

**VICARIOUS LIABILITY OF NON-PROFIT AND
CHARITABLE ORGANIZATIONS**

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1. INTRODUCTION

Several high profile cases involving the sexual and physical abuse of children by employees of an institution have heightened the concerns of the public and those who care for the vulnerable. Non-profit and charitable organizations today are not only haunted by the potential horror of employees' criminal misconduct but, as the Mount Cashel situation demonstrates, with the prospect that such misconduct may result in financial ruin.

Recent developments in the law concerning vicarious liability have raised new fears that, no matter how vigilant, non-profit and charitable organizations may not be able to bear the risk presented by liability for employee misconduct. In particular, in June of 1999 the Supreme Court of Canada specifically addressed vicarious liability for sexual assaults committed by employees of non-profit and charitable organizations in its decisions *Bazley v. Curry* (1999), 174 DLR (4th) 45 (SCC) ("*Children's Foundation*") and *Jacobi v. Griffiths* (1999), 174 D.L.R. (4th) 71 (SCC) ("*Boys' and Girls' Club*").

Not only has a new, potentially broader test emerged for determining when vicarious liability will attach to an employer, but it has been decreed that policy considerations do not merit exempting non-profit organizations from the application of the vicarious liability doctrine.

We review below the *Children's Foundation* and *Boys' and Girls' Club* decisions, prefaced by a discussion of the concept of vicarious liability. The lower court decisions which have interpreted the SCC decisions to date will also be considered. We conclude that, while vicarious liability for criminal misconduct may be more likely than in the past, there are still yet some restraints on the vicarious floodgates.

Nevertheless, it is timely that non-profit and charitable organizations review their corporate structures, policies and procedures to assess whether changes are necessary to minimize the exposure to this onerous principle of liability. We have been asked to address whether provincial organizations can be held liable for the actions of staff of local affiliates, be they employees or volunteers. The answer to this question for any particular set of facts depends on how the Courts determine who employs an errant "employee". Put another way, the answer depends on who had a sufficient degree of "knowledge and control" over the "employee's" actions to warrant a finding of vicarious liability.

This is not as easy as it sounds. In the 1998 "United Church" case, *B. (W.R.) V. Plint* (1998), 161 D.L.R. (4th) 538 (BC SC), the United Church of Canada and the Government of Canada each argued that the other was the sole employer of a dormitory supervisor who had perpetrated sexual assaults on students at a residential school between 1943 and 1970. The British Columbia Supreme Court found them both jointly liable. The United Church case and other decisions will also be discussed below.

2. WHAT IS VICARIOUS LIABILITY?

Vicarious liability is not a new concept. What is new is the application of vicarious liability in the context of intentional misconduct which is clearly outside the “scope of employment”.

Courts have traditionally applied the “Salmond” test to determine whether vicarious liability should attach to innocent employers. Employers will be vicariously liable when either the employee’s act is authorized by the employer or the employee’s unauthorized act is so connected with authorized acts that it can be regarded as a mode of the authorized act, or within the “scope of employment”. For example, an employer would likely be vicariously liable for a school bus driver involved in an accident resulting in injuries to the passengers, regardless of whether the driver’s actions were negligent or intentional.

Vicarious liability has been variously described as a form of “strict”, “absolute” or “no-fault” liability, because it is imposed in the absence of fault of the employer. This means that an organization may be liable for negligence of its employee even if it has taken extraordinary steps, albeit unsuccessful, to prevent the negligence from occurring. In other words, whether or not an organization is vicariously liable, is an entirely separate consideration from whether the organization itself has been negligent or failed to meet its “duty of care”.

Sexual assaults have historically, though not always, been considered to be outside of the scope of an employee’s scope of employment. As Binnie J. observed in *Boys’ and Girls’ Club*, Canadian Courts have demonstrated “a strong reluctance to impose no-fault liability for such deeply personal and abhorrent behaviour on the part of an employee.” (at 91 - 92)

Why, you may ask, do the Courts subvert the principle that one is “guilty until proven innocent”? In our view, the answer lies primarily in the fact that victims of sexual assault in an institutional setting can rarely recover damages from the perpetrators, i.e. the employees, themselves. Even if the perpetrator is insured, insurance normally excludes coverage for criminal acts. Vicarious liability is simply a method of shifting a portion of the damages, insofar as that can be addressed by a monetary award, away from the victims to institutions which can, it is hoped, more easily bear the cost. As will be discussed further below, it is this supposition with which non-profit and charitable organizations may take umbrage, in that the price for bearing the risk may be that the organization cannot continue to exist, and so continue to help the vast majority of the people it serves. (See the discussion in *Boys’ and Girls’ Club*, at 103.)

