risk and vested its employee with a certain degree of authority so as to render the acts more likely to occur. While the employer may not have committed any independent fault of its own, it nevertheless owns the fault of the employee. As Lord Denning said in Jones:

"In all these cases, the important thing to remember is that, when a master employs a servant to do something for him, he is responsible for the servant's conduct as if it were his own. If the servant commits a tort in the course of employment, then the master is a tortfeasor as well as the servant. The master is never treated as an innocent party."264

As we have seen in such cases as McFee v. Joss and Fenn, an employer partially at fault is barred from claiming indemnity from its employee. Although Fenn fails to recognize this, the most an at-fault employer would be entitled to is contribution under the Negligence Act.

While vicarious liability is imposed on an employer for having committed an independent act, it is

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264 Supra note 222 at 1597
nevertheless not “at fault.” As we have seen in Chapter 1, the employer’s vicarious liability is strict, no-fault liability. It cannot be faulted for having taken those risks but once it has, it assumes ownership of any consequential liabilities. Thus, it should not be barred from claiming indemnity on the basis that it contributed to the damages sustained.\footnote{It goes without saying that the employer should not, on this theory, be entitled to contribution. It has committed no fault. Furthermore, allowing the liability to be split between the employer and employee would create much confusion and litigation. How would liability be apportioned between the two parties?}

That being said, it can be argued that the employer assumes the risk of employee negligence.\footnote{\textit{Cole v. Lockhart} supra note 236} As Fleming puts it, the risk of employee carelessness is part of the cost of doing business.\footnote{\textit{Fleming} at 300. The American approach to vicarious liability is contained in the Restatement (Second) of Agency (1957). Comment a. under 229 (at 507) captures the essence of the inquiry in stating that, “the ultimate question is whether or not it is just that the loss resulting from the servant’s acts should be considered as one of the normal risks to be borne by the business in which the servant is employed.”} Employers are cognizant of this fact and insure themselves accordingly. Employees are as a matter of practice, named as additional insureds under insurance policies taken out by employers, or are considered unnamed insureds. In those circumstances, the right to pursue subrogation rights against the employee/wrongdoer is waived, as a matter of course.

Some have suggested that the non-exercise of the right of indemnity is so prevalent as to enable the employee to argue that the waiver of indemnity is now an implied term of the employment agreement.\footnote{Schwartz supra note 64; see also Symposium Discussion, 56 S. Ca. L. Rev. 155 at page 201} This is consistent with what one would assume are the reasonable expectations of the parties. It would be unreasonable for the employer to assume that its employees will perform job-related duties without any occasional carelessness. From the employee’s point of view, he or she will expect the employer to stand behind him for any accidents which occur while performing job-related duties.

Hence, not only should the employer’s right of indemnity be waived, it should be recognized that it is the employee who should be indemnified. Recognising that the employer should ultimately bear all responsibility for acts of employee negligence is consistent with the reasons why vicarious

\footnote{\textit{Cole v. Lockhart} supra note 236}
liability is justified. As we have seen, vicarious liability is imposed not only because the employer is the superior risk-bearer but as well, because it is the one who initially created or exacerbated a risk. It is the enterprise as a whole which should bear responsibility and that responsibility should include the negligence of its employees.

Hence, the employee's right to indemnity from the employer should be recognized. This would conform with the realities of the business world. Employees do not expect to bear responsibility for acts they perform on behalf of their employer. So long as they are performing employment-related duties, they expect their employer to stand behind them. They conduct the employer's business with the expectation that the employer's insurance will cover them. That expectation is so persuasive that in most cases, employees will not even bother confirming the availability of insurance before starting work.

Some may argue that allowing the employee to have a right of indemnity may result in a level of undeterrence. But as we have seen, any perceived level of underdeterrence is illusory. The employer has at its disposal a number of internal disciplinary measures which can accomplish the same result. The employer is in a far better position to determine what disciplinary measures will work and is in a better position to implement them. For those employees with little or no assets, the prospect of facing a potential money award may simply have no deterrent effect and other disciplinary measures such as demotion and termination are more likely to affect his level of care.

