

## **Arguing Liability Without Fault**

Liability without fault is a form of liability that is policy driven and relationship based. The traditional form of no-fault liability that might impact on governmental activity is vicarious liability. In recent years, this type of faultless liability normally associated with employment relationships has been combined with the less well-known doctrine of non-delegable duties of care to create the potential for broad Crown liability to independent contractors as well as in employment relationships.

The purpose of this paper<sup>1</sup> is to review these two theories of liability by reference to recent Supreme Court of Canada jurisprudence and to summarize the parameters which have been placed on them by the Supreme Court.

### **1. Vicarious Liability**

Vicarious liability is the liability that arises when the law holds one person (usually an employer) responsible for the acts of another (usually an employee), although the person held responsible has not been at fault. It can reasonably be described as no-fault or strict liability. The policy originated in commercial employment situations where an

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<sup>1</sup> Some of the commentary in this paper was originally presented in a conference paper prepared by the writer and Kimberley-Ann Knapp for the conference on “Sexual Tort Claims” presented by the Continuing Legal Education Society, January 9, 2004, Vancouver, B.C.

employee, while carrying out the terms of employment, engaged in actionable, usually tortious conduct, for which it was felt the employer should be held to account.

While various theories have been advanced to explain why one faultless person should be held liable for the misconduct of another person, it is generally accepted today that the liability principle is purely policy driven. In the following passage, Professor Fleming expresses both the policy underpinnings and commercial origins of the theory:

Despite the frequent invocation of such tired tags as “respondeat superior” or “qui facit per alium facit per se”, the modern doctrine of vicarious liability cannot parade as a deduction from legalistic premises, but should be 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.<sup>2</sup>

Despite the clear commercial origins of the principle, there is no doubt that it applies to the Crown as well as to non-profit enterprises.

Two issues generally arise in determining whether to impose vicarious liability on one person for the acts of another – whether the relationship between those persons is such as to attract vicarious liability and whether the acts of the person at fault are the kinds of acts for which the person not at fault should be held responsible.

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<sup>2</sup> Fleming, *The Law of Torts* (9th ed.), p. 410 (citations omitted)

**(i) Relationship Issues**

The traditional relationship that is required for vicarious liability to be imposed is that of employer/employee. For many years it has been axiomatic that an employer will be held liable for at least some of the acts of the employee, but not for the misdeeds of an independent contractor. Recently, the courts have moved away from the formal distinction to examine the relationship between the parties, regardless of how the parties themselves characterize it, to determine whether vicarious liability should be imposed.

The Supreme Court of Canada considered this problem in a commercial case, *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*<sup>3</sup> (“*Sagaz*”). In *Sagaz*, the Court considered the appropriate test for determining whether a tortfeasor is to be considered an employee or an independent contractor for the purposes of vicarious liability. The Court held that the existence of a contract referring to the parties as one or the other is not determinative, but rather requires a functional inquiry in which the “central question” is whether the person engaged to perform the services is performing them as a person in business on his or her own account. The factors relevant in such a determination are:

- (a) the level of control the employer has over the worker’s activities;
- (b) whether the worker provides his or her own equipment;

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<sup>3</sup> [2001] 2 S.C.R. 983

- (c) whether the worker hires his or her own helpers; and
- (d) whether the worker has managerial responsibilities.

The level of control, while not determinative, is significant in that it would be unjust to impose vicarious liability for a tort committed in pursuit of the tortfeasor's own private purposes, or for tortious conduct that could not have been influenced or prevented by the person held vicariously liable.

**(ii) Nature of Acts**

Vicarious liability does not require that an employer be held liable for *all* acts of the employee. The acts must be sufficiently related to the employment relationship that the policy considerations that lead to vicarious liability will reasonably apply.

