

DOLDEN

WALLACE

FOLICK LLP

**AUTHORITY, INTIMACY, POWER
AND THE MANIFESTATION OF RISK:
VICARIOUS LIABILITY OF INSTITUTIONS
FOR SEXUAL ABUSE**

Janis D. McAfee & Robert Smith

September 2018

18th Floor - 609 Granville St.
Vancouver, BC
Canada, V7Y 1G5
Tel: 604.689.3222
Fax: 604.689.3777

302 – 590 KLO Road
Kelowna, BC
Canada, V1Y 7S2
Tel: 250.980.5580
Fax: 250.800.8761

850 - 355 4th Avenue SW
Calgary, AB
Canada, T2P 0J1
Tel: 1.587.480.4000
Fax: 1.587.475.2083

14TH Floor – 20 Adelaide St E.
Toronto, ON
Canada, M5X 2T6
Tel: 1.416.360.8331
Fax: 1.416.360.0146

CONTACT LAWYER

Janis D. McAfee

Tel: 250-980-5581

E-mail: jmcafee@dolden.com

Robert Smith

Tel: 647-798-0609

E-mail: rsmith@dolden.com

Authority, Intimacy, Power and the Manifestation of Risk: Vicarious Liability of Institutions for Sexual Abuse

The modern approach to the imposition of vicarious liability on institutions for sexual abuse committed by persons working on their behalf began in 1999 with the Supreme Court of Canada's decisions in *Bazley v. Curry*¹ and *Jacobi v. Giffiths*². In those cases, the Court held that vicarious liability can be imposed if the risk of wrongdoing is sufficiently connected to the power and authority that are given to the assailant by his or her employer's enterprise.

In the landmark 2003 decision of *K.L.B. v. British Columbia*³, the Supreme Court of Canada explained the basis for the imposition of vicarious liability in the following terms:

The doctrine of vicarious liability ... does not require tortious conduct by the person held liable. Rather, liability is imposed on the theory that the person may properly be held responsible where the risks inherent in his or her enterprise materialize and cause harm, provided that liability is both fair and useful.

These pithy sentences provide a good foundation for understanding the law of vicarious liability in the sexual abuse context. The wrongful acts, and the conditions that led to them, must logically flow from the situation created by the employer (be it a government entity, for-profit, or not-for-profit enterprise) in order for a court to impose vicarious liability.

Later in *K.L.B.*, the Court explained that the imposition of vicarious liability serves two purposes: fair and effective compensation for victims and the deterrence of future harm. The Court held that it is fair for the organization that creates the risk to bear the consequences of injuries that are materializations of the risk. The Court also held that

¹ [1999] 2 SCR 534. (see also *Ivic v. Lakovic*, 2017 ONCA 446)

² [1999] 2 SCR 570.

³ [2003] 2 SCR 403.

assigning liability to an employer will have a deterrent effect because employers are in a position to reduce intentional wrongs through efficient organization and supervision.

Since the release of these decisions, much judicial ink has been spilled in determining the extent of the connection that is required in order to impose vicarious liability on an employer. These cases are fact-specific and often contradictory. This paper attempts to cut through the noise by taking a cross-industry perspective to the issue of vicarious liability. The common themes examined by courts when determining whether to impose vicarious liability center on authority, intimacy and power. Specifically, courts tend to ask whether the authority came from the employer, whether the employee's job required intimacy with the victims, and whether the wrongdoing that occurred was a manifestation of the risks inherent in the employer's enterprise. The following examples will explain how courts have applied these factors in practice.

Mere opportunity is insufficient

The fact that an employee of an institution commits acts of sexual wrongdoing will not, on its own, lead a court to impose vicarious liability. Courts have held that the mere creation of the opportunity for an employee to commit sexual abuse is insufficient to ground such a finding.

For instance, school boards employ hundreds of employees from principals to teachers to audio-visual technicians to custodians. Each of these employees is placed in an environment where they work closely with children. The chance for abuse is therefore omnipresent. The jurisprudence shows, however, that something more than this opportunity is required for vicarious liability to be imposed on the school board.

A good example of this doctrine is the Supreme Court of Canada's decision in *E.D.G. v. Hammer*⁴. Released at the same time as *K.L.B., Hammer* confirmed that there must be more than the mere creation of an opportunity for abuse. In *Hammer*, the plaintiff was abused

⁴ [2003] 2 SCR 459.

by a school janitor over the course of several years. The janitor had no direct duties related to the care or instruction of students, did not have direct authority over students, and was not under the supervision of the principal. The trial judge and the Court of Appeal held that it was inappropriate to impose vicarious liability because of the lack of authority bestowed upon the janitor by the school. The Supreme Court of Canada held that “*creation of opportunity without job-created power over the victim or other link between the employment and the tort will seldom constitute the ‘strong connection’ required to attract vicarious liability*”. The Court concluded that the “*mere fact that an organization provides a person with the opportunity to commit a tort does not, on its own, render that tort a manifestation of risks created by the organization.*”

This theme was also present in *K.G. v. B.W.*⁵ where a school board was not held vicariously liable for the actions of a teacher when the wrongdoing occurred off school grounds and outside of the teacher’s duties. In *K.G.*, the teacher was a family friend of her victim and the assaults all happened in the student’s home. The Court decided that the teacher’s involvement with the student’s family fell outside of her duties as a teacher. As such, there was no connection between the wrongdoing and the teacher’s employment.

