Vicarious Liability in Sexual Assault

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The issue of vicarious liability of employers for the wrongful acts of employees has long been a difficult issue. Nowhere is the difficulty more clear than in sexual assault cases where employers can never be said to have intended the wrongful conduct; seldom can it be said that employers would have any reason to anticipate the wrongful conduct. Nevertheless, when an employee uses their position in some fashion to permit the sexual assault, employers have been held liable. Liability can follow if the sexual misconduct is sufficiently related to conduct (authorized by the employer) falling within the scope of employment.

The test is not tremendously clear of application, although the theory behind it is straightforward. Specifically, in a sexual assault circumstance, the test for an employer's vicarious liability focuses on whether the employer's business and the power given to the employee materially increases the risk of sexual assault. Issues of power imbalance are significant, particularly in the context of the delivery of medical or educational services.

In the *TW v Seo* [2005] O.J. No. 2467 decision, the defendant employers were a private medical testing group performing ultrasound operations. An employee who, under the guides of providing ultrasound testing, actually assaulted patients was the personal, employee, defendant. After considering the relationship between the employee and the ultrasound clinic, the Court of Appeal agreed that vicarious liability was appropriate. The more important passages dealing with vicarious liability follow:

> 37. An employer may be found vicariously liable for the wrongdoing of an employee even where the employer is not at fault. The trial judge correctly found that Seo was an employee. The trial judge applied the test set out in 671122 Ontario Ltd. v. Sagaz Industries Canada Inc., [2001] 2 S.C.R. 983, to make this determination. On the basis of the total relationship between the parties, including the high level of control that Queensway had over the workplace, the fact that Seo did not provide his own tools, nor hire his own assistants, nor take any financial risk in the operation of the clinic, Seo was found to be an employee of the clinic.
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> 38 Queensway contends that the trial judge erred in finding it vicariously liable for Seo's conduct. Cases where vicarious liability for sexual assault has been imposed typically involve children. No cases were submitted that mirror the facts of this case. Therefore, it is necessary to examine the question on a principled basis using the reasons provided in Bazley v. Curry, [1999] 2 S.C.R. 534 and Jacobi v. Griffiths, [1999] 2 S.C.R. 570.
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> 39. In Bazley, supra, the Supreme Court of Canada set out the legal principle for, and the public policy basis of, the doctrine of vicarious liability. The doctrine imposes liability on employers for the tortious conduct of their employees and agents, provided that the misconduct is sufficiently related to the conduct authorized by the employer. Imposition of vicarious liability on employers is a form of strict liability. The employer may be without fault or blame for the underlying negligent or intentional misconduct of the tortfeasor.
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> 40. Bazley confirms that the 'scope of employment', or "Salmond test", as set out in the text, Salmond & Heuston on the Law of Torts, 18th ed. (London: Sweet & Maxwell, 1981) continues to have application. As McLachlin J. explained in Bazley, under the Salmond test, employers are vicariously liable for employee torts falling within the scope of employment. McLachlin J. quotes from Salmond and Heuston on the Law of Torts at p. 437:
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> An employee's wrongful conduct is said to fall within the course and scope of his or her employment where it consists of either (1) acts authorized by the employer or (2) unauthorized acts that are so

connected with acts that the employer has authorized that they may rightly be regarded as modes -- although improper modes -- of doing what has been authorized: Canadian Pacific Railway Company v. Lockhart, [1942] A.C. 591 at 599 (P.C.).

41. In Bazley, the employer operated a residential care facility for troubled children. An employee of the facility abused a child. The Supreme Court found the employer vicariously liable for the employee's unauthorized and intentional wrong on an application of the following three principles (at pp. 559-60):

1. The court 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 court should determine the fundamental question of whether the wrongful act is sufficiently related to conduct authorized by the employer to justify the imposition of vicarious liability. Where there is a significant connection between the creation or enhancement of a risk and the wrong that occurs, vicarious liability will serve the policy considerations for the provision of an adequate and just remedy and of deterrence. Employers should bear the generally foreseeable cost of their business.