Such a right of indemnity has already been legislated in a number of jurisdictions. The Employees Liability Act of New South Wales provides for instance, that:

\[26\] In a recent article, J. Neyers suggests that in every contract of employment the principal promises to indemnify its agents and employees for harms incurred in the course of employment. He goes further and suggests that when a plaintiff sues an employer for vicarious liability he is in fact claiming to be subrogated to the employee's entitlement to indemnity. This subrogation theory may be far-fetched but the point is that the employee's right to indemnity is almost taken for granted in this argument. See “Canadian Corporate Law, Veil-Piercing, and the Private Law Model Corporation” 50 U.T.L.J. 173 (2000) at 196-8

3. (1) If an employee commits a tort for which his or her employer is also liable:

(b) the employer is liable to indemnify the employee in respect of liability incurred by the employee for the tort (unless the employee is otherwise entitled to an indemnity in respect of that liability)

The implied term suggested is essentially the same term which the employee in *Lister* argued for and which was rejected by the House of Lords, by a 3-2 majority. The term was rejected by the court primarily because of the perceived difficulty in defining the term and qualifying the circumstances under which it would apply. The minority members however agreed with what Lord Denning had stated in the Court of Appeal, that if the employer is insured, it was an implied term that the employer would not seek contribution or indemnity from its employee.\(^{271}\)

A. Intentional torts

There is a point where rightly, the liability assumed vicariously by the employer should not be his to bear. In practice, these situations will arise infrequently because usually if the wrongful act is outside the scope of the employment, the employer will not be held vicariously liable. However, as the *Bazley* case illustrates, the scope of vicarious liability, especially for intentional torts, is being expanded. In those cases, especially where the wrongful act is antithetical to the employment and is for the employee’s own purposes and not in furtherance of the employer’s aims, it seems unfair to saddle all of the liability upon the employer. It may have been appropriate to find the employer vicariously liable to the plaintiff but, as between the employer and the employee, there is no reason why the employer should not be entitled to claim indemnity.

If the employee committed an intentional act unrelated to his/her employment duties, different considerations arise. Likely, the employee would not be covered by the employer’s insurance policy

\(^{271}\)It is important to note that in *Lister*, only the employer was sued and the employee was not third partyed into the action. Had the employee been sued, the employee could((hav) and should have been entitled to be indemnified by the insurer. See in agreement *Atiyah* at 424-5. In those circumstances, the insurer could not have sought indemnity from the employee, its insured. This inconsistency with the result reached by the House of Lords was one of the reasons why one of the Lords, Lord Somervell of Harrow dissented on this issue in *Lister* and was prepared to imply the term as argued by the employee. This inconsistency illustrates why the *Lister* decision is unacceptable.
as exclusions for intentional and wilful acts are usual. However, if the employer is found vicariously liable, it should not be barred from recovering indemnity from the employee, to the extent that is possible (assuming the employee at fault is solvent which will likely be academic in the vast majority of cases).

There are more fundamental reasons why the right to claim indemnity should be retained when the employee commits an intentional or criminal act. This requires us to refer to the "enterprise" as the entity assuming vicarious liability. This fictional person is defined by the risks undertaken by the enterprise and more specifically, by what the employer has authorized the employee to do. However, when the employee diverts from employment duties by for example, defrauding a client of the employer, the creation of the fictional person is more difficult to justify. And when the employee commits a totally independent act for his benefit alone such as sexual assault, the employer and employee become separate and the fiction collapses. Yet, from the plaintiff's perspective, the employee remains part of the enterprise since the plaintiff is unaware what the employee was or was not authorized to do. Whether the employee's acts were committed in the course of the employer's employment or not, is not a question which should preoccupy a plaintiff. This is why courts have often imposed liability on employers for the intentional torts of their employees.

Furthermore, as we have seen, the vicarious liability rule which rests on enterprise risk imposes liability whose scope goes beyond the employment relationship. Hence, resort to the fictional person, while perhaps appropriate in cases where the employee has committed negligence in furtherance of the employer's objectives, cannot be invoked for other situations such as intentional torts.

