
UPDATE ON CASE LAW INVOLVING CROSS-OVER AND VICARIOUS LIABILITY FOR CHARITABLE AND NON-PROFIT ORGANIZATIONS

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A. INTRODUCTION

Over the past decade, a number of lawsuits have arisen involving incidents of abuse that were committed between the 1940s and the 1960s by employees of religious institutions involved with the operation of residential schools. These schools were designed specifically for First Nations children by the Canadian government under the *Indian Act* (Canada)¹ in conjunction with various religious institutions.

Charity Law Bulletin No. 19, published in January 2003 (“CLB No. 19”),² provided a general commentary concerning the legal principles reflected in the residential schools cases. This commentary was presented in order to assist charities and non-profit organizations in taking steps to protect against liability in situations where an employee of either an affiliated member entity or a governing umbrella organization is found liable for damages in a lawsuit. CLB No. 19 used the term “cross-over liability” to describe the liability that can occur between affiliated corporations in this regard. Since the court decisions available as of the date of that bulletin were generally inconsistent with each other, a clear conclusion could not be drawn in this area of the law.

¹ R.S.C. 1985, c. I-5.

² Esther S.J. Oh and Terrance S. Carter, “Cross-Over Liability: Principles from the Residential Schools Cases” in *Charity Law Bulletin* No. 19 (January 31, 2003), online: <http://www.carters.ca/pub/bulletin/charity/index.html>.

It is beyond the scope of this Charity Law Bulletin (“Bulletin”) to provide a detailed commentary with respect to the ongoing developments involving the residential schools cases. Rather, the purpose of this Bulletin is to provide an update on CLB No. 19, including a brief summary and analysis of some of the key court decisions which contain a discussion of cross-over and vicarious liability as it relates to the abuse of children and youth by authority figures in charitable organizations (*e.g.*, residential schools, churches, etc.). Cross-over liability arises in the context of a multiple corporate structure where a member or employee of one of the entities is found liable for damages in a lawsuit and the assets of the governing and/or affiliated entities are thereby exposed as well. In contrast, vicarious liability imposes liability on an employer or principal for the wrongful conduct of an employee or agent whose actions result in a loss to a third party. Unlike direct liability, vicarious liability does not require that the employer or principal actually have caused the loss sustained by the third party.

This Bulletin concludes with practical suggestions which charities and non-profit organizations can consider in order to protect against cross-over liability and vicarious liability to the extent that it is possible to do so.

B. BACKGROUND INFORMATION CONCERNING CROSS-OVER LIABILITY

As indicated in CLB No. 19, multiple corporate organizational structures are generally thought to be helpful in insulating the assets of an incorporated entity from the liabilities of other affiliated corporations. However, the emerging case law involving abuse that occurred at residential schools suggests that separate incorporation in itself is inadequate to protect the assets of the corporation from damages that may also be awarded against a separate but affiliated entity, whether incorporated or unincorporated.

A review of the residential schools cases also suggests that self-containment of the operations of each corporate entity, where possible, can be of assistance in protecting against cross-over liability in the event of a lawsuit against an affiliated corporation.

The legal principles concerning cross-over liability derived from the residential schools cases, available as of the date of CLB No. 19, were the following:

- ◆ Cross-over liability is more likely to be imposed on an incorporated national entity which has a significant degree of control over the actions of the members or employees of associated incorporated entities, as in employer/employee or principal/agent relationships;

- ♦ Cross-over liability is less likely to be imposed where a separately incorporated national entity has little or no involvement in the actions of members or employees of associated entities;
- ♦ Similar principles appear to apply to any cross-over liability which might occur between associated entities on both a vertical and horizontal level in the hierarchy of associated entities;
- ♦ In the situation of a single national legal entity, liability in any part of the entity will likely affect the assets of all of the other parts of the national entity.

Although a number of the residential schools cases have been appealed in recent years, this has not necessarily resulted in significant clarification of the comments contained in CLB No. 19. Four years later, there continues to be a great deal of uncertainty concerning this area of the law.

