RECENT DEVELOPMENTS IN VICARIOUS LIABILITY
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Introduction

On June 17, 1999 (a date said by some to be "a day that will live in infamy") the Supreme Court of Canada released two companion decisions on the issue of vicarious liability. At issue in both cases was the liability of employers for the intentional torts of their employees. In both Bazley v. Curry, [1999] 2 S.C.R. 534, [Bazley] and Jacobi v. Griffiths, [1999] 2 S.C.R. 570 [Jacobi] employees had been criminally convicted of sexual abuse and therefore the liability of the perpetrator was not in issue. The question to be determined was whether the employers were vicariously liable for sexual abuse committed by their employees, which had been perpetrated against children. Bazley and Jacobi, while upholding the Salmond test, clarified the specific factors to be considered in determining employer liability [hereinafter the "Bazley test"].

The policy considerations which are to be regarded in a determination of vicarious liability are clearly enunciated in this test, and will be discussed in detail below. This test has been consistently upheld in the following six years in numerous trial and appellate level decisions and in subsequent Supreme Court rulings, and remains in effect today.

Despite the uniformity with which courts have purported to apply the Bazley test, there has been discrepancy in its application. The average legal professional, let alone a lay person, would be forgiven for questioning the initial appearance of inconsistency with which courts have held employers vicariously liable for the intentional torts of their employees. It is not always clear or apparent why one employer is found vicariously liable, when another employer in
a strikingly similar situation may not be found liable. The inconsistence is further enhanced when the defendant is a non-profit corporation, as was the case in both *Baz/ey* and *Jacobi*. In *Baz/ey*, McLachlin J. (as she then was) delivered the unanimous decision for the court, which found the Children's Foundation vicariously liable for the sexual misconduct of their employees, and noted at para. 56:

> I conclude that the case for exempting non-profit institutions from vicarious liability otherwise properly imposed at law has not been established. I can see no basis for carving out an exception from the common law of vicarious liability for a particular class of defendants, non-profit organizations.

Conversely, in *Jacobi*, the Boys' and Girls' Club of Vernon was found not to be vicariously liable for the sexual abuse committed by their employee. Binnie J., writing for the majority, noted at para. 78 that although "'fairness' to these non-profit organizations is entirely compatible with vicarious liability provided that a strong connection is established between the enterprise risk and the sexual assault. Given the weakness of the policy justification however, I think the respondent and other non-profit organizations are entitled to insist that the strong connection test be applied with appropriate firmness."

This statement by Justice Binnie was later interpreted in lower court rulings to apply a different standard for finding non-profit defendants vicariously liable, which has in turn lead to further Supreme Court commentary.

The question of vicarious liability is predominantly found in cases regarding the sexual abuse of children. The Federal and Provincial governments, school boards, churches and non-profit children's groups have all been frequently named as defendants. Less frequently, but still importantly, the *Baz/ey* test has also been applied to transportation corporations and bar owners for the intentional torts of their drivers and security staff respectively. The Supreme Court has also had recent opportunity to clarify the issue of vicarious liability.
liability as it relates to independent contractors. This paper will discuss the current application of the Baz/ey test as it applies in sexual abuse cases, Crown, non-profit and corporate defendants as well as independent contractors.

**Sexual Abuse**

**Non-profit defendants: School Boards, Churches and Children's Charities**

In *Baz/ey* the test for vicarious liability is outlined as follows:

41 Reviewing the jurisprudence, and considering the policy issues involved, I conclude that in determining whether an employer is vicariously liable for an employee's unauthorized, intentional wrong in cases where precedent is inconclusive, 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. 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 the 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.

Although discussed here in the context of sexual abuse, these factors have been broadly applied to cases involving vicarious liability of employers. Also of broad application is McLachlin J.'s (as she then was) discussion of the foreseeability issue. As noted below, it is not sufficient to simply apply the broad notion of the "but-for" test. While the examination of the connection between the intentional tort and the scope of employment must not be too limited, it is not sufficient to simply suggest that the employer must have foreseen the harm. Rather, there must be more than mere opportunity created by the employment, the employment must substantially increase the risk of the harm occurring. As noted at paras. 39-40 in Baz/ey.

39 The connection between the tort and the employment is broad. To say the employer's enterprise created or materially enhanced the risk of the tortious act is therefore different from saying that a reasonable employer should have foreseen the harm in the traditional negligence sense, making it liable for its own negligence. As Fleming explains (supra, at p. 422):

Perhaps inevitably, the familiar notion of foreseeability can here be seen once more lurking in the background, as undoubtedly one of the many relevant factors is the question of whether the unauthorised act was a normal or expected incident of the employment. But one must not confuse the relevance of foreseeability in this sense with its usual function on a negligence issue. 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. [Emphasis added.]

40 On the other hand, this analysis’s focus on what might be called “general cause”, while broader than specific foreseeability, in no way implies a simple “but-for” test: but for the enterprise and employment, this harm would not have happened. This is because reduced to formalistic premises, any employment can be seen to provide the causation of an employee’s tort. Therefore, “mere opportunity” to commit a tort, in the common “but-for” understanding of that phrase, does not suffice: *Morris v. C. W Martin & Sons Ltd.*, [1966] 1 O.B. 716 (C.A.) (*per* Diplock L.J.). The enterprise and employment must not only provide the locale or the bare opportunity for the employee to commit his or her wrong, it must materially enhance the risk, in the sense of significantly contributing to it, before it is fair to hold the employer vicariously liable. Of course, opportunity to commit a tort can be "mere" or significant. Consequently, the emphasis must be on the strength of the causal link between the opportunity and the wrongful act, and not blanket catch-phrases. When the opportunity is nothing more than a but-for predicate, it provides no anchor for liability. When it plays a more specific role _ for example, as permitting a peculiarly custody-based tort like embezzlement or child abuse _ the opportunity provided by the employment situation becomes much more salient.

The test from *Baz/ey* is summarized and adopted in the majority decision of Justice Binnie in *Jacobi* at para. 31. There, Binnie J. determined that the Boys and Girls Club of Vernon was not vicariously liable for sexual assaults perpetrated by one of their leaders on camping trips and in his home:

31 McLachlin J. in *Children's Foundation* sets out the two-step process for determining when an unauthorized act is "so connected" to the employer’s enterprise that liability should be imposed (at para. 15):

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.

In my view, the case law, reflecting policy judgments by various courts over many years and across many different jurisdictions, "clearly" suggests that the imposition of no-fault liability in this case would
overshoot the existing judicial consensus about appropriate limits of an employer's no-fault liability. This same conclusion is reached under the second step of the analysis in which the "broader policy rationales" are confronted directly. I therefore think the British Columbia Court of Appeal correctly denied vicarious no-fault liability in this case and I would dismiss the appeal on that point, without prejudice to the appellants' right to continue proceedings in the Supreme Court of British Columbia, if so advised, on the issues of the Club's potential fault-based liability.