The traditional test is referred to as the *Salmond* test, which was summarized by Chief Justice McLachlin in this way:

... employers are vicariously liable for

- (1) employee acts authorized by the employer; or
- (2) unauthorized acts so connected with authorized acts that they may be regarded as modes (albeit improper modes) of doing an authorized act.<sup>4</sup>

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<sup>4</sup> *Bazley v. Curry*, [1999] 2 S.C.R. 534, (“*Bazley*”) at para. 10

Much of the recent jurisprudence has been concerned with determining the scope of the second category. The Supreme Court has provided the following approach for determining whether the second branch of the *Salmond* test has been satisfied:

First, a court should determine whether there are precedents which unambiguously determine on which side of the line between vicarious liability and no liability the case falls. If prior cases do not clearly suggest a solution, the next step is to determine whether vicarious liability should be imposed in light of the broader policy rationales behind strict liability.<sup>5</sup>

The Court in *Bazley* reviewed a series of previous decisions and concluded that the common theme where liability was imposed was “where the employee's conduct is closely tied to a risk that the employer's enterprise has placed in the community, the employer may justly be held vicariously liable for the employee's wrong”.<sup>6</sup> The policy considerations were described as the provision of a just and practical remedy for the harm and deterrence of future harm.<sup>7</sup>

One practical difficulty in applying these policy principles lies in the area of control. If an employer does not have effective control over the activities of the employee, it is difficult to see how imposing vicarious liability on the employer will deter future harm. It may also be arguable that a remedy that imposes no-fault liability on a person not in a position to prevent the tortious act may be practical but not particularly just.

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<sup>5</sup> *Bazley*, para. 15

<sup>6</sup> *Bazley*, para. 22

<sup>7</sup> *Bazley*, para. 29-34

The Court was alive to these problems in its discussion of these principles in *Bazley*, and made the following comments:

At one time the law held masters responsible for all wrongs committed by servants. Later, that policy was abandoned as too harsh in a complex commercial society where masters might not be in a position to supervise their servants closely. Servants may commit acts, even on working premises and during working hours, which are so unconnected with the employment that it would seem unreasonable to fix an employer with responsibility for them. ...

A wrong that is only coincidentally linked to the activity of the employer and duties of the employee cannot justify the imposition of vicarious liability on the employer. To impose vicarious liability on the employer for such a wrong does not respond to common sense notions of fairness. Nor does it serve to deter future harms. Because the wrong is essentially independent of the employment situation, there is little the employer could have done to prevent it. Where vicarious liability is not closely and materially related to a risk introduced or enhanced by the employer, it serves no deterrent purpose, and relegates the employer to the status of an involuntary insurer.<sup>8</sup>

The other difficulty with such a policy-driven approach is that it becomes difficult to find a principled distinction upon which a reasonable prediction can be made as to whether certain acts will be considered to be “closely tied to a risk that the employer's enterprise has placed in the community”. This difficulty can be illustrated by the result in *Bazley* itself, when compared to the result in the companion case of *Jacobi v. Griffiths*<sup>9</sup>, released the same day as *Bazley* by the same Court, but coming to the opposite result.

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<sup>8</sup> *Bazley*, para. 35-36

<sup>9</sup> [1999] 2 S.C.R. 570

Both cases dealt with vicarious liability of a non-profit charitable employer for the sexual assault by an employee of a young person. In *Bazley*, the Court concluded that the employer had created or materially enhanced an enterprise risk by introducing a program which put Bazley in a parent-like relationship with young people. In *Jacobi*, however, with a very similar fact situation, a majority of the Court came to a different conclusion. The distinction drawn by the majority provides some indication of the limits of this policy analysis.

The majority (per Binnie J.) begin their analysis with a comment that suggests a concern about the implications of a broad policy foundation for no-fault liability:

The attribution of vicarious liability is not so much a "deduction from legalistic premises" as it is a matter of policy, as the Court observes in *Bazley v. Curry*, [1999] 2 S.C.R. 534, released concurrently (hereinafter "*Children's Foundation*"), at para. 26. Nevertheless, as the Court adds, "[a] focus on policy is not to diminish the importance of legal principle" (para. 27). ... In my opinion, however, the present case falls on the other side of the line, and does not warrant the imposition of vicarious liability. Much as the Court may wish to take advantage of the deeper pockets of the respondent to see the appellants compensated, we have no jurisdiction *ex aequo et bono* to practise distributive justice. On the facts of this case, legal principle and precedents favour the respondent.<sup>10</sup>