III. CHILDREN’S FOUNDATION AND BOYS’ AND GIRLS’ CLUB

THE SCC DECISIONS

The Children's Foundation is a non-profit organization receiving government funding to operate residential care facilities for emotionally troubled children in the care of the Superintendent of Child and Family Services of British Columbia. A child in its care was sexually assaulted by an employee expressly hired to act as a surrogate parent to the child. The assault took place in the course of the employee's duties, which involved intimate activities, such as bathing and tucking the child in at bedtime. (at 50)

The Boys' and Girls' Club of Vernon (the "Club") is a non-profit corporation providing organized recreational activities for its members, children and youths who pay a small fee to join. An employee supervisor was encouraged to form friendships with the children, two of whom he sexually assaulted outside the Club's activities (with the exception of one incident). (at 87 - 88; see also 90)

The Supreme Court of Canada ("SCC") released its decisions in June of 1999. Direct liability on the part of the Children's Foundation and the Club was not at issue on the appeals. In a unanimous decision it was found that the Children's Foundation *is* vicariously liable for its employees' conduct, thus dismissing the Children's Foundation's appeal from the B.C. Court of Appeal. (at 71) However, in *Boys' and Girls' Club*, the SCC split 4 to 3, the majority (per Binnie J., for Cory, Iacobucci and Major JJ.) upholding the B.C. Court of Appeal's finding that the Club *is not* vicariously liable. (at 87) The minority (per McLachlin J., for L'Heureux-Dube and Bastarache JJ.) would have found the Club vicariously liable. (at 76)

THE "ENTERPRISE RISK" TEST: *CHILDREN'S FOUNDATION*

In *Children's Foundation*, McLachlin J., on behalf of the unanimous Court, expressed dissatisfaction with the semantic discussions caused by attempts to categorize unauthorized intentional torts (the second branch of the Salmond test). She observed that conduct can often be described correctly in more than one way. (at 57)

McLachlin J. advised that, in situations where the existing case law does not provide adequate guidance, the Courts are to focus on whether there is a significant connection between the wrongful act and the creation or enhancement of a risk by the employer. The employment must *materially* enhance the risk of the impugned act before an employer will be held vicariously liable. Where a significant connection exists, the twin policies underlying the attachment of vicarious liability will also be met: (1) fair and efficient compensation for victims; and (2) deterrence. (at 64 - 67)

McLachlin J. listed the following as examples of relevant factors:

- (1) the opportunity the enterprise afforded the employee to abuse power;

- (2) the extent to which the wrongful act may have furthered the employer's aims;
- (3) the extent to which the wrongful act was related to friction, confrontation or intimacy inherent in the employer's enterprise;
- (4) the extent of power conferred on the employee in relation to the victim; and
- (5) the vulnerability of potential victims. (at 64-65)

McLachlin J. added that requiring or permitting employees to touch a client in intimate body zones may enhance the risk of sexual touching. (at 66) She also added that in some circumstances, the suggestion that the employer created an enhanced risk of harm will be negated when the impugned act takes place away from the job site and outside of working hours. (at 66 - 67)

Applying the foregoing, McLachlin J. concluded that the intimate control and parental power required by the terms of employment in *Children's Foundation*, where the employee acted as a surrogate parent to the child, created the risk leading to the wrongful act. As McLachlin observed, "Indeed, it is difficult to imagine a job with a greater risk for child sexual abuse." (at 70)