[emphasis added]

This two-stage approach to determining whether the tort is sufficiently connected to employment has been followed in numerous Saskatchewan decisions, including *V.P. v. Canada (Attorney General)*, [1999] S.J. No. 723 where it is succinctly summarized by Madam Justice Hunter as follows:

68 In Bazley the court framed the issue so that it is governed by the "Salmond" test. Employers are vicariously liable for employee acts authorized by the employer or unauthorized acts which are so connected with authorized acts that they may be regarded as modes of doing an authorized act. In the case of vicarious liability for an employee's sexual assault committed on clients or persons within their care, the test is whether the unauthorized act of sexual assault is so connected with the authorized acts. Therefore, the Salmond test is approached in two steps.

1. The court should determine whether there are precedents which unambiguously determine on which side of the line between vicarious liability and no liability the case falls.

2. If not, the second step is to determine whether vicarious liability should be imposed in light of the broader policy rationales behind strict liability.

Turning specifically to torts of sexual assault and sexual abuse, it is evident from the plethora of case law that policy considerations play a pivotal role in finding defendants vicariously liable. With the relatively new (increasing substantially within the last twenty years) understanding of the lasting social, economic and psychologically detrimental effects that sexual abuse has on victims, courts have been searching for a path to compensation for victims. It can be argued that in some cases, courts are indulging in the end justifies the means". No one can argue that the victims of such reprehensible acts are
deserving of compensation. It is arguable, however, that the path to compensation some courts have chosen lacks intellectual or academic integrity.

The deep pockets of non-profit, charitable and Crown employers (and/or their insurers) have been targeted by plaintiffs as a source of compensation. In many of these cases the perpetrators have already been criminally convicted for the offense and in many instances are not involved in the civil action, or, if they are, they are a nominal defendant with no hope of financial recovery from them.

In theory, a balance is being sought between victim compensation and employer liability. However, it would certainly seem that following both truncated and thorough reviews of the policy considerations (as outlined in Baz/ey and Jacobi) courts are tending to find employers vicariously liable. Fact situations which seem virtually identical have produced drastically different results with respect to Church and non-profit organizations' liability for sexual abuse. Also, while the federal government has been held liable for the sexual abuse of children in residential schools, provincial governments have been found to not be liable for abuse suffered by children in foster care. The incidents of when school boards will and will not be liable are equally divided.

The confusion amongst judiciary stems form the companion cases of Baz/ey and Jacobi, as noted above. In Baz/ey, Justice McLauglin commented with specific regard to sexual abuse:

42 Applying these general considerations to sexual abuse by employees, there must be a strong connection between what the employer was asking the employee to do (the risk created by the employer's enterprise) and the wrongful act. It must be possible to say that the employer significantly increased the risk of the harm by putting the employee in his or her position and requiring him to perform the assigned tasks. The policy considerations that justify imposition of vicarious liability for an employee's sexual misconduct are unlikely to be satisfied by incidental considerations of time and place. For example, an incidental or random attack by an employee that merely happens to take place on the employer's premises during working hours will scarcely justify holding the employer liable. Such an attack is unlikely to be related
to the business the employer is conducting or what the employee was asked to do and, hence, to any risk that was created. Nor is the imposition of liability likely to have a significant deterrent effect; short of closing the premises or discharging all employees, little can be done to avoid the random wrong. Nor is foreseeability of harm used in negligence law the test. What is required is a material increase in the risk as a consequence of the employer's enterprise and the duties he entrusted to the employee, mindful of the policies behind vicarious liability.

43 What factors are relevant to whether an employer's enterprise has introduced or significantly exacerbated a risk of sexual abuse by an employee? ... It is obvious that the risk of an employee sexually abusing a child may be materially enhanced by giving the employee an opportunity to commit the abuse. There are many kinds of opportunity and the nature of the opportunity in a particular case must be carefully evaluated in determining whether it has, in fact, materially increased the risk of the harm that ensued. If an employee is permitted or required to be with children for brief periods of time, there may be a small risk of such harm - perhaps not much greater than if the employee were a stranger. If an employee is permitted or required to be alone with a child for extended periods of time, the opportunity for abuse may be greater. If in addition to being permitted to be alone with a child for extended periods, the employee is expected to supervise the child in intimate activities like bathing or toileting, the opportunity for abuse becomes greater still. As the opportunity for abuse becomes greater, so the risk of harm increases.

44 The risk of harm may also be enhanced by the nature of the relationship the employment establishes between the employee and the child. Employment that puts the employee in a position of intimacy and power over the child (Le., a parent-like, role-model relationship) may enhance the risk of the employee feeling that he or she is able to take advantage of the child and the child submitting without effective complaint. The more the employer encourages the employee to stand in a position of respect and suggests that the child should emulate and obey the employee, the more the risk may be enhanced. In other words, the more an enterprise requires the exercise of power or authority for its successful operation, the more materially likely it is that an abuse of that power relationship can be fairly ascribed to the employer. See Boothman v. Canada, supra.

45 Other factors may be important too, depending on the nature of the case. To require or permit an employee to touch the client in intimate body zones may enhance the risk of sexual touching, just as permitting an employee to handle large sums of money may enhance the risk of embezzlement or conversion. This is the common sense core of the "mode of conduct" argument accepted by the trial judge in this case. (The same factor might of course be analyzed in terms of enhanced opportunity.) Time and place arguments may also be relevant in particular cases. The mere fact that the wrong occurred during working hours or on the jobsite may not, standing alone, be of much importance; the
assessment of material increase in risk cannot be resolved by the mechanical application of spatial and temporal factors. This said, spatial and temporal factors may tend to negate the suggestion of materially enhanced risk of harm, insofar as they suggest that the conduct was essentially unrelated to the employment and any enhanced risk it may have created (for example, the employee's tort occurred offsite and after hours). The policy considerations of fair compensation and deterrence upon which vicarious liability is premised may be attenuated or completely eliminated in such circumstances.

46 In summary, the test for vicarious liability for an employee's sexual abuse of a client should focus on whether the employer's enterprise and empowerment of the employee materially increased the risk of the sexual assault and hence the harm. The test must not be applied mechanically, but with a sensitive view to the policy considerations that justify the imposition of vicarious liability - fair and efficient compensation for wrong and deterrence. This requires trial judges to investigate the employee's specific duties and determine whether they gave rise to special opportunities for wrongdoing. Because of the peculiar exercises of power and trust that pervade cases such as child abuse, special attention should be paid to the existence of a power or dependency relationship, which on its own often creates a considerable risk of wrongdoing.

The disparity in the verdicts which followed these seminal cases arises, quite simply, due to the extensive discretion afforded by the above cited "policy consideration" and examination of the "opportunity" afforded by a particular employment. This "test" proves to be anything but. It appears to be but a means of opening the door of judicial discretion very wide indeed; further, judges are quite willing to stride boldly through that doorway, to effect the result they wish based on the particular circumstances of each case.

The factors to be considered by a court are so numerous that a careful balancing of factors can often be tipped in either direction.

The policy consideration of "fair and efficient compensation for wrong and deterrence" has lead to conflicting decisions relating to the vicarious liability of School Boards for the tortuous acts of teachers. As in the cases of churches sometimes being found vicariously liable for the acts of their employees,
(discussed below) the decisions relating to school boards' vicarious liability are at variance.