The concept of "deep pockets" expresses the unease which many have for the policy rationale supporting vicarious liability. *Jacobi* may be viewed as an attempt by at least a majority of the Court to put the brakes on the broad policy footings laid in *Bazley* for this no-fault liability. In *Jacobi*, the employer created a program which introduced a risk

similar to that of the Children’s Foundation in *Bazley* with similar unfortunate results – sexual assault by an employee on vulnerable children under his supervision. For the most part, the assaults took place away from the Club and outside working hours, which was viewed as significant by the majority.

The majority conducted its own review of the case law and concluded that they illustrated “the historical reluctance of judges in this country to fix employers with no-fault liability on the basis merely of job-created opportunity even where accompanied (as in the present appeal) by privileged access to the victim.”<sup>11</sup> The Court emphasized that there must be a strong connection between the enterprise and the assault and expressed the governing principle in this way:

To find a strong connection, there must be a material increase in the risk of harm occurring in the sense that the employment significantly contributed to the occurrence of the harm. In *Children's Foundation* at para. 41, the Court suggested that five factors (at least) could be relevant in assessing whether an employer created or materially enhanced the risk of an employee committing an intentional tort and thereby incurred no-fault liability. These were:

- (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;

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<sup>10</sup> *Jacobi*, para. 29

<sup>11</sup> *Jacobi*, para. 51

- (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.<sup>12</sup>

In the end, the Court was not satisfied that the connection was sufficiently strong to impose liability.

The differing results in these two cases indicate how fact dependant most vicarious liability cases are. At the level of principle, the list of factors referred to in *Bazley* and summarized in *Jacobi* seem to provide common ground for the Court in assessing how the strength of the connection between the job-created enterprise and the tortious activity is to be determined.

## **2. Non-Delegable Duty of Care**

The second no-fault theory relevant to potential Crown liability is the principle of non-delegable duty of care. This theory has particular significance to Crown liability because it normally appears to be based on the delegation of statutory obligations, which will for the most part be imposed on the Crown or Crown employees for which the Crown is more clearly vicariously liable.

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<sup>12</sup> *Jacobi*, para. 79

The theory of a non-delegable duty of care is that in certain circumstances the person who delegates to an independent contractor the performance of a duty of care imposed on that person will remain responsible for the careful performance of the duty. This theory has been referred to as a “disguised form of vicarious liability”<sup>13</sup> and it does appear to amount to a limited vicarious liability for the acts of independent contractors when a specific duty of care can be characterized as “non-delegable”.

At the outset, it should be noted that the terminology does not express the underlying doctrine well. The principle underlying this form of liability is not that the duty is non-delegable but that responsibility for the careful performance of the duty cannot be discharged by delegating the performance of the duty. Prowse J.A. explained what she characterized as “somewhat misleading” terminology in her Court of Appeal judgment in *M.B.* in this way:

To call a duty non-delegable does not mean that the duty cannot be delegated, but, rather, that ultimate responsibility for the performance of the duty cannot be delegated. Responsibility for the performance of the duty remains with the delegator who will be held liable in the event that the duty is not performed, or if it is performed negligently or tortiously.<sup>14</sup>

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<sup>13</sup> Fleming, *The Law of Torts* (9th ed.), p. 434

<sup>14</sup> *M.B. v. British Columbia*, 2001 BCCA 227, at para. 73 per Prowse, J.A. Although the lead decision in the Supreme Court of Canada on these issues is *K.L.B.*, it was in the *M.B.* decision in the Court of Appeal where the Court of Appeal justices discussed the issues more fully.

The leading case on non-delegable duty is *Lewis v. British Columbia*.<sup>15</sup> This case concerned liability of the Crown for the actions of the Ministry of Transportation and Highways in delegating certain maintenance work which was in turn performed negligently.