McLachlin J. also rejected the argument that non-profit organizations should be exempted from the imposition of vicarious liability for an employee's sexual assaults. She expressed some sympathy for the contention that it is unfair to fix such liability upon organizations providing much needed services to the community. However, she held that from the perspective of the innocent child who was harmed, that it is fair for the institution which created the risk to bear the legal responsibility for the damage. Moreover, she rejected any distinction between paid and volunteer staff, stating that "the same considerations of fairness and deterrence arise". (at 68 - 69)

Lastly, McLachlin J. denounced the argument that non-profit organizations, unlike commercial organizations, have few means of distributing losses since they cannot increase what they charge the public and they cannot easily obtain insurance for liability arising from sexual abuse.: "The suggestion that the victim must remain remediless for the greater good smacks of crass and unsubstantiated utilitarianism." Forced to choose between a non-profit organization and the victim, she did not hesitate to choose the latter. (at 69)

Children's Foundation was an “easy” case in which to apply the enterprise risk test. As Binnie J. described it in *Boys' and Girls' Club*, “Power and intimacy, of course, are hallmarks of a parenting relationship. It was the job-created parent-like relationship that attracted vicarious liability.” (at 98) The greater difficulty of applying the foregoing analysis to the facts in *Boys' and Girls' Club* is reflected in the Court's split decision.

McLachlin J., writing on behalf of the minority in *Boys' and Girls' Club*, found the prior case law to be of no assistance due to its formalistic reasoning. (at 79) By contrast, Binnie J., on behalf of the majority, emphasized that the “enterprise risk” theory put forward in *Children's Foundation* was an effort to *explain* the existing case law, not reject it. (at 101)

Binnie J. reviewed the case law, concluding that the mere presence of an adult-child relationship does not automatically equate to the presence of risk sufficient to support the imposition of vicarious liability: “While the vulnerability of children provides the appropriate context in which the respondent's enterprise is to be evaluated, vulnerability does not itself provide the ‘strong link’ between the enterprise and the sexual assault that imposition of no-fault liability would require.” (at 111)

Binnie J. also distinguished the Club from the Children's Foundation in that the Club offers its services in a public setting, in group activities with other persons, including other children and adults. (at 107) There was no “job-created authority for the perpetrator to insinuate himself into the intimate lives of these children.” (at 91)

In Binnie J.'s view, the Club could not be said to be vicariously liable, because the sexual abuse became possible only when the employee managed to subvert the public nature of the Club's activities, by isolating the victims from the group in a manner that was entirely contrary to the group's purpose. In particular, the employee enticed the children to his home to cultivate a one-on-one relationship which was entirely outside Club activities. (at 107) Binnie J. concluded that:

Where, as here, the chain of events constitutes independent initiatives on the part of the employee for his personal gratification, the ultimate misconduct is too remote from the employer's enterprise to justify “no fault” liability. (at 108)

Since the SCC decisions were released, it is sometimes forgotten that the Club was found *not* vicariously liable for the actions of its employee, albeit by a slim majority. Indeed, the tenor of Binnie J.'s comments, both with respect to the case law and policy analysis, indicate that all is not lost for non-profit and charitable organizations.

As an example of the “creation of opportunity without job-created power”, Binnie J. cited *E.D.G. v. Hammer*, [1998] B.C.J. No. 992 (B.C. S.C.), where the B.C. Supreme Court found a school board had no vicarious liability for a sexual assault committed by a janitor. (at 92)

Similarly, in *Goodwin c. Commission Scolaire Laurenval* (1991), 8 C.C.L.T. (2d) 267 (Que. S.C.), the Quebec Supreme Court held the school board had no vicarious liability for a sexual assault committed by a janitor, even where the janitor had some child-care responsibilities supervising children in the school after hours. (at 93)

A greater risk is entailed when there is a “job-created excuse for intimate access to the individual who becomes the victim”; that is, there is privileged access to the victim. (at 93) Binnie J. went on to observe that vicarious liability has been most often applied in a parent-like relationship. Though he took pains to state that a parent-like relationship is not a precondition to a finding of vicarious liability in child abuse cases, he concluded that this shows “how high the courts have set the bar before imposing no-fault liability.” (at 100)