Authority from the organization

In *John Doe v. Bennett*⁶, the Supreme Court of Canada imposed vicarious liability on the Roman Catholic Episcopal Corporation of St. George’s for the sexual abuse of a variety of parish children by a priest. The Court imposed vicarious liability on the Roman Catholic Episcopal Corporation because of the immense authority it provided to the priest, especially over children. This authority gave the priest not only the opportunity to abuse children, but the opportunity to use his power to do so. This made those abuses more likely and tied them closely to the Corporation. The Court noted that the

⁵ [2000] OTC 416.

⁶ [2004] 1 SCR 436.

Corporation expected its parish priests to be closely involved with children. His anointment gave him the opportunity to assume a leadership role over children. The Court also noted that the priest had immense authority in his small, rural, heavily catholic parish and that this power stemmed from the authority of the Roman Catholic Episcopal Corporation.

Bennett can be contrasted with *Hammer*, where the Court held that the school janitor was provided with the opportunity to engage in wrongdoing, but those wrongdoings did not flow from his employment or the authority given to him by the school board. In contrast, vicarious liability was imposed, in *Bennett*, because the Roman Catholic Episcopal Corporation not only provided the opportunity for wrongdoing, but the authority it granted the priest “*substantially enhanced the risk which led to the wrongs ... suffered.*”

Vicarious liability was imposed against a school board for a teacher’s abuse of a student in *Doe v. Avalon East School Board*⁷. In that case, the victim was a student in the assailant teacher’s computer course. The teacher instructed the victim to study in a separate room, where the assault occurred.

The Court imposed vicarious liability on the basis that the school board gave the teacher the authority that he used to set up the circumstances where the offence was committed. The Court held that the abuse of the authority given to the teacher by the school board could lead to harm.

Expected intimacy with vulnerable persons

The case law has also established that another touchstone of vicarious liability is whether the position of authority expected the assailant to establish psychological intimacy with the people under his or her control. This factor is linked to the ultimate question of whether the abuse is a manifestation of the inherent risks of the organization.

⁷ 2004 NLTD 239. (see also *Langstaff v. Hastings & Prince Edward Board of Education*, 2013 ONSC 1448)

Recall that in *Bennett*, one of the factors acknowledged by the Supreme Court of Canada was the fact that the wrongdoing was strongly related to the priest's inherent psychological intimacy with his minor parishioners. In *B.M.G. v. Nova Scotia (Attorney General)*⁸, the Nova Scotia Court of Appeal held that a provincial probation officer's psychological intimacy with a person under his charge can encourage the victim's submission to abuse and increase the opportunity for such abuse. As a result, whether the mandate of the organization encourages or expects intimacy, either physical or psychological, between its employees and vulnerable persons is a significant factor in the vicarious liability analysis.

Power imbalances

The ability of the assailant to exercise power over the victims is another factor that is considered in the vicarious liability analysis. In *K.T. v. Vranich*⁹, the Ontario Superior Court of Justice noted that the victim's boss wielded considerable economic power over her and that this made abuse more likely.

In *Bennett*, the Supreme Court of Canada placed special emphasis on the power differential that was created by the position of the church in the community, which the Court described as "God like".

Conclusion: was the abuse a manifestation of the risks inherent in the employer's organization?

Courts will impose vicarious liability if there is a sufficiently strong connection between the purpose of the enterprise and the actions of the assailant. This connection must extend beyond merely creating the opportunity for the assailant to engage in sexual abuse. Instead, the abuse must flow from the operations of the organization and the power it gives to its employees. As has been shown, courts examine the extent of the authority granted to the assailant by the organization, the level of intimacy expected of the assailant

⁸ 2007 NSCA 120.

⁹ 2011 ONSC 683.

relative to the victims, and the power imbalances at work, in order to determine if the sexual abuse was a manifestation of the risk created by the organization.

Vicarious liability is imposed without direct fault on the part of the organization. This draconian remedy is imposed to further the societal goals of full compensation for victims (in circumstances where such compensation is fair to the organization) and deterrence. It is incumbent upon organizations to take all necessary steps to ensure that persons they entrust with authority and encourage to become psychologically intimate with vulnerable populations do not abuse their power.

Vicarious liability exposures on government entities, for-profit and not-for-profit enterprises related to sexual abuse claims will continue to pose a significant risk to commercial insurers. The very nature of these claims presupposes that the complainants will come forward years after the fact when the factual matrix is difficult to assemble and witness evidence may be lost. An appreciation of the legal analysis that our courts will undertake when assessing vicarious liability will at least assist those in the insurance industry to embark on a more thorough risk analysis.