The use of the fictional person, the "enterprise" cannot be justified when dealing with the rights as

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272See i.e. Sansalone v. Wawanesa, [2000] S.C.J. No. 27; Scott v. Wawanesa Mutual Insurance Co., [1989] 1 S.C.R. 1445, where a policy explicitly excluded coverage for “loss or damage caused by a criminal or wilful act.” See also Bluebird Cabs v. Guardian Insurance, [1999] B.C.J. No. 694 where the applicable policy contained an exclusion for damages which were not caused by an "accident" thereby excluding intentional acts. See also University of Western Ontario v. Yamash (1988) 67 O.R. (2d) 525 where the policy provided coverage for loss caused by accident or was not expected or intended.
between the employer and the employee who has committed an intentional act. Weinrib, for example, proposes that we regard the fictional employee/employer entity as a "more capacious bearer of responsibility than the individual whose act was faulty." But if the faulty employee engages in conduct which furthers his own purposes and agency, and those differ from his employer's, the two do not converge into one especially when they are antithetical. In the Bazley case for instance, the employer was engaged in the care of children and employed Curry to further those goals. When Curry intentionally did something for his own purposes, he was expressing his own agency, which was inconsistent with his employer's.

One could argue that by choosing to engage in a certain activity and undertaking certain risks, the employer should absorb all losses, including those incurred as a result of employee intentional torts without any right of recourse against the employee. The employer is held vicariously liable to the plaintiff because there was a connection between what the employee was authorized to do and the wrongdoing. Concern over victim compensation may lead courts to hold an employer liable in those circumstances and thus, maintain the fiction of the aggregate "enterprise." But as between themselves, the employee intentionally deviated from the enterprise's objectives and the fictional "enterprise" should be collapsed in order for the employer to have recourse against the employee.

Thus, the master should be entitled to claim indemnity from its employee where the latter has committed an intentional tort. The New South Wales legislation, for instance, recognizes this:

5. This Act does not apply to a tort committed by an employee if the conduct constituting the tort:
   (a) was serious and wilful misconduct; or
   (b) did not occur in the course of, and did not arise out of, the employment of the employee.

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275Employees Liability Act 1991 No. 4. The Act also specifically provides that it binds the Crown. The Act was enacted to overcome the effects of the Lister decision and to provide the employee with a right of indemnity. See "Explanatory Notes for Bills Passed in 1991", New South Wales.
Other jurisdictions have similar provisions excluding coverage for "serious and wilful misconduct".

B. Independent Contractors

As we have seen, the employer of an independent contractor may be held vicariously liable for its torts. Where the contractor commits an intentional act, there is no apparent reason why he should not be treated the same way an employee is under those circumstances, and be exposed to a claim for indemnity. It would be unrealistic however to assume that the parties intended or expected that a term be implied in their relations whereby the employer would waive the right to claim indemnity from the contractor. When it comes to dealings between employers and contractors, such terms should be the subject matter of express contractual terms.

There may be situations where the independent contractor is covered under the employer’s insurance policy. If so, then the contractor becomes immune to claims of subrogation. This however would be consistent with the employer assuming those risks at the outset of the project. But in the absence of express contractual provisions stipulating that the employer would assume the risk of contractor negligence or the employer doing so by taking out insurance for such risks, there is no reason to imply such terms.

If employees and independent contractors are to be treated differently for the purposes of determining rights of contribution and indemnity, it would seem important to be able to distinguish between the two types of workers. Ironically, we earlier advocated in favour of abolishing the distinction traditionally made between servants, agents and contractors for the purposes of imposing

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276 *Wrongs Act*, South Australia, s. 27c

277 See i.e. *Commonwealth Construction v. Imperial Oil Ltd.*, supra note 261 where the policy taken out by the owner of a construction project covering the owner, its contractors and sub-contractors.

278 Ibid. The Supreme Court held that in those circumstances, the principal contractor and subcontractors were interconnected for the purposes of insurance and consequently, any action between themselves would be tantamount to one suing itself. See also Brown and Menezes, "Insurance Law in Canada" 2nd ed. (Scarborough: Carswell 1991) at 334
vicarious liability. It seems however, that in order to resolve potential claims for contribution and indemnity, the distinction must be maintained. It must be highlighted however that in many cases, this sort of distinction will not be necessary either because the parties have previously settled their rights by way of contractual provisions or, by way of insurance arrangements. The expansion of vicarious liability for the acts of independent contractors which is evident, should provide incentives for the parties to provide for contractual remedies ahead of time.