Binnie J. also endorsed Newbury J.A.’s comments at the B.C. Court of Appeal (30 B.C.L.R. (3d) 1, at 39-40), in which he states that something more is required than an employee simply taking advantage of the opportunity to know a child to develop a relationship with that child elsewhere, that “something more” being a close connection between the employee’s duties and his or her wrongful acts. (at 109)

Consider *Goodwin*, the janitor case discussed above. The Quebec Supreme Court observed that vicarious liability might have been imposed had the janitor struck the children as part of his supervisory duties, for example, because they refused to leave the school on his orders. However, vicarious liability was not imposed where the janitor’s actions were unrelated to his supervisory duties. (at 93)

Furthermore, though non-profit and charitable organizations would have preferred an exemption from vicarious liability, Binnie J. offered some comfort on the policy portion of the enterprise risk test.

Binnie J. cited the case of *John R. v. Oakland Unified School District*, 769 P. 2d 948 (Cal. 1989), at 957, where the Supreme Court of California had expressed the concern that, if vicarious liability were to be imposed for intentional torts, “school districts would be dissuaded from permitting teachers to interact with their students on any but the most formal and supervised basis.” (at 105) Binnie J. went on to observe that:

A public authority such as a school board will typically have a greater capacity for loss-spreading and deterrence management than a volunteer, non-profit organization such as the Club. Nevertheless, I think the California court is correct to point out that *in an understandable desire to help victims of child abuse, courts ought not to be oblivious to the societal ramifications of the proposed solution.* (emphasis added; at 106)

More generally, Binnie J. cautioned against failing to balance the policy of efficient compensation with adherence to the standards of the enterprise risk test, noting that an employer will almost always be in a better position to provide effective compensation to a sexual assault victim than the assailant. (at 102) Furthermore, “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 ... to practise distributive justice.” (at 86)

In addition, Binnie J. is cognizant that “There may be little an employer can do in reality to deter such conduct in its employees if the possibility of ten years in jail is not sufficient... [especially as] ‘Conventional incentives and disincentives used by enterprises simply do not work to deter compulsive sexual misconduct.’” (at 104; citing Jahnke J., *Ciarochi v. Boy Scouts of America, Inc.* Alaska Sup.Ct., Ketchikan Registry IKE-89-42 CI, August 6, 1990, at 22) Additionally, recreational organizations “could be expected to respond rationally, if reluctantly, to a new harbinger of financial liability. They might vote with their feet.” (at 86; see also 105)

Nevertheless, Binnie J. does accept that the imposition of vicarious liability on non-profit organizations can be fairly done so long as there is a *strong* connection between the enterprise risk and the sexual assault: “Given the weakness of the policy justification, however, I think ... non-profit organizations are entitled to insist that the *strong* connection test be applied with appropriate firmness.” (Binnie J.’s emphasis; at 106) Elsewhere, Binnie J. hints that the imposition of vicarious liability on non-profit organizations may merit “judicial restraint”. (at 102)

Accordingly then, while non-profit and charitable organizations cannot argue that they are exempt from the vicarious liability doctrine, in some circumstances such organizations may be able to argue that the link between the organization’s activities and the assault must be stronger than for other public and private organizations.

SINCE *CHILDREN’S FOUNDATION AND BOYS’ AND GIRLS’ CLUB*

Only a year has passed since the SCC decisions but there have been some lower court decisions interpreting the SCC decisions.

M. (F.S.) v. Clarke, [1999] B.C.J. No. 1973 (B.C. S.C.), a 1999 decision of the British Columbia Supreme Court, dealt with vicarious liability for a dormitory supervisor’s sexual assaults upon a young child resident in an Indian Residential School. Applying the analysis set out in the SCC cases, the Court found that the supervisor had exercised parental control in a manner closely analogous to the facts in *Children’s Foundation*. (at 335 - 340) Accordingly, the employers - both the federal Crown and the Anglican Church - were found to be vicariously liable (at 346)¹. The joint liability of the employers will be discussed further below.

¹The Anglican Church has apparently appealed this decision to the British Columbia Court of Appeal: See [2000] B.C.J. No. 1481 (B.C. C.A.)