Cory J., writing for the majority, described the concept of non-delegable duty in this way:

It is clear that a party upon whom the law has imposed a strict statutory duty to do a positive act cannot escape liability simply by delegating the work to an independent contractor. Rather a defendant subject to such a duty will always remain personally liable for the acts or omissions of the contractor to whom it assigned the work. ... This must follow because an absolute statutory duty requires the performance of a positive obligation that is imposed on a particular entity which will always remain responsible for the performance of that duty.<sup>16</sup>

In *Lewis*, the Court seemed to view this set of principles as relating only to statutory duties, pointing out that “a common law duty does not usually demand compliance with a specific obligation”<sup>17</sup> and further that:

The strict duty to perform a particular act imposed by statute and the common law duty to take reasonable care if an act is undertaken reflect two divergent positions on a spectrum of liability. Within that spectrum there are a variety of legal obligations which may, depending on the circumstances, lead to a principal's liability for the negligence of an independent contractor. Whether or not there will be liability for the negligence of the acts of the independent contractor will depend to a large

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<sup>15</sup> [1997] 3 S.C.R. 1145

<sup>16</sup> *Lewis*, para. 17

<sup>17</sup> *Lewis*, para. 18

extent upon the statutory provisions involved and the circumstances presented by each case.<sup>18</sup>

The Court also referenced a passage in Atiyah's *Vicarious Liability on the Law of Torts* to support the principle:

If a statute confers a power on a government department, or a local authority, *e.g.*, to enter private land or premises, for their own purposes, and the authority chooses to exercise that power by delegating the work to a contractor, it is not unreasonable that the landowner should be entitled to look to the person authorised by statute to do the work, rather than to the contractor who does it, in the case of negligence or the like. The statute is unlikely to confer such powers on bodies which are financially incapable of meeting any liability for negligence, but a local authority or a government department may well employ a small contractor who is incapable of doing so.<sup>19</sup>

The statute in *Lewis* provided that the Minister "shall direct the construction, maintenance and repair" of all highways and further provided that the Minister has the "management, charge and direction of all matters relating to the acquisition, construction, repair, maintenance, alteration, improvement and operation" of highways. The Court commented as follows:

These sections clearly indicate that the Ministry has the management and direction of all matters relating to construction, repair and maintenance of the highways *and must direct those operations*. ... That statutory authority, when exercised, gives rise to a duty to perform that work with reasonable care. ... It is but fair that when a public authority exercises the statutory authority and power granted to it in circumstances which may

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<sup>18</sup> *Lewis*, para. 20

<sup>19</sup> P.S. Atiyah, *Vicarious Liability on the Law of Torts* (1967), PP. 358-59, cited at *Lewis*, para. 34

have serious consequences for the public interest that it be held liable for a breach of duty occasioned by the negligent acts of its contractor. In those circumstances, it is both appropriate and just to hold a public body ultimately responsible for *ensuring that reasonable care is taken* in the work necessary to carry out its authority.<sup>20</sup>

The analysis in *Lewis* indicates that a person on whom a statutory obligation (as distinct from a discretionary power) is imposed will remain legally responsible for the proper performance of that statutory obligation whether or not that person carries out the obligation or delegates it to a contractor. The duty of care becomes a duty to ensure that reasonable care is taken.

### 3. *K.L.B. and Crown Liability*

These two theories of no-fault liability – vicarious liability and the “disguised form of vicarious liability” that is non-delegable duty – were first considered together by the Supreme Court in a trilogy cases decided in October of 2003, *K.L.B. v. British Columbia* (“*K.L.B.*”)<sup>21</sup>, *M.B. v. British Columbia* (“*M.B.*”)<sup>22</sup>, and *E.D.G. v. Hammer* (“*E.D.G.*”)<sup>23</sup>.

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<sup>20</sup> *Lewis*, para. 22-24 (emphasis added)

<sup>21</sup> [2003] S.C.R. 403, 2003 SCC 51

<sup>22</sup> [2003] S.C.R. 477, 2003 SCC 53

<sup>23</sup> [2003] S.C.R. 459, 2003 SCC 52

**(a) Background**

*K.L.B.* and *M.B.* both involved claims of Crown liability for historic abuse by foster parents of children under their care. In each case, the children had been apprehended by the Superintendent of Child Welfare and placed with the foster family. In neither case was the placement attacked as negligent. It was common ground in both cases that the foster parents were independent contractors not employees of the government.