In the recent Alberta Court of Appeal decision of S.G.H. v. Gorsline, [2004] A.J. No. 593, the court unanimously rejected an appeal from the trial judge’s conclusion that the Calgary Board of Education was not vicariously liable for sexual assaults committed by the plaintiffs physical education teacher/coach. In upholding the lower court ruling, the Court of Appeal found (paragraph 13) that the trial judge had applied the correct test, and carefully assessed the appropriate policy considerations. After concluding that previous case law did not resolve the issue of vicarious liability, at paragraphs 24 - 25 the Court determined that "...the legislature imposed duties on school boards to provide educational services in the community. Nothing done by the board significantly enhanced the risk of sexual abuse in the context of the educational system. While the teacher’s work provided an opportunity for the teacher to commit the offences and a measure of authority over the students, this was insufficient to impose vicarious liability...The incidental connection between the Board's activities of building schools, hiring teachers and mandatory attendance is insufficient to trigger liability."

The Saskatchewan decision of D.S. v. Parkland School Division1 also addresses the liability of a School Board for sexual assaults committed by a teacher, but at the time of writing this paper, had not been decided.

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1 This action has been the subject of many lower court applications on various issues. The Defendant school board had successfully applied to bring a third party claim against the Plaintiff's parent's for negligently breaching the duty they owed as parents in D.B. v. Parkland School Division No. 63, 2000 SKQB 64, [2000] 7 WWR 186, which was upheld by the Court of Appeal in D.B., 2001 SKCA 9, [2001] 5 W.W.R. 617. The School Board's application to strike out D.B.'s negligence claim as being statute barred under the Statute of Limitations was then granted, and an appeal from that application was dismissed, D.B., 2002 SKCA 69. As a consequence, the Parent's then brought an application to have the third party claim in negligence struck, and it was held by the Chamber's judge that "In so far as the allegations against the defendant Board lie in vicarious liability for the actions of Carruthers, such a liability is derivative and it is my view that they cannot be in a stronger position than their employee would be in, in so far as a claim over against the parents is concerned." On appeal from that decision in D.B.,[2004] S.J. No. 537 the Court of Appeal, after a review of vicarious liability asked and answered the question: "whether someone sued in vicarious liability can seek contribution from someone in negligence
In contrast to the Alberta Court of Appeal decision in *S.G.H.*, *supra*, is *Doe v. Avalon East School Board* [2004] N.J. No. 426. In *Avalon*, the school board was found vicariously liable for the sexual assault by a teacher who had been employed by the school board for nearly twenty years. As in previous cases, the teacher had already been found guilty in the criminal courts, and his direct personal liability was not in issue. In this case, the teacher had told a student to sit in a separate classroom while a test was being written. He then followed the student into the room and sexually assaulted him. When the assault was reported, the school board took immediate action, and the teacher resigned and was charged and convicted.

Justice Faour, while commenting upon the contrasting jurisprudence relating to school board vicarious liability summarized *S.G.H.*, *supra*, at paras. 33-34 of where he noted:

34 In *Gorsline* the employment as a physical education teacher provided an opportunity to develop the relationship with the plaintiff. Many of the activities and situations which provided the context for the assaults were outside the purview of the school board's mandate, and in many instances, off the premises. In that case, parents sent students to track meets and other activities which took place outside school hours, thereby breaking the chain of connection with the board's business. This case stands for the proposition that opportunity created by the employment, by itself, is not sufficient to draw liability.

Faour J. then went on to determine that (following *Baz/ey, Jacobi*, and *Bennett*) in this instance the school board was liable. He addressed the risk created by the school board's delegation of power to teachers by stating:

52 This is not to say that the business of the board is inherently risky. However, education is a service that is delivered directly to youths who are vulnerable by virtue of their age. As a consequence, such activity when the primary tortfeasor cannot do so?”. They held that the Board could only successfully proceed against the parents if the original tortfeasor could have succeeded in the action, and that it was “inherently offensive to postulate that a teacher could commit sexual acts upon a student entrusted to her care and then argue the child’s parent’s were liable because they should have prevented her own acts from occurring.”
carries with it the associated risk of harm should the authority delegated to an employee, in pursuance of the Board’s business, be abused.

53 The School Board has the kind of direct purpose, role and mandate which may present the opportunity for a tortious act which is connected with that role and mandate. It brings into the community a service for which there is a very compelling public interest. In providing that service, it has a legislated authority over the students in its schools. The process of educating children requires that a board have a form of custodial authority to enable it to educate them. While the purpose for which the board is established does not require that a teacher be given the kind of intimate, parental role that the court described in Bazley, nonetheless it is necessary that the Board, in carrying out its mandate, will require professional teachers to receive a significant measure of power and authority over students. It is certainly closer to the Bazley model than the role of the club that the court described in Jacobi, where there was no power or authority over its clients, merely a mandate to organize recreational activities for youths.

54 When any body exercises the kind of authority that gives it a degree of control over a vulnerable population, there is a risk that harm may result if an employee abuses that authority. It is the exercise of that kind of authority over the students that puts the School Board closer to the position of the defendant in Bazley than to the defendant in Jacobi.

While noting at paragraph 63) that sexual assault did not further the aims of the employer, the authority to isolate children in a classroom by themselves did:

... This was for the purpose of carrying out the Board's mandate as part of the education system. The wrongful act was directly connected with his role as a teacher. He was in a position of power vis-a-vis the plaintiff; as a student required to submit to the directions of a teacher, the plaintiff was vulnerable to a wrongful exercise of that power and authority. Neary's responsibilities required him to exercise a directive and disciplinary role over the students in his charge. The Plaintiff was such a student, and was vulnerable to the extent that he was required to subject himself to Neary's direction.

It was also concluded that the policy objective of deterrence was applicable, even though it was acknowledged that there "was nothing the Board could reasonably have done to prevent this assault" (paragraph 65). Fabour J.
concluded that the Board was in the best position to minimize such incidents, and
that the deterrence Justice McLaughlin spoke of in Baz/ey was of a general, not
specific nature. As a result, the Board's inability to prevent such assaults was
"irrelevant to the imposition of vicarious liability" (at paragraph 66).

Crown liability

Crown liability has been the subject of numerous Saskatchewan cases,
many stemming from the tortuous acts of the same individual administrator at the
Gordon Residential School. William Starr has been criminally convicted of
numerous acts of sexual assault and sexual abuse, and his victims are making
their way through the civil courts. The Starr cases raise the issue of what
constitutes "scope of employment", as not all of Starr's victims were residents or
pupils at the school. This individual's conduct has lead to one of the few cases
where the liability of the Crown was determined at the first stage of the two stage
Salamon test, in that the courts are able to identify an "identical fact situation"
where vicarious liability was held to exist.