The 1999 decision of the Saskatchewan Court of Queen's Bench in *P. (V.) v. Canada*, [2000] 1 W.W.R. 541 (Sask. Q.B.) dealt with sexual and physical assaults upon a young child by an administrator at a residential school on an Indian reserve. The administrator's only contact with the child was to discipline him when he had been caught running away. (at 544 - 545) After reviewing the SCC decisions and the case law, the Court determined that the administrator's position fell in between that of the strong parental role played by dormitory supervisors and child care attendants, on the one hand, and the janitor case where the janitor has no job-created power, on the other. Unlike the janitor cases, the administrator had been given the "power of discipline". (at 561 - 562)

Unable to determine on the basis of the case law that vicarious liability had been established, the Court applied the "enterprise risk" test. The Court observed that the acts of discipline furthered 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." The Court determined that the disciplinary exercise was "inherent in the employer's enterprise". The Attorney General of Canada, as employer, was thus found to be vicariously liable. (at 562 - 563)

A decision of the British Columbia Supreme Court rendered in April of this year, *M.D. (Guardian ad litem of) v. B.C.*, [2000] B.C.J. No. 915 (B.C. S.C.), considered the vicarious liability of the Province of British Columbia (Ministry of Children and Families) for an assault by a foster parent upon an infant. (at para. 1) Briefly reviewing the SCC decisions, the Court observed that the foster parent had shaken the child, who required constant attention, in the course of performing activities directly related to the duties the Ministry had imposed on her. Without reviewing the case law, the Court then concluded with a "Salmond-type" analysis, stating that the wrongful act "is sufficiently related to the conduct authorized by the Ministry to justify the imposition of vicarious liability." Moreover, the fact that the Ministry prohibited physical discipline did not change the character of the wrongful act to the conduct authorized by the Ministry. (at paras. 76 - 80)

On the one hand, these recent cases have imposed vicarious liability upon employers. On the other, all the cases have considered the "easier" circumstance in which the perpetrators have been exercising explicit parental control or "parent-like" authority.²

CONCLUSIONS

²Readers may be interested in the analysis of the SCC decisions employed in *Matusiak v. British Columbia and Yukon Territory Building and Construction Trades Council*, [1999] BCJ No. 2416 (BCSC), where a union was found vicariously liable for the violent and threatening behaviour of its members.

As we have seen, courts have traditionally been reluctant to impose vicarious liability on innocent employers when the impugned acts constitute sexual assault. It seems clear, however, that even on the most conservative reading of the SCC decisions, some circumstances will now give rise to vicarious liability on the part of non-profit and charitable organizations that would not have arisen prior to the SCC decisions.

Moreover, it would be shortsighted to assume the new approach will be confined to sexual assault cases. Any form of harm could meet the test, including physical, sexual and emotional abuse. Indeed, physical abuse was at issue in both *M.D.* and *P. (V.)*, *supra*.

Nor must the SCC decisions be confined to the child abuse context. Organizations providing services in any capacity are exposed to vicarious liability claims. In *Boys' and Girls' Club*, Binnie J. noted as an example of an alternate power relationship the 1991 Supreme Court of California case, *Mary M. v. City of Los Angeles*, 814 P.2d 1341 (1991), where the City of Los Angeles was found vicariously liable for the sexual assault by a police officer of a motorist he had stopped for impaired driving. (*Boys' and Girls' Club*, at 100 - 101)

Non-profit and charitable organizations will be particularly vulnerable when their employees are engaged in “parent-like” relationships with the people they assist. Vicarious liability will be much more likely in potentially intimate situations involving young children and individuals with disabilities requiring personal assistance.

In addition, despite Binnie J.’s admonitions, some trial judges will no doubt attach findings of vicarious liability directly to the so-called “deeper pockets” of non-profit and charitable organizations and their insurers, without much analysis to support such a finding.

Nevertheless, in our view, the SCC has clearly stated that there must be a strong and close connection between an employee’s duties and his or her wrongful acts to impose vicarious liability on an employer. While “parent-like” relationships will usually attract vicarious liability, it will be much more difficult to establish vicarious liability in non-intimate situations.