In *K.L.B.*, the appellants suffered abuse in two successive foster homes in the form of excessive discipline, exposure to inappropriate sexual behaviour, and, on one occasion, K. was sexually assaulted by the older adopted son. The trial judge found the government liable on a no-fault basis for the torts committed by the foster parents under both theories of vicarious liability and breach of a non-delegable duty and also held that the government had failed to exercise reasonable care in arranging suitable placements for the children, and in monitoring and supervising these placements. She rejected the defence that the tort actions were barred by the British Columbia *Limitation Act*<sup>24</sup>.

The Court of Appeal allowed the Crown's appeal in part. A majority of the Court upheld the trial judge's conclusion that the government was vicariously liable and in breach of a non-delegable duty of care in the placement and supervision of the children. However, the Court found that the plaintiffs' claims were statute-barred, with the exception of K.'s claim for sexual assault.

In *M.B.*, the respondent was apprehended from a home where her biological father was frequently violent and had sexually abused her. The respondent was placed in the foster home of Mr. and Mrs. P, where Mr. P. engaged in sexually inappropriate behaviour and sexually assaulted the respondent on one occasion. The trial judge held that the Crown was vicariously liable for Mr. P.'s tort and his breach of fiduciary duty, and found that his tort constituted a breach of the Crown's non-delegable duty to look after the welfare of foster children. She also found that although the social workers were negligent in their monitoring and supervision of the placement, this negligence could not be causally connected to the abuse.

A majority of the Court of Appeal dismissed the Crown's appeal on the issues of vicarious liability and non-delegable duty.

In *E.D.G.*, the night janitor at a public elementary school began a series of sexual assaults on the appellant. When she came down to the boiler room to clean blackboard brushes, he would take her into an adjacent storage area, lock the door and engage in sexual acts. The trial judge found that no person employed by the Board had any reason to suspect that the janitor was engaged in or might likely be engaged in inappropriate behaviour with the children.

At trial, the appellant successfully recovered damages from the janitor, but her claims against the respondent Board, based on vicarious liability, breach of non-delegable duty

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<sup>24</sup> 1996 R.S.B.C. c. 266

and breach of fiduciary duty, were unsuccessful. The appellant appealed the trial judge's holdings on the issues of fiduciary and non-delegable duty, but abandoned her claim based on vicarious liability. The Court of Appeal dismissed her appeal. The appellant appealed to the Supreme Court of Canada on the issues of fiduciary duty and non-delegable duty.

The Supreme Court heard the three cases together and released reasons for judgment on the same day. The Court dealt with the overlapping issues by making *K.L.B.* the lead decision on the issues of vicarious liability and breach of non-delegable duty. In its decision, the Court unanimously dismissed the plaintiff's case for liability based on non-delegable duty of care and also dismissed the case based on vicarious liability.<sup>25</sup>

**(b) Vicarious Liability**

In *K.L.B.*, the Court tied the leading case law together in holding that plaintiffs must demonstrate at least two things to make out a successful claim for vicarious liability:

- (i) they must show that the relationship between the tortfeasor and the person against whom liability is sought is sufficiently close to make a claim for vicarious liability appropriate (see *Sagaz*); and

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<sup>25</sup> Arbour J. would have found liability for vicarious liability, but agreed with the majority that in any event the claims were statute-barred.

(ii) plaintiffs must demonstrate that the tort is sufficiently connected to the tortfeasor's assigned tasks that the tort can be regarded as a materialization of the risks created by the enterprise (see *Bazley/Jacobi*).