In V.P. v. Canada (Attorney General), [1999] S.J. No. 723, it was held
that the Crown was vicariously liable for Starr's misconduct but that it committed
no personal wrongdoing against V.P., who was a resident at Gordon Residential
School for one month in 1975 when he was twice sexually assaulted by Starr. In
so finding, Justice Hunter noted that unlike the "janitor" cases, where the mere
opportunity created by the employment does not create a "strong connection"
with which to impose vicarious liability\(^\text{2}\), here there was a sufficient connection.

2 S.C.R. 459, where the lower court ruling finding the school board not to be vicariously liable for the
sexual assaults perpetrated by a janitor was not appealed. The ground for appeal in E.D.G. was the issues
of fiduciary and non-delegable duty. The "Janitor" cases are discussed by Justice Binnie in Jacobi at para.
45 as follows:
In this instance Starr, whose only connection to the victim was during discipline, was furthering the employer's aims in that "someone in a residential school is required to exercise parent-like authority, and secondly, in a school context someone must be able to administer discipline. Appropriate discipline would further the employer's aims. (...) Accordingly, the A-G is vicariously liable for the misconduct of Starr which was committed on V.P. in the course of and under the guise of administering discipline.,,3

In *D.W. v. Canada (Attorney General)*, [1999] S.J. No. 742, another victim of Starr claimed vicarious liability of the Crown. Starr was deemed to have committed the assaults in question. In *D.W.*, Justice Maurice found (paragraph 26) that the inquiry into the Crown's vicarious liability could stop after the first stage of the *Bazely* test because he viewed "... V.P. v. Attorney General of Canada, supra, as being clear precedent for the imposition of vicarious liability on the Crown, for the sexual assaults committed by Starr, on the plaintiff."

The recent Saskatchewan case of *H. L. v. Canada (Attorney General)* has been the subject of judicial consideration at the Queen's Bench, Court of Appeal and Supreme Court levels, with the Supreme Court reasoning being released on April 29, 2005.4 *H.L.* was also a victim of Starr; however, unlike the individuals in *V.P.* and *D.W.*, H.L. was neither a pupil nor a resident at the Gordon Residential School. This case is unique in that it found Starr's direction

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3 Ibid., at paras. 104-107.
of an extracurricular boxing club, run out of the school gymnasium, to be substantially connected to Starr’s role as administrator of the school. As such, the Crown was held to be vicariously liable for the sexual assaults committed upon H.L.

The trial level finding of vicarious liability was appealed to the Court of Appeal, which upheld Justice Klebuc’s decision on that issue, although offering different reasoning and factual analysis. Vicarious liability is not the central or contentious issue in the Supreme Court decision, which addresses the standard of review to be applied by the Court of Appeal under the Court of Appeal Act, 2000, and the calculation of damages. The Court of Appeal specifically granted leave to appeal (in [2003] S.J. No. 555, despite a unanimous decision in [2002] S.J. No. 702) in order to address the question of appropriate pecuniary damages in residential school cases - a topic too broad to be considered within the confines of this paper.

Regarding the question of vicarious liability, Klebuc J. found that Canada had both created and enhanced the risk that enabled Starr to abuse H.L. In so finding, he addressed (at paragraphs 30 - 37) the policy considerations addressed in Baz/ey and Jacobi and the previous Starr cases of v.P. and D.W. Klebuc J. then concluded:

[43] In summary, I am satisfied that Canada operated the boxing club and held it out to be a significant achievement on the part of the Department of Indian Affairs in the fulfilment of its goals. The Department’s involvement went far beyond providing facilities and some funding as evidenced by its many internal reports and the testimony of Starr. In so doing it created or enhanced the risks which are the subject of the within action...

Second Ground - Previous Cases

[44] In my view the relationships among H.L., Starr and Canada so closely approximate those upon which vicarious liability was imposed upon the employer in Bazley v. Curry that it is dispositive of the issue of vicarious liability in the instant case. The decision in Jacobi v. Griffiths is of lesser relevance for Canada is not a non-profit organization
which provided H.L. with a service for little or no reward. Rather, it is an entity with substantial resources, and the ability to spread the true cost of "doing business" among many. Nor is there any evidence that Canada's ability to fulfill it's legislated mandates would be adversely affected if it were vicariously liable for Starr's misconduct.

[45] Canada operated Gordon's Day School and the Residence as part of its special relationship with the aboriginal inhabitants of Canada. Under s. 91 (24) of the Constitution Act, 1867, the federal government gained jurisdiction over Indians and lands reserved for their use. In connection therewith it assumed responsibility for providing specific services for Indian nations, including the provision of social assistance, health-care services and education for Indian children....

[46] Canada's argument that the elements of power and intimacy in the instant case were no more formidable than those considered in Jacobiv. Griffiths is not sustainable. The known poverty and dysfunction of the L. family unit, the number of children at the Residence who came from problem homes, the lack of alternate recreational facilities at the Gordon First Nation Reserve, the perceived and actual control of Starr and Canada over those facilities and the activities available at the Residence, and the role of Canada as a provider for aboriginal people, collectively established a de facto power relationship between H.L. and Canada materially different from those expected between a non-profit organization situated in an urban setting and an urban youth who used its services...

[47] While my conclusion is dispositive of the issue of vicarious liability based on the ratio of Bazley v. Curry, I also have applied the analytical approach prescribed therein for determining whether vicarious liability should be imposed, including (i) the opportunity factor, (ii) furtherance of an employer's aims, (iii) inherent intimacy, (iv) power confirmed on the employee and (v) vulnerability of the victim. Discussion of these factors necessitates a review of some the evidence previously discussed.

[48] As administrator of the Residence, Starr was the senior manager on staff and had access to all of the Residence's facilities .... The facilities of the Residence and gymnasium at Gordon's Day School, which were under Starr's control after regular school hours, were the hubs for social activities for Indian communities near the Residence. This made him the de facto gatekeeper over many significant activities for children. In the result, non-resident students who came to enjoy activities sponsored by Canada were exposed and subjected to Starr's authority not only over the facilities, but in the case of boxing, his control and direction of its activities on a daily basis. Collectively, these opportunities materially enhanced Starr's ability to abuse the power associated with his position as administrator of the Residence and a prime implementer of its boxing program.
Starr’s opportunity to abuse his authority was further enhanced by Canada’s deficient management and supervisory structure.

In summary, the criteria for the imposition of vicarious liability on Canada have been met in the instant case.

As noted above the Court of Appeal upheld the finding of vicarious liability, but set aside Justice Klebuc's awards for loss of past and future earnings. After a lengthy discussion on the appropriate standard of review available under the Court of Appeal Act, 2000, the issue of vicarious liability was discussed by Cameron J.A. beginning at paragraph 103.

After noting that the second branch of the Salmond test could be more easily stated then applied (at paragraph 106), the court went on to review Baz/ey and Jacobi. Although disagreeing with Justice Klebuc's determination that "the relationships among H.L., Starr and Canada so closely approximate those upon which vicarious liability was imposed upon the employer in Bazley v. Curry that it is dispositive of the issue of vicarious liability in the instant case." (at paragraph 142), Cameron J.A. held, at paras. 143-144:

... Nothing turns on the trial judge's precedential reliance on Bazley, however, for he went on to conduct the requisite assessment.