Some sort of test must therefore be acknowledged in order to make a distinction between servants and contractors. We reviewed in the previous chapter, the various tests which have been developed through the case law in order to distinguish between servants and contractors for issues related to vicarious liability. Most of these tests focus on the element of control the employer had over the worker in order to decide whether it should be held vicariously liable. That approach is slightly different from the one we aim to take in this context. We are concerned here not about the degree of control the employer had over the worker but rather, whether the worker was operating a separate business such that it would be inappropriate to bar the employer from claiming indemnity from the contractor. To a certain extent, the parties’ expectations will be crucial. If the worker was operating his/her own business then there would be no expectation that the employer be ultimately responsible for his negligence unless express provision was made in their contract.

It will not always be obvious whether an employee should be treated as a contractor or a servant. I would suggest that the entrepreneur test and the organization test are best suited for this process because both tests aim at determining whether the employee was conducting his/her own business. The degree of control the employer may have over the employee/contractor is not determinative. In this context what is important is whether the putative employee was conducting his or her own business such that there would be no expectation on the part of either party that the employer would assume all liabilities. Persons who operate their own businesses also tend to have procured insurance or otherwise, have anticipated and dealt with potential liabilities.

In conclusion therefore, the right an employer currently has to obtain indemnity from an employee should not be abolished. However, where the employee commits negligence, there should be an implied term that the right to claim indemnity is waived and that the employer indemnifies the
employee. There are no persuasive reasons, practical or theoretical, which can justify the continued recognition of the master's right of indemnity in those circumstances. The Lister decision which established such a right should have never been adopted in Canada and this is evident from the number of decisions have attempted to narrow its application. Moreover, the right is so rarely exercised in Canada to make it essentially extinct.
CONCLUSION

There is little doubt that the Supreme Court of Canada decisions in Bazley and Jacobi will have a significant impact on the doctrine of vicarious liability. We began this thesis by discussing the two cases and we have seen that there are important distinctions to be made between the decisions rendered by Madam Justice McLachlin in Bazley and that of Mr. Justice Binnie in Jacobi. The most important distinction is their differing view on whether vicarious liability is imposed on an employer because it failed to take adequate precautions to avoid harm which could have been avoided or, whether liability is imposed for inevitable accidents. We preferred to adopt the latter view that expressed by Mr. Justice Binnie in Jacobi.

Although their views on certain issues may diverge, the decisions of Binnie and McLachlin are in agreement to the extent that the court adopts the theory of enterprise risk as the basis of vicarious liability. Under this view, vicarious liability is imposed on employment enterprises who engage in a certain activity which poses inherent risks of harm to others. There must also be a connection between the risk in question, what the tortfeasor was authorized to do and the wrongdoing.

We have argued that vicarious liability which rests on enterprise risk is in fact, an independent basis of liability, one which is based on a proprietary theory of responsibility. By choosing to engage in a certain kind of business, the employment enterprise assumes ownership of any consequential liabilities which may flow from risks which are typical of that business. Although some fault on the part of the employee is required to attract liability, the employer is itself without fault.

The adoption of the theory of enterprise risk allows for the scope of vicarious liability for intentional torts to be expanded. The scope of the liability is longer defined exclusively by the scope of the employee's authority. Rather, the scope is circumscribed by the risks which are typical of the enterprise. In the case of employment situations where a certain degree of job-created power and
intimacy exists, the risk of sexual torts is heightened. The employment enterprise is exposed to vicarious liability in those circumstances even if the precise incident of wrongdoing was not foreseeable.

The scope of the liability which exists under the theory of enterprise risk has therefore been expanded to encompass a broader variety of intentional torts. The liability has been expanded in another direction as well. One of the consequences of the Supreme Court of Canada decisions is that the liability attaches not only for acts committed by employees but also for non-employees in certain circumstances. This trend was already evident in cases decided prior to Bazley. With the adoption of a theory of responsibility which rests on principles of ownership, a distinction between employees and independent contractors should no longer be made for the purposes of attributing vicarious liability. Courts should no longer be concerned over classifying the tortfeasor as an employee in order to determine whether vicarious liability should follow. Rather, the focus should be on whether the wrongful conduct was related to a risk created by the enterprise.

Assuming vicarious liability is imposed on an employment enterprise, the employer and employee are considered joint tortfeasors. Under current law, the employer had a right of indemnity against the wrongdoer. In practice however, that right is rarely exercised and the law should reflect this reality. The employer in most cases assumes the risk of employee negligence. The employer however does not assume the risk that an employee commits an intentional tort, nor does it assume the risk its contractors will commit torts. In those cases, the right to claim indemnity should remain.