The Court further observed that the relationship that most commonly attracts vicarious liability is that of employer/employee as it serves both policy goals of compensation and deterrence. The Court then stated:

By contrast, imposing vicarious liability in the context of an employer/independent contractor relationship will not generally satisfy these two policy goals. Compensation will not be fair where the organization fixed with responsibility for the tort is too remote from the tortfeasor for the latter to be acting on behalf of it: in such a case, the tort cannot be reasonably regarded as a materialization of the organization's own risks and vicarious liability will have no deterrent effect where the tortfeasor is too independent for the organization to be able to take any measures to prevent such conduct. Hence, the relationship of employer to independent contractor does not generally give rise to vicarious liability (subject to certain exceptions: see P.S. Atiyah, *Vicarious Liability in the Law of Torts* (1967), at p. 327).

In the foster care cases of *K.L.B.* and *M.B.*, the question of vicarious liability turned solely on the first issue, that is, whether the relationship between the foster parent tortfeasors and the government was sufficiently close<sup>26</sup>. The Court concluded that the factors in *Sagaz* suggested that the government was not vicariously liable for the wrongs committed by foster parents against the children entrusted to them, given that foster parents must operate independently of day-to-day state control if they are to meet the

goals of foster care. Although foster parents are indeed acting in the service of a public goal, their actions are too far removed from the government for them to be reasonably perceived as acting “on account of” the government in the sense necessary to justify vicarious liability.

This conclusion, according to the Court, finds confirmation in the fact that the imposition of vicarious liability would do little to deter what direct liability does not already deter. Rather, such an imposition of liability could do harm, in that it might discourage governments from placing children in foster homes in favour of less efficacious institutional settings, and would raise the question of why the government should not also be vicariously liable for other torts by foster parents such as negligent driving causing injury to a foster child.

**(c) Non-Delegable Duty of Care**

The Court then considered the application of the doctrine of non-delegable duty of care to the problem of Crown liability for foster parent abuse. The theory that had been accepted in the courts below was based on the statutory requirement under the *Protection of Children Act*, R.S.B.C. 1960, that once a child is apprehended as being in need of protection, the Superintendent of Child Welfare becomes responsible for the care,

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<sup>26</sup> The Crown had conceded that the tort was sufficiently connected to the tortfeasor’s assigned tasks.

maintenance and physical well-being of the child and becomes the legal guardian of the child. The policy element of this form of no-fault liability had been expressed by Prowse J.A. in the Court of Appeal in this way:

In this case, the Superintendent undertook the care, supervision or control of the plaintiff who was committed to his care under the Act. In my view, he was so placed in relation to the plaintiff as to assume a particular responsibility for her safety, in circumstances where the plaintiff might reasonably expect that due care (if not special diligence) would be exercised. In other words, the relationship between the Superintendent and the plaintiff in these circumstances fell within the class of relationships which, on a policy basis, supported a finding of a non-delegable duty.<sup>27</sup>

The Supreme Court of Canada did not accept the applicability of this doctrine to the duties of the Superintendent under the *Protection of Children Act*.

The Chief Justice began by observing that non-delegable duties are not necessarily limited to statutory duties, a point left unclear in *Lewis*. She then went on to discuss carefully the statutory duties in *K.L.B.*, pointing out that the scheme of the Act was that the Superintendent was responsible for the child upon apprehension and under an obligation to place the child in a foster home or with a children's aid society. She then distinguished between the obligations of the Superintendent before placement, which she described as personal and non-delegable, and the Superintendent's obligations after placement, which were not:

The legislation offers no basis for imposing on the Superintendent a non-delegable duty to ensure that no harm comes to children through the abuse

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<sup>27</sup> *M.B. v. British Columbia*, 2001 BCCA 227, at para. 82

or negligence of foster parents. Foster parents provide day-to-day care for the children. But the Act does not suggest that the Superintendent is responsible for directing this day-to-day care and for ensuring that no harm comes to the children in the course of this care. In this respect, the Act differs significantly from the statutes at issue in *Lewis, supra*, which imposed a duty on the Minister of Transportation and Highways personally to direct and manage the maintenance and repair works. Although the Act makes the Superintendent solely responsible for the well-being of a child before placement, it does not suggest that this is work for which the Superintendent retains responsibility after placement.<sup>28</sup>

The proposition which appears to emerge from this analysis is that when a non-delegable duty claim arises from a statute, the terms of the statute must be read carefully to determine what duties were intended to be performed personally and what duties were intended to be performed by others. Where the duties were intended to be performed by others, they would presumptively be delegable and liability for inadequate performance would not flow back to the statutory designate. This approach narrows the scope of obligation under this doctrine to cases where the statute explicitly provides for a duty to be performed personally by the statutory designate.