We have done likewise and, while we may not agree with every aspect of the trial judge's assessment, we have arrived at the same conclusion he did, namely that the Government should be held vicariously liable. In other words, we are of the opinion the trial judge's conclusion is correct, though he may have erred in reaching it.
Cameron J.A.'s analysis then proceeded as follows. It is worth reviewing the lengthy quote below, in detail:

[146] ... In our judgment the close connection test of Bazley and Jacobi is satisfied, which is to say we, too, are of the view the defendant Starr's sexual abuse of the plaintiff was sufficiently related to conduct authorized by the Department to justify the imposition of vicarious liability on the Government.

[147] There are several features of the case that in our judgment weigh in favor of imposing vicarious liability. To begin with, there is the significant risk of child sexual abuse introduced, generally, by the Government's enterprise. Then there is the job-related opportunity for such abuse by the defendant Starr and the job-related power entrusted to him. In addition, there is the vulnerability of the children with whom he came into contact in the discharge of his duties and the performance of his added responsibilities. This does not provide the whole of the basis for our opinion, for other factors fall to be considered, namely the defendant Starr's acts relative to the aims of the enterprise, and the extent to which his sexual abuse of the plaintiff related to intimacy inherent in the enterprise. For the moment, however, let us explain our thinking in respect of the former.

1. The factors of risk, opportunity, power, and vulnerability

[148] In the abstract, the risk of child sexual abuse introduced by the enterprise was greatest in relation to the resident students and greatest at the instance of the child-care workers. But the risk did not end there. It might have done so had the defendant Starr stuck to his official duties; or had the Department held him to them, but with the approval of the Department he did not. So the risk carried over to him. And it seems fair to say, as did the trial judge, that the risk was materially enhanced, given the nature and extent of the added responsibilities the defendant Starr undertook with the encouragement and approval of the Department. Those added responsibilities served to appreciably augment his job-related powers in relation to the children and his job-related opportunities for sexual contact with them.

[149] So far as the extracurricular activities of the children were concerned, student and non-student alike, he assumed an influential and powerful presence in their lives, as he was encouraged to do.... Some of the settings were private, others were generally public, and all were accompanied, it seems fair to say, by distinct elements of respect and trust and dependancy, even emulation perhaps.

[150] Counsel for the Attorney General, in his submission, tended to isolate the Boxing Club and its activities from the enterprise as a whole, treating the Club as an enterprise in itself that was undertaken by the defendant Starr and others independently of their employment and as volunteers, ...
[151] The trial judge rejected a similar approach, and rightly so in our respectful opinion. Realistically, one cannot compartmentalize the Government's enterprise in this way, or so detach the Club and rob it of its unique nature, or so characterize the relationships to which the enterprise and the Club gave rise—not when assessing the risk of the enterprise, or the job-related opportunities and powers of the defendant Starr, or the vulnerability of the participants to sexual abuse at his instance. The Club was an integral, if comparatively small, part of the Government's enterprise as a whole—a peculiar, personal enterprise dedicated to the educational, developmental, and social needs of relatively deprived children from Gordon's Indian Reserve and other Reserves. All was part of a piece, as it were, and the defendant Starr's job-related power and authority pervaded every facet of it. As did the dependency of the children.

[152] He was never a mere boxing coach, ... He was at all times, and in every respect, the local embodiment of all the power and authority of the enterprise as a whole ... Nor was he a mere volunteer. He undertook to do what he did in relation to the boxing and other clubs as an outgrowth of his official duties, even as a sanctioned extension of some of those duties....

[153] Nor, as the incident in the defendant Starr's private office demonstrates, did his job-related opportunities to abuse his power stop at the door of the gymnasium or end in public settings.... his was the power to command attendance, if for no other reason than his was the power to assess performance and grant or withhold reward.

[154] Even in the gymnasium, his job-related opportunities to abuse his power extended to a private setting.... The opportunity was there, the storage room was at hand, and the means of inducement were present. So, too, were vulnerable and generally dependent youngsters. All of this was closely connected to the enterprise and his employment, particularly as it was allowed to evolve. Even the means of inducement derived from the enterprise and his employment, not independently of it. So even this setting was conducive to sexual entreaty, were that the bent of someone in the position Mr. Starr came to enjoy.

[156] The road trips, especially the overnight ones, afford another example of his job-related opportunity to engage boys in sexual activity.

[157] None of this can be realistically detached from the Government's enterprise as a whole, not as the enterprise was actually conducted with the knowledge and approval and encouragement of the Department. Nor can any of this be realistically removed from the risk of the enterprise. Not that the
specific risk might have been foreseen, but it was inherently present and it was very real.

[158] Having regard for all of this, the enterprise may be said in general to have created a significant risk of employee sexual impropriety with children. And, in the case of the defendant Starr, the risk may be seen to have been appreciably enhanced, given the role he was allowed to assume, with its all-pervasive powers and opportunities, and the vulnerability of the youngsters. In our judgment, all the elements of enhanced risk were present and added up to a material, concrete risk.

[159] Tragically, the potential of this was realized repeatedly, as it was for example

in V.P. v. Canada (Attorney General) and Starr, [2000] 1 W.W.R. 541 (Sask. a.B.) and again in D.W v. Canada (Attorney General) and Starr (cited earlier) ...

[160] The present plaintiff did not, of course, attend Gordon's Day School and live in Gordon's Student Residence. So, his case differs from the others, but practically speaking the difference is slight. The defendant Starr assumed a powerful role in the lives of children such as the plaintiff, as well as in the lives of the children attending the school or residing in the residence. In reality, the plaintiff and those in like position were no less vulnerable than the others, given their equivalent age, background, and circumstance. Nor was the quality of the job-related opportunity for sexual abuse appreciably different, as is clear from this and the other case ....

[161] This pattern of abuse was not so much a product of his official duties, as it was the product of the combination of his official duties and the added responsibilities he undertook with the encouragement of the Department, particularly his organization and conduct of the activities provided for the children, resident and non-resident alike, in the context of the various clubs. In a sense this was but an extension of his role in relation to the resident students, though one of lesser breadth.

[163] While the trial judge may not have assessed these factors in quite this way, we are of the view their assessment supports the fairness of imposing vicarious liability on the Government.

2. The factors of aims and intimacy

[164] The Attorney General submitted that the trial judge overlooked these factors and that they run counter to the just imposition of vicarious liability. It is said that the aims of the enterprise were altogether at odds
with what the defendant Starr did to the plaintiff and that the enterprise
did not include job-related intimacy in the relationship between the two.

[165] The aims of the Government's enterprise on Gordon's Indian
Reserve most certainly did not extend to child sexual abuse. That
being so, the degree of risk of this occurring may be seen, at least in the
abstract, to have been lower than in a case where an employee's
intentional torts serve, though unintended by the employer, to advance
the aims of the enterprise. In the circumstances of this case, however,
we are of the opinion this factor is of slight weight, if for no other
reason than it is so strongly overborne by the factors of job-related
opportunity and power, and the vulnerability of the children,
including the likes of the plaintiff.