3. To determine the sufficiency of the connection, the following factors should be considered:

   a) the opportunity afforded for the employee to abuse his power;
   b) the extent to which the act is furthered by the employer's aims;
   c) the extent to which the act is related to friction, confrontation, or intimacy;
   d) the extent of the power of the employee over the victim; and,
   e) the vulnerability of the potential victims.

42. In summary, the test for an employer's vicarious liability for an employee's sexual abuse of a client should focus on whether the employer's enterprise and its 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.

43. The test for vicarious liability 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 exercise of power and trust that pervade cases such as child abuse, special attention should be paid to the existence of power or a relationship of dependency, which on its own often creates a considerable risk of wrongdoing.

44. In this case, the trial judge applied the Bazley principles and properly characterized the nature of the relationship between the clinic and the employee. He concluded that Queensway was vicariously liable for the tortious acts of Seo, which were sufficiently related to authorized conduct to justify the imposition of liability. I agree.

45. The clinic's enterprise and empowerment of the employee materially increased the risk of sexual assault. The business of the clinic and the authority given to Seo by the clinic created a serious risk of sexual assault to patients. Presumably for privacy reasons, the clinic protocol called for the technician to be alone in a room with the patient, who is partially disrobed. The patient disrobes and dresses again in a space that is adjacent to the examining area. The patient has trusted her own physician who has advised her that this test is necessary and prescribed the test to be performed by a qualified technician. She must depend upon and trust the technician to do the test that has been ordered. The patient cannot be expected to know the boundaries or limits of authorization of the technician. The patient presents herself to the ultrasound technician who is expected to possess the skill, experience, and qualifications to perform the prescribed test and only that test that her physician has requested. Furthermore, the patient who attends at the clinic has a certain level of vulnerability arising from the stress and anxiety associated with unknown health problems.

46. As McLachlin J. noted in Bazley, at para. 43, "As the opportunity for abuse becomes greater, so the risk of harm increases." The risk of harm is enhanced by the nature of the relationship between

the employee and the patient. The relationship in this case is materially different from that between a child and a caregiver. Notwithstanding the opportunity for misconduct, there are at least two reasons why a competent adult in a health care setting is less vulnerable to sexual assault than a child. The adult is more able to physically protect herself and the employee is more likely to fear the adult's disclosure. In this case, the assault was covert, and the respondent was not aware that the technician was touching her improperly until afterward. The technician was permitted to touch the plaintiff in intimate body zones because of the authority granted to him by his employer. The relationship between the respondent and the technician was strictly professional and short term. Nonetheless, the circumstances lead the respondent to trust Seo completely.

47. The risk of sexual touching is increased by the fact that ultrasound testing requires or permits the employee to touch the patient in intimate body zones. In other words, the actual abdominal touching is part of what must be legitimately done by the technician. There is the finest line between legitimate touching and criminal or tortious conduct. In this case, where the requested test was an upper gastrointestinal tract test and the technician tested for ovarian cysts instead, the difference between legitimate and criminal touching was probably a distance of less than 12 inches of anatomy.

48. There is an obvious and strong connection between what the employer was asking the employee to do and the wrongful act. Because that connection is so strong, one can properly conclude that the employer significantly increased the risk of harm by putting the employee in his position and requiring him to perform the assigned tasks.

49. The nature of the enterprise and the actual duty of the technician are so connected to the wrong that, in my view, it cannot be said that the clinic provided a 'mere opportunity' to a employee. On an application of the legal principles, Seo's wrongful act was so closely related to the authorized conduct, it justifies the imposition of vicarious liability.

50. The finding of vicarious liability in this case also meets the policy objectives set out by McLachlin J. in Bazley, that is, fair and sufficient compensation for wrong and deterrence of future harm.

51. The policy objectives of the doctrine of vicarious liability dictate that the employer who has introduced the risk of the wrong is fairly and usefully charged with its management and minimization. There must be an incentive for those who control institutions or enterprises that engage in the intimate touching and/or treatment of vulnerable individuals to minimize the risk of harm to patients. Finding the employer vicariously liable encourages such employers to 'take such steps and hence, reduce the risk of further harm.

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