#### **4. Recent Developments**

The decision of the Supreme Court in *K.L.B.* has helped to clarify the law on no-fault liability, but the precise boundaries of the policy framework are still being drawn. The Court recently had another opportunity to examine the scope of vicarious liability in a

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<sup>28</sup> *K.L.B.*, at para. 36

sexual assault case<sup>29</sup>, and reiterated the tests established in *Bazley, Jacobi* and *K.L.B.* The five factors set out in these cases were repeated, with some additional emphasis on the degree of control exercised by the employer:

The employer's control over the employee's activities is one indication of whether the employee is acting on his or her employer's behalf: *K.L.B.*, *supra*, at para. 22. At the heart of the inquiry lies the question of power and control by the employer: both that exercised over and that granted to the employee. Where this power and control can be identified, the imposition of vicarious liability will compensate fairly and effectively.<sup>30</sup>

In another recent decision, the Alberta Court of Appeal considered this line of cases and emphasized the causal connection between the employment and the wrongful act in explaining where the line for liability was to be drawn:

The emphasis is on the strength of the causal link between the employment and the wrongful act; the employment must materially enhance the risk of a wrongful act: *Bazley* at paras, 36-42. The connection must be strong or significant.<sup>31</sup>

The Supreme Court will soon have yet another opportunity to clarify these principles. Another decision of the British Columbia Court of Appeal dealing with no-fault liability for sexual assaults, *E.B. v. Order of the Oblates of Mary Immaculate in the Province of*

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<sup>29</sup> *John Doe v. Bennett*, [2004] 1 S.C.R. 436, 2004 SCC 17 (“*Bennett*”)

<sup>30</sup> *Bennett*, para. 21

<sup>31</sup> *S.G.H. v. Gorsline*, 2004 ABCA 186, at para. 20

*British Columbia*, decided prior to the release of *K.L.B.*, has been argued and is currently under reserve at the Supreme Court of Canada.<sup>32</sup>

## 5. Conclusion

The judgment of the Supreme Court in *K.L.B.*, together with the *Bazley/Jacobi* line of cases that preceded it, provides important clarification of the law in relation to no fault liability against the Crown. Liability in respect of a non-delegable duty of care will only be imposed where the statute or other law imposing the duty makes it clear that the task giving rise to the duty is to be performed personally by the person under the obligation. If the statute or law creating the obligation indicates that the task may be performed by someone else, it is unlikely that liability based on non-delegable duty of care will be imposed.

With respect to vicarious liability, the Court has confirmed the Salmond test that liability will attach to employee acts authorized by the employer or unauthorized acts so connected with authorized acts that they may be regarded as modes (albeit improper modes) of doing an authorized act. In order to meet the second branch of the Salmond test, there must be a strong connection between the enterprise from which the relationship arises and the act for which liability is being allocated. To find a strong connection, the

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<sup>32</sup> The case was argued December 7, 2004 and judgment reserved.

employer must have created or materially enhanced the risk that the improper act will be carried out. To determine whether such a strong connection exists, the Court has suggested consideration of the following five factors:

- (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.

These factors arise out of difficult factual situations relating to abuse of vulnerable children by caregivers. At a more general level, these factors will have to be adapted to cases as they arise. The intent in each case will be to determine whether the nature of the enterprise materially increased the risk that the act in question would occur and whether it is fair from a policy perspective that the faultless employer should be responsible for it. The

policy foundation of this form of liability ensures that the jurisprudence will continue to develop in this important area of Crown liability.

John J.L. Hunter Q.C.  
May 2005