[166] With that, we turn to the factor concerning job-related intimacy in the
relationship between the defendant Starr and the plaintiff, a factor that
bears upon the degree of risk of child sexual abuse inherent in the
enterprise. In our judgment, this factor carries more weight in this case
than does the factor concerned with the aims of the enterprise. But even
then, it is difficult to appreciate how it weighs against the fair imposition of
vicarious liability.

[167] It is true that the job-related relationship between the defendant
Starr and the plaintiff did not extend to touching in intimate body zones,
as in Bazley, or even to exposure of the naked body, as in changing
clothes or showering or some such thing. No physical intimacy of that
nature seems to have been contemplated, and none was found by the
trial judge to have existed. To this extent, this factor can be seen as
reducing the risk of child sexual abuse. But that is not the end of the
matter, because a significant measure of emotional intimacy might have
been expected. Indeed, it was inevitable.

[168] The sort of relationship between the defendant Starr and the
aboriginal youths enrolled in the boxing program was bound to lead to
strong emotional bonding....

[169] In itself, this is perhaps not that significant. But rather than
detract from the just imposition of liability, it rather adds to it,
because it adds to the risk of sexual impropriety when combined
with the other risk factors of job-related opportunity and power, and
of vulnerable youngsters.

[170] On balance, then, we are of the view the Government should be
held vicariously liable for the defendant Starr's wrongful acts. Put another
way, we are of the opinion the trial judge, though he may have mis-
assessed the matter at a turn or two, arrived at the correct conclusion
because the close connection test of Bazley may be seen to have been
satisfied. Accordingly, we have decided to dismiss this limb of the appeal.

[emphasis added]
The Supreme Court's extensive review did not disrupt the finding of vicarious liability. The trial judge's findings relating to qualification of experts, causation and mitigation were restored; however the Court of Appeal's determinations with respect to damages, regarding the applicability of incarceration, collateral benefits and loss of future earning were upheld. As noted above, this decision also clarifies the standard of appeal available to the Saskatchewan Court of Appeal. These issues are intricate enough to found a separate paper, and are not dealt with herein.

Unlike the finding of Crown liability in the Starr cases, in the Supreme Court decision of K.L.B. v. British Columbia. [2003] 2 S.C.R. 403 the provincial Crown was found not to be liable for the sexual abuse perpetrated on foster children by foster parents. Although the Crown had not appealed the Court of Appeal's finding of vicarious liability, as vicarious liability was an issue in two companion cases, it was also discussed in this case. As noted by Chief Justice McLachlin, at paragraph 18, "direct liability in negligence law requires tortuous conduct by the person held liable, in this case the government. The doctrine of vicarious liability, by contrast, 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." (Baz/eyand Jacobi).

McLachlin C.J. goes on to note that plaintiffs must demonstrate firstly that the relationship between tortfeasor "and the person against whom liability is sought is sufficiently close as to make a claim for vicarious liability appropriate." In this regard, see the discussion of Sagaz below, regarding the distinction between independent contractors and employees.

Secondly, it was held plaintiffs have to show a sufficient connection between the tort and the tortfeasor's assigned tasks so that "the tort can be
regarded as a materialization of the risks created by the enterprise." After noting that the inquiry in *Sagaz* pertained to whether a person performing the service for the employer was engaged in business on their own account, and thus the functional question was phrased within a for-profit enterprise, McLachlin C.J. notes that the foster care system is a non-profit enterprise. In such a context, "the focus of the inquiry will be simply on whether the tortfeasor was acting 'on his own account' or acting on behalf of the employer."

*Quaere* whether this is setting up a two-tiered system for finding vicarious liability, despite Justice McLachlin's assertions in *Bazley* that non-profit organizations are not exempt from a common law finding of vicarious liability.

Although the level of control over the worker's activities is a factor, it is noted at paragraph 22 that it is not the sole consideration, and is not "in itself determinative of whether vicarious liability is appropriate." Extensive consideration is given to the mode in which foster parents operate, including their general independence over the day-to-day care of the children, who will interact with the children and when, and the fact that the children are residing in the foster parents' own homes.

It is also noted, at paragraph 26, that the imposition of vicarious liability would do little to deter what direct liability does not already deter. It is therefore determined that the case for extending vicarious liability "to the relationship between governments and foster parents has not been established" (paragraph 29). The *Bazley* decision is distinguished in that the care for the children was not provided in private homes, the employees were salaried and they were clearly acting on behalf of the foundation. Arbour, J., in dissent would have found the government vicariously liable, as in her opinion the policy considerations as enunciated in *Bazley* had been met.
One of the most recent considerations of vicarious liability to be determined by the Supreme Court of Canada is in the case of John Doe v. Bennett, [2004] 1 S.C.R. 436. Father Kevin Bennett, a Roman Catholic priest in Newfoundland, had sexually abused the 36 unnamed plaintiffs over the course of almost two decades. The priest's liability was not at issue. What was at issue was the vicarious liability of the numerous named defendants. The plaintiffs had named the Roman Catholic Episcopal Corporation of St. George's, two individual bishops who had presided over the dioceses during the course of Father Bennett's employment, a neighboring Episcopal corporation and the bishop of the same neighboring dioceses as well as the Roman Catholic Church itself.

This case is an excellent example of what is required to display a "strong connection" between an employee's actions and an employer's enterprise.

To begin with, it should be noted that the decisions of Baz/ey, Jacobi and K.L.B., affirm the same test for vicarious liability. This is stated at paragraph 19. After reviewing the steps in the two-stage test, as discussed above, it is summarized at paragraph 21:

At the heart of the inquiry lies the question of power and control of 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.

Bennett also clarifies that non-profit bodies are not protected from tort liability under the guise of public interest.

At paragraph 26 the Supreme Court notes that the precedents dealing with church-related activities "do not clearly determine the issue, although they tend to support the imposition of vicarious liability on the Episcopal corporation."s

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s In McDonald v Mombourquette (1996), 152 N.S.R. (2d) 109 (leave to appeal refused), the Nova Scotia Court of Appeal reversed the trial judge's finding that the Roman Catholic Episcopal Corporation of Antigonish was vicariously liable for sexual assaults committed by priest on children in the parish. The key factor was that the priest had acted "totally contrary to the religious penance he was sworn to uphold."
The defendants had been attempting to argue that the Episcopal corporation was only responsible for the control of property, and therefore did not have sufficient control of the person (i.e., the priest) to be found vicariously liable. The Supreme Court found that the bishop in charge of the dioceses, and the Episcopal corporation, were legally related to the extent that the vicarious liability of the one would be the vicarious liability of the other. It was also held that the relationship between the bishop and the priest was both spiritual and temporal with the bishop exercising extensive control over the priest and it was therefore "akin to an employment relationship" (paragraph 27).

It was noted that the bishop had provided Father Bennett with the opportunity to abuse his power, in that all of the activities he organized were done so in his role as parish priest. This included directing altar boys, leading the parish band, being involved in a boy scout troop, and various other parochial activities. It is also noted that Bennett's acts were strongly related to the psychological trust and intimacy inherent as his role as a priest (paragraph 29).