An additional benchmark court decision that is relevant to any discussion concerning the application of cross-over liability to charitable organizations is *Re Christian Brothers of Ireland in Canada*,³ which was denied leave to appeal to the Supreme Court of Canada (“SCC”). For a more detailed examination of the issues involved in the Christian Brothers case, reference can be made to *Charity Law Bulletin* No. 3 and *Charity Law Bulletin* No. 24.⁴ As a result of the broader implications of the *Christian Brothers* case, and related court decisions, those bulletins conclude that special purpose charitable trust funds can be subject to seizure by creditors for claims that are unrelated to the purposes for which the funds were donated.

C. SUPREME COURT OF CANADA DECISIONS

Among the various lower court decisions concerning cross-over liability and vicarious liability, a handful have been heard by the SCC, including the following: *John Doe v. Bennett*⁵ (a decision released in March 2004), *Blackwater v. Plint*⁶ and *E.B. v. Order of the Oblates of Mary Immaculate in the Province of British Columbia*⁷ (both decisions released in October 2005). The legal principles derived from these three decisions are the focus of this section of the Bulletin.

³ [2000] O.J. No. 1117.

⁴ See Terrance S. Carter, “Supreme Court’s Refusal to Grant Leave to Appeal in *Christian Brothers* Case Prejudices Charities” in *Charity Law Bulletin* No. 3 (March 26, 2001) and Terrance S. Carter and R. Johanna Blom, “Update on Christian Brothers” in *Charity Law Bulletin* No. 24 (September 30, 2003), online: <http://www.carters.ca/pub/bulletin/charity/index.html>.

⁵ [2004] S.C.J. No. 17. [*Bennett*]

⁶ [2005] S.C.J. No. 59. [*Blackwater*]

⁷ [2005] S.C.J. No. 61. [*Order of the Oblates*]

1. The *Bennett* decision

a) Background

As outlined in *Church Law Bulletin* No. 11,⁸ in the *Bennett* case, the SCC addressed the issue of when a church will be held vicariously liable for the sexual misconduct of its employees. As indicated earlier in this Bulletin, vicarious liability is imposed on an employer for the wrongful conduct of an employee which results in a third party sustaining a loss. *Bennett* was a parish priest in a Roman Catholic Diocese in Newfoundland who, over a span of several decades, sexually abused a number of young boys who were under his care. The following is a brief summary of the relevant comments from *Church Law Bulletin* No. 11 that are relevant to a discussion on cross-over liability and vicarious liability.

b) Court Decisions

In commenting on the public policy rationale that would support a finding of vicarious liability, Chief Justice McLachlin made the following comments in the *Bennett* decision:

Vicarious liability is based on the rationale that the person who puts a risky enterprise into the community may fairly be held responsible when those risks emerge and cause loss or injury to members of the public. Effective compensation is the goal. Deterrence is also a consideration. The hope is that holding the employer or principal liable will encourage such persons to take steps to reduce the risk of harm in the future.

In the earlier leading case of *Bazley v. Curry*,⁹ the SCC rejected the argument that non-profit organizations should be shielded from tort liability in the public interest. Yet, in *Jacobi v. Griffiths*,¹⁰ a decision released on the same day as the *Bazley* decision, a majority of the SCC suggested that imposing liability on a non-profit organization could negatively affect the policy rationales underlying the imposition of vicarious liability and may necessitate a measure of judicial restraint. Nearly five years later, in order to address this apparent inconsistency, Chief Justice McLachlin's comments in the *Bennett* decision confirmed that non-profit status in itself would not be sufficient grounds to obviate a finding of vicarious liability, as follows:

The majority reasons in *Jacobi* suggest that non-profit status may sometimes negatively impact on the policy rationales that underlie the imposition of vicarious liability; however, they do not

⁸ See Mervyn F. White, "Supreme Court of Canada Brings Clarity to Vicarious Liability of Churches in Canada" in *Church Law Bulletin* No. 11 (May 31, 2005), online: <http://www.carters.ca/pub/bulletin/church/index.html>.

⁹ [1999] 2 S.C.R. 534. [*Bazley*]

¹⁰ [1999] 2 S.C.