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Bowal, Peter; Bontorin, Louis

Centre for Public Legal Education Alberta (CPLEA)

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Vicarious Liability: The Legal Responsibility of Employers

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"It is right and just that the person who creates a risk bears the loss when the risk risk ripens into harm." - *Bazley v. Curry, 1999 CanLII 692 (SCC)* [1]



[2] Introduction

After the massive train derailment disaster last summer in Lac Mégantic, Quebec, the chief executive of the train company was roundly criticized for what appeared to be placing the blame for the calamity on an employee. True, that employee may have been personally responsible in a direct sense, but his large corporate employer is the one who hired, trained and supervised him and made money from his service. The employer is the person who chose to make a profit by running highly inflammable crude oil through the town that night. The public refused to allow the

employer to deflect all blame and accountability to the worker.

As it turns out, legal responsibility operates in the same way. Vicarious liability holds employers accountable for the wrongful negligent or intentional tort actions of their employees, while they are acting in the course of their employment. Put another way: one who is injured by an employee who is working at the time for an employer can sue both the employee (as the principal person responsible in law) *and* the employer (who is deemed by the law to be indirectly, or vicariously, responsible for the same injury).

Rationale

There are at least three reasons for this rule:

Vicarious liability holds employers accountable for the wrongful negligent or intentional tort actions of their employees, while they are acting in the course of their employment.

1. by hiring employees, the employer creates the risk of harm to third parties by its employees' negligence. Where it benefits from the use of employees, the employer should also accept all the risk that comes with those employees;
2. it provides an incentive for employers to exercise care in the selection, training and supervision of all employees. A business should see such "in the course of employment" liability as one of the many overall costs of doing business. An employer can insure against the risk of injury at lower cost than the victim. The rule also instills a sense of social responsibility; and
3. most employers have "deeper pockets" than their employees, which means that if the employee does not have sufficient resources to pay for the injury, the employer's superior economic position will help ensure the injured party will be properly compensated. We note, however, in some cases (such as the Lac Mégantic tragedy) even the pockets of employers and their insurers may not be deep enough to satisfy all claims. Some large scale incidents will drain and bankrupt a company.

The purpose of vicarious liability is to obtain a just and practical remedy for the victim so far as possible and to deter future harm.

Vicarious liability is sometimes referred to as strict, or no-fault, liability because the employer

itself is not actually or personally at fault. Indeed, vicarious liability does not apply only to employers and employees. The law holds "one person responsible for the misconduct of another because of the relationship between them," ([eText on Wrongful Dismissal and Employment Law](#) [3]) such as a parent and child and sometimes, spouses. We will focus on the employment context.

Bazley v. Curry

Up to 1999, the *Salmond* "scope of employment" test meant that the employee was doing what she was told to do. It did not matter *how* one did that work. The employer was vicariously liable for: (1) employee acts authorized by the employer; and (2) unauthorized acts related to the work. If the employee committed a tort while doing the job the employer was liable.

In *Bazley v. Curry* [1], the Supreme Court of Canada in 1999 reconsidered the contentious second basis of liability; whether vicarious liability should be imposed on the employer when the employee's act was only "coincidentally linked" to the job. The purpose of vicarious liability is to obtain a just and practical remedy for the victim so far as possible and to deter future harm. The new test would be whether the employee's wrongful act was "sufficiently related" to conduct authorized by the employer. That is to say, to hold an employer legally responsible, one would have to show "a significant connection between the creation or enhancement of a risk and the wrong." Some relevant factors are:

- a) the opportunity the employer gave the employee to abuse his power;
- b) the extent to which the wrongful act may have furthered the employer's aims (more likely to be committed by the employee);
- c) the extent to which the wrongful act was related to friction, confrontation or intimacy inherent in the employer's business;
- d) the power conferred on the employee in relation to the victim; and
- e) the vulnerability of potential victims to wrongful exercise of the employee's power.

In the *Bazley* case, the Children's Foundation was a non-profit organization in British Columbia. It hired Curry to act as a substitute parent for troubled children, not knowing he was a pedophile. He acted as an actual parent would, including bathing them and tucking them in. However, he went further and took advantage of his position by sexually abusing a young boy, Bazley. The Children's Foundation was found vicariously liable for Curry because the abuse arose from his job responsibilities to tuck children in for the night.

While the employer can be vicariously liable, the rogue employee can also be directly liable for the same wrong, both civilly and criminally, if the wrongful act is a criminal offence. In this case, Curry was also charged under the *Criminal Code of Canada*. An employee can also be terminated from employment for the wrong.

Vicarious Liability and the Moral Hazard Problem

Employees know that their employers will be held vicariously liable to third parties for their wrongs. While they may be sued civilly for their wrongs, rogue employees know, as a practical matter, it is the employer who will pay for it, and the employee has less incentive to avoid the harm. Some employment contracts contain hold-harmless or indemnity clauses, but these offer little protection for employers, who are as likely to recover compensation from reckless, indifferent employees as injured third parties are able to recover damages.

The Royal Oak Mines Case

We conclude with another tragic example that demonstrates the challenge of applying vicarious liability consistently. A strike occurred at Giant Mine, one of Royal Oak's mines. The strike quickly escalated into violence. Royal Oak wanted to keep the mine open, so it hired Pinkerton's security, as well as replacement workers. The workers were represented by CASAW Local 4, a local union that was a part of CASAW National.

There were a few minor incidents, including explosions. Then on September 18, 1992 Roger Warren, one of the miners on strike, slipped into one of the mine shafts and planted explosives, which killed nine miners. The families of the murdered miners sued, and were awarded \$10.7 million in damages. The companies involved were found jointly and severally liable. Warren was charged and convicted under the *Criminal Code* on nine counts of murder.

CASAW National was originally held vicariously liable for its local union CASAW Local 4. It appealed and that decision was overturned. The union was found *not* vicariously liable for the actions of Warren because the unions "are distinct legal entities which are not generally liable at law for the actions of the other." In this case, vicarious liability could be imposed only on the employer, not another party such as a union.

CASAW Local 4 also successfully appealed the ruling that it was vicariously liable. Despite Warren having done an act on his job site that related to mining, he was considered acting as a "rogue" member of the union. The Court said his union could not be held liable for that, (Fallowka v. Pinkerton's of Canada Ltd., 2010 SCC 5 (CanLII), [2010] 1 SCR 132 [4]) but it seems clear that Curry was a "rogue" employee too.

Each case will be analyzed separately to determine if there is sufficient relation between the wrongful act committed and the creation of a risk by the employer.

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[1] Bazley v. Curry, 1999 CanLII 692 (SCC): <http://canlii.ca/t/1fqlw>

[2] Image: <http://www.lawnow.org/wp-content/uploads/2012/07/Employment-Law.jpg>

[3] eText on Wrongful Dismissal and Employment Law:
<http://canlii.org/en/commentary/wrongfuldismissal/>

[4] Fullowka v. Pinkerton's of Canada Ltd., 2010 SCC 5 (CanLII), [2010] 1 SCR 132:
<http://canlii.ca/t/283kf>

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