Despite the foregoing, one should keep in mind that non-profit and charitable organizations escaping vicarious liability for an employee’s intentional misconduct are still liable for the negligence of their employees. Where such negligence exists, the employer will be responsible for damages in any event. The only consequence of a finding of vicarious liability for employees’ negligence, as opposed to a finding of vicarious liability for employees’ intentional misconduct, may be an increased exposure to aggravated and punitive damages awards.

CHECKLIST

The best way for any organization to defend itself from both vicarious liability claims and negligence claims is to ensure that its policies and procedures are designed to prevent employee misconduct. Though these policies and procedures may not provide a defence to vicarious liability claims, it can reduce the risk that the misconduct will happen in the first place.

Furthermore, it is noteworthy that the Club escaped vicarious liability in part because the abuse became possible only when the employee subverted the public nature of the Club's activities by isolating the victims in a manner that was contrary to the group's purpose. (*Boys' and Girls' Club*, at 107) It would seem wise to follow the SCC's lead by building in a public component to as many of the organization's activities as possible.

That being said, to be effective, every organization requires policies and procedures which have been carefully designed for that particular organization. Here are some suggestions and issues to consider:

- Arrange group activities instead of individual activities whenever possible;
- Arrange for the presence of more than one staff member at all times;
- When hiring new staff, check personal references, inquire into gaps in work and educational history, speak with former employers and conduct a criminal record check for all potential employees;
- Consider whether high-risk activities provide sufficient benefit to justify the potential liability;
- Adopt a written zero tolerance policy with respect to relationships between staff and those the organization provides services to;
- Adopt a written policy and procedures which may include: a statement of zero tolerance; a definition of prohibited conduct, including examples; complaint procedures; mandatory reporting requirements for staff; a description of the consequences for misconduct; and the provision of support services for victims.
- Educate ALL staff about the policy and procedures and ensure they are aware of any legal obligations, such as those of the *Child and Family Services Act*, R.S.O. 1990, c. C.11.
- Once policies and procedures are put in place, ensure that they are strictly followed.

IV. THE CHAIN OF COMMAND: WHO WILL BE VICARIOUSLY LIABLE?

When a particular set of facts calls for the imposition of vicarious liability, courts may still face the task of determining to what entity vicarious liability should attach. In reviewing some recent cases, *United Church* and *M.(F.S.)*, *supra*, are particularly instructive.

The *United Church* decision by the British Columbia Supreme Court was rendered in 1998, when *Children's Foundation* and *Boys' and Girls' Club* had been granted leave to appeal to the SCC from the British Columbia Supreme Court. Like *M.(F.S.)*, *United Church* considered the sexual assaults of a dormitory supervisor upon students attending an Indian Residential School. (at 541 - 543)

The Court observed that the Principal of the school had the authority to hire and fire the supervisor and exercised control, *inter alia*, over the supervisor's activities. However, the Court concluded that it would not be accurate to characterize the Principal as the supervisor's employer. The Court then determined that "If incorporated, [the school] would have been the employer of [the supervisor]. However, [the school] did not exist as a legal entity and hence it is necessary to look beyond". (at 546)

The Church and the Government of Canada each contended that the other was the employer. The Court framed the issue as follows: "Which one... can be properly characterized as the directing or controlling entity of [the school] and consequently responsible in law for the conduct of [the supervisor] who was controlled and directed on a day-to-day basis through the office of the Principal?" (at 546)

After an extensive review of the historical relationship between the Church and the federal government, the Court determined that both parties had jointly controlled the activities of the supervisor through the Principal. (at 568) Formal agreements which indicated otherwise did not affect this determination as the parties had not put them into practice. (at 563) Therefore, both parties were found to be vicariously liable. (at 574)

M. (F.S.), *supra*, involving remarkably similar facts, took place after the release of the SCC decisions. Like the *United Church* case, the Anglican Church took the position that it played only a pastoral role and it had no responsibility for the assaults. (at 334) At the hearing, the Government of Canada, no doubt cognizant of *United Church*, did not claim that it had not employed the perpetrator, but argued that if vicarious liability was found the Government of Canada should be jointly liable with the Anglican Church. (at 334 - 345) The answer to this question would be determined by the question "who was [the supervisor's] employer?"; which in turn was to be determined by answering the question "whose business is it?" (at 340) Again, after an extensive analysis of the indicia of control over the supervisor's activities, the Court determined that both parties were vicariously liable. (at 346)

Interestingly, in *P.(V.)*, *supra*, also a residential school case, Canada's Attorney General admitted for the purposes of that action that it was responsible for the supervision and daily

operations of the residence at the relevant time. (at 544) *P.(V.)* was decided a few months after *M.(F.S.)*.