Based on all of these factors it was held at paragraph 32 that "the enterprise substantially enhanced the risk which lead to the wrongs the plaintiffs/respondents suffered." It was therefore determined that the Episcopal Corporation of St. George's was vicariously liable.

Of note, however, is the potential limitation of the case's general applicability. The diocese of St. George's was particularly isolated with few other authority figures, including a lack of municipal government, secular organizations, police, courts or other community leadership. Despite the fact that the bishop of the neighboring dioceses (and thereby its Episcopal corporation) had received reports of Father Bennett's abuse, they were not held vicariously liable for his sexual assaults committed by a priest. The trial judge emphasized the job-conferred power of a priest over church youth.

In K(W.) v Pornbacker (1997), 32 BCLR (3d) 360 (S.C.), the court declined to follow Mombourquette and held the Catholic Church, through its Bishop of Nelson, to be both negligent and vicariously liable for sexual assaults committed by a priest. The trial judge emphasized the job-conferred power of a priest over church youth.
actions as the element of direct control was held to be lacking. Based on the limited information regarding the organization of the Roman Catholic Church in general, the Supreme Court declined to deal with the Church's vicarious liability towards these plaintiffs.

**Independent Contractors**

The Supreme Court of Canada addressed the issue of employer liability for independent contractors in the case of 671122 *Ontario Ltd. v Sagaz Industries Canada Inc.*, [2001] 2 S.C.R. 983 [*Sagaz*].

In *Sagaz* an employee had terminated Canadian Tire's supply relationship with a company referred to as "Design", which had been the principle supplier of synthetic sheepskin carseat covers. The employee then instigated a side deal, being a supply relationship with Sagaz, in return for a kick-back scheme. The employee's actions were discovered and his employment was terminated. However, Canadian Tire continued the supply relationship with Sagaz because it preferred the products it was receiving.

The Supreme Court determined that the Court of Appeal erred in holding Sagaz vicariously liable to Design. In writing for the majority Major, J. looked at the question of whether Sagaz was vicariously liable for the tortious conduct "of its consultant who was hired to assist in securing Canadian Tire's business" (paragraph 3). It was determined that the consultant was not an employee, but instead an independent contractor of Sagaz. In Major. J.'s analysis of vicarious liability, beginning at paragraph 25, he began by examining the policy rationale which underlies vicarious liability. He began by noting:

Vicarious liability is not a distinct tort. It is a theory that holds one person responsible for the misconduct of another because of the relationship between them. Although the categories of relationships in law that attract vicarious liability are neither exhaustively defined nor closed, the most
common one to give rise to vicarious liability is the relationship between master and servant, now more commonly called employer and employee.

Vicarious liability, by contrast, is considered to be a species of strict liability because it requires no proof of personal wrong doing on the part of the person who is subject to it. As such, it is still relatively uncommon in Canadian tort law.

Major J. then noted that the most recent Supreme Court discussion of policy considerations justifying the imposition of vicarious liability was in Baz/ey. He then reviewed those policy considerations noting (at paragraph 31) that "vicarious liability provides a just and practical remedy to those who suffer harm as a consequence of wrongs perpetrated by an employee."

Major J. then addressed the concerns commonly held by employers that they will be found liable in principle purely because they have "deep pockets", even though they are not personally at fault. It is noted that this same concern had been addressed in Baz/ey by Justice McLachlin, where she noted at paragraph 1:

Vicarious liability is arguably fair in this sense. 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 fair that the person or organization that creates the enterprise and hence the risk should bear the loss. This accords with the notation that it is right and just that the person who creates a risk bear the loss when the risk ripens into harm.

Vicarious liability's second policy consideration (as outlined in Baz/ey) is "deterrence of future harm as employers are often in a position to reduce accidents and intentional wrongs by efficient organization and supervision."

This policy ground is related to the first policy ground of fair compensation, as "[t]he introduction of the enterprise into the community with its attendant risk, in turn, implies the possibility of managing the risk to minimize the costs of the harm that may flow from it" (Baz/ey, supra. at paragraph 34).
According to Major J., the question as to why employers can be held vicariously liable for the actions of employees yet only rarely for the actions of independent contractors, lies with the element of control that the employer has over the direct tortfeasor (the worker). "If the employer does not control the activities of the worker, the policy justifications underlining vicarious liability will not be satisfied." As noted in paragraph 35 of Sagaz:

Vicarious liability is fair in principle because the hazards of the business should be borne by the business itself; thus, it does not make sense to anchor liability on an employer for acts of an independent contractor, someone who was in business on his or her own account. In addition, the employer does not have the same control over an independent contractor as over an employee to reduce accidents and intentional wrongs by efficient organization and supervision. Each of these policy justifications is relevant to the ability of the employer to control the activities of the employee, justifications which are generally deficient or missing in the case of the independent contractor. . . However control is not the only factor to consider in determining if a worker is an employee or an independent contractor.

How does this accord with the rationale that because the employer/owner puts the business (and its associated risks) into the community in the first place, that owner should bear those risks (Baz/ey, supra. at paragraph 34)?

As the distinction between employee and independent contractor is an important factor in many legal determinations, Major J. undertakes an examination of case law from contracts to wrongful dismissals which have examined the issue of control. However, it is the Court's opinion (noted at paragraph 46) that "there is no one conclusive test which can be universally applied to determine whether a person is an employee or an independent contractor". He states what must always occur is a search for the total relationship between the parties. He concludes, at paragraph 47:

Although there is no universal test to determine whether a person is an employee or an independent contractor . . . the central question is whether the person who has been engaged to perform the services is performing them as a person in business on his or her own account. In making
this determination, the level of control the employer has over the worker’s activities will always be a factor. However, other factors to consider include whether the worker provides his or her own equipment, whether the worker hires his or her own helpers, the degree of financial risk taken by the worker, the degree of responsibility for investment and management held by the worker, and the worker’s opportunity for profit in the performance of his or her tasks.

Based on this analysis it was determined that the individual was an independent contractor and not an employee in relation to Sagaz. In coming to this conclusion it was therefore unnecessary to engage in the second stage of analysis as to whether the tortuous conduct was committed within the scope of employment.

In summary, the Supreme Court’s reasoning in Sagaz has set the principle that in determining a question of vicarious liability, it must first be determined whether the employee is truly an employee or an independent contractor. Only if it is found that the individual is an employee need the court go on to consider whether or not the tortuous act was committed within the scope of employment.

Sagaz, Baz/ey and Jacobi were all considered by Justice Klebuc of The Saskatchewan Court of Queen’s Bench in Sirois v. Gustafson, [2002] S.J. No. 664 [Sirois].

In Sirois the driver of a semi-trailer, after being cut off and given the finger by the plaintiff, got out of his truck and smashed the driver's side window of the plaintiff's car with a hammer. The plaintiff then sued the driver (Gustafson) and TransX Limited, claiming that the relationship between TransX and Gustafson was that of employer and employer. TransX in turn maintained that Gustafson was an independent contractor.
Interestingly, Klebuc J. held (paragraph 4) that the claim against TransX would be dismissed regardless of whether their relationship was one of employee and independent contractor or one of employee and employer. This determination was made after an examination of Gustafson's actions, for which he was charged and convicted (public mischief). Gustafson was held personally liable to the plaintiff as it was determined, at paragraph 21, that his behaviour was "vindictive, reprehensible and malicious and therefore warrants condemnation and punishment by way of punitive damages notwithstanding his conviction of public mischief."

In turning to the discussion of vicarious liability, Klebuc J. began by examining Sagaz, at paragraph 24. He also examined The City of St. John v. McDonald, [1926] S.C.R. 371, [City of St. John], which outlines the circumstances where the employer of an independent contractor would not be relieved of liability for their conduct. As quoted at paragraph 25:

... [W]here the danger of injurious consequences to others from the work ordered to be done is so inherent in it that to any reasonably well-informed person who reflects upon its nature the likelihood of such consequences ensuing, unless precautions are taken to avoid them, should be obvious, so that were the employer doing the work himself his duty to take such precautions would be indisputable. That duty imposed by law he cannot delegate to another, be he agent, servant or contractor, so as to escape liability for the consequence of failure to discharge it. That, I take it, is a principle application in such a situation whatever be the nature otherwise or the locus of the work out of which it arises.

Injuries due to improper acts authorized by the employer, to his negligence in the selection of the contractor, to his failure to impart proper instructions, to his neglect to prevent the creation on his own property by the contractor of a nuisance, or its continuance, or to his giving employment to do acts which, though lawful, can be done only at he peril of him who does them, are really not within the purview of the doctrine imputing vicarious responsibility. In these case the responsibility is rather direct and rests on personal acts or omissions.

Outside the of the rare occurrences where an employer can be held vicariously liable for the actions of an independent contractor, as was noted at Paragraph 26, it is considered neither fair nor just to hold an employer liable for
the tortuous acts of an independent contractor when they are utterly unrelated to the contract. After reviewing the policy considerations underlining vicarious liability, again citing *Baz/ey, Jacobi* and *Sagaz*, Klebuc J. determined:

If no liability would attach to the employer for a tortfeasor's conduct where an employer and employee relationship exists between them, liability will not attach to the employer if the relationship is one of employer and independent contractor. Such a finding in the instant case would be the positive of the plaintiff's claim and ovate the determination of whether the relationship between TransX and Gustafson was one of employer and independent contractor.

Klebuc J. reviewed the testimony and circumstances before him and found no credible evidence for the assertion that:

Drivers of large trucks employed by long-haul carriers are Subject to stress and other emotional pressure of such magnitude that uncontrolled emotional outbursts should be viewed as forming an inherent part of such business, or that TransX knew or ought to have known that Gustafson might react in the way that he did while performing his tasks. In addition, no policy consideration suggests that truck carriers should be liable for intentional torts unnecessarily committed by their drivers, save and except the principle that they might be in a better position to spread the risk. As noted in *Sagaz, supra.*, at p. 552 (L.R.), an employer's deep pockets are not in themselves sufficient to impose vicarious liability. It must also be just to place liability for the wrong on the employer.

*Sirois* is one of the recent Saskatchewan decisions that buck the trend of an almost automatic finding of vicarious liability on the part of employers. It is interesting to note that while Klebuc J. considered the exact same cases (*Baz/ey, Jacobi* and *Sagaz*) as are considered by most courts when faced with the issue of vicarious liability, he did not find the policy considerations extended so far as to make an employer liable for the clearly independent and violent acts of the individual named defendant. This case is in contrast to the older (1981) Alberta Court of Queen's Bench decision in *Triplett v Steadman*, 1981 CarswellAlta 297, where an employer was held liable for the drinking and driving of an employee. In *Triplett*, despite the fact that driver admitted to
understanding that he should not be driving the truck while under the influence of alcohol, it was determined by Crossley J at paragraph 10:

That the employee’s knowledge alone that he what he was doing was improper would not remove his act from the scope of his employment.

The transport company was held liable for the driver having become intoxicated and driven in the side of the plaintiff's home, based on Crossley J’s findings that no specific instructions had been given to the defendant not to drink and drive. It had been held in Triplett (paragraph 6) that if an employee’s conduct could be characterized as pertaining to his employment and not as just an independent action coincidentally entered into at the same time, then it would be counted within the scope of his employment and his employer would therefore be liable. The issue of the policy considerations surrounding vicarious liability was of course not discussed within his reasoning, as it was almost two decades prior to the decisions of Baz/ey and Jacobi.

Recent Saskatchewan Interpretation

The writer would be remiss if a recent Saskatchewan decision on vicarious liability was not discussed herein. That is the case of Sickle Estate et al v. Gordy et al, [2004] S.J. No. 707 (Q.B.). This case involved a motor vehicle accident which led to fatalities. The deceased was coming home from work, and his dad was riding along. A car driven by Moore was coming the opposite way, lost control and crossed into the path of the deceased; indeed, Moore was also killed. Moore had been employed by a food concession linked to Thomas Carnival Inc., the midway entertainment at exhibitions, fairs and carnivals. There was some evidence that several employees were traveling from one job to another, in a rough form of “convoy”.

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The Estate of the first driver sued. Moore was found negligent. The owner of the car she was driving was liable under statute. The issue was whether the employer was liable under the principles of vicarious liability.

Kovach J. held there was liability, but not from the employer. Vicarious liability is discussed at paragraphs 10 to 27. *Baz/ey, supra*, is reviewed in detail. The court found that it was not satisfied on the evidence that the business of the employer materially enhanced the risk of a car accident. There was no evidence to suggest the employer could have done anything to prevent the accident from happening. Moore's negligent operation of her vehicle was only coincidentally linked with her employment and could not justify the imposition of vicarious liability on the employer. Mr. Justice Kovach went further, stating he was not even satisfied from a policy perspective that there was a reasonable basis to impose vicarious liability on the employer.

Like *Siros*, *supra*, this case seems to back off from the expanding net of vicarious liability, and limit the ambit of the *Baz/ey* line of cases.

**Conclusion**

While vicarious liability for sexual assault and sexual abuse still often results in judicial consideration of vicarious liability policy issues being decided in favour of compensating the victim, we have also seen a concerted effort by the courts to define and limit the factors which tie an employer into responsibility for their employee's tortious act.

Nevertheless, over the last decade vicarious liability has been a widening net, drawing more and more employers into the ambit of liability. There is some measure of a lack of intellectual honesty here. Judges being human, they feel empathy for these victims and do not want to see them re-victimized by finding the perpetrator liable, but the victim obtaining no actual compensation.
Most recently, however, the pendulum has begun to swing back. As shown in the school board cases (which did not find the school boards liable) and some of the new church cases (which limits the scope of liability), courts are now engaging in a true analysis of the Supreme Court’s list of factors.

Clearly, this is an area of law which is still evolving and which will continue to change over the decade to come, and perhaps beyond.