On the other hand, in *M.D.*, *supra*, the Court addressed whether or not vicarious liability could attach to the Ministry for the actions of the foster parent, when it was clear that the relationship was not that of the “classic definition” of employee-employer. The Court nevertheless found that, based on the “direct control” exercised by the Ministry over the foster parent, as opposed to supervision, the relationship was analogous to an employee-employer relationship or a “near employment relationship”, and not that of an independent contractor. Accordingly, the Ministry could be found vicariously liable for her actions. (at paras. 66 - 75)

The Court in *United Church* also distinguished the joint employer relationship found there from “a case where the Church was hired as an independent contractor and then left to manage the school subject only to periodic review.” (at 568)

As for the SCC decisions themselves, the Boys’ and Girls’ Club of Vernon, a non-profit corporation, was the only entity sued, other than the perpetrator himself.

The Court of Appeal decision in *Children’s Foundation* mentions that the Children’s Foundation was presumably a “children’s aid society” pursuant to the *Protection of Children Act*, R.S.B.C. 1960, c. 303, accepting the rights and duties of a parent passed on to it by the Superintendent of Child Welfare. (*B.(P.A.) v. Curry* (1997), 34 C.C.L.T. (2d) 242 (B.C. C.A.), per Newbury J.A., at 274) Indeed, the Children’s Foundation argued at the SCC that the provincial government should bear the responsibility for the sexual assaults, as it was the provincial government who placed the child in the Children’s Foundation’s care (at 67).

The SCC summarily dismissed the Children’s Foundation’s contention, stating that “The connection between the original government order and the sexual abuse is too remote to support liability”, despite the fact that the Superintendent’s liability was not at issue in the reference. (at 69)

On another note, recall that the Court in *Children’s Foundation* also dismissed the argument that there should be a distinction between the employment of volunteers and paid employees. (at 68)

CONCLUSIONS / CHECKLIST

Given the foregoing analysis, the answer to the question, “Can provincial organizations be held vicariously liable for the actions of the staff at local affiliates?”, is yes. Here are a number

of suggestions³ which may assist an organization to minimize its vicarious liability exposure from a structural perspective.

- ❑ To protect a provincial entity, INCORPORATE the local affiliates as separate legal entities: The Court in *United Church* stated that liability would not have flowed through to the larger entity had the school been incorporated. Also incorporate the provincial entity: minimize the risk for the local affiliates too.
- ❑ Remember that an organization is not made immune from vicarious liability by incorporation: both a provincial entity and a local affiliate could be liable as joint “employers”.
- ❑ Review the relationship the provincial organization has with its local affiliates to determine whether the provincial organization might be found to be an “employer” of the local affiliate’s staff: who controls the day-to-day activities of the affiliate and its employees?
- ❑ Where a provincial organization is intricately intertwined with a local affiliate, consider whether to maintain the relationship or restructure.
- ❑ If the relationship is to stay in place, ensure that all policies and procedures extend to the local affiliate and are strictly enforced.
- ❑ Any arrangement between organizations defining separate spheres of influence must be adhered to: in *United Church*, the Court relied on the actual relationship between the parties and not the agreement between them.

³Charitable organizations may wish to note that the Ontario Court of Appeal determined in April of this year in *Re Christian Brothers of Ireland in Canada* (2000), 47 O.R. (3d) 674 (Ont. C.A.) that assets held in “specific charitable purpose trusts” are exigible to satisfy the claims of tort claimants. Applications for leave to appeal to the SCC were dismissed on November 16, 2000.

- ❑ Ensure that policies and procedures address all individuals potentially identifiable as employees.
- ❑ Get and/or review INSURANCE coverage to ensure that it covers all entities as comprehensively as possible: it's too expensive not to.
- ❑ The moment a suspicion of liability arises, call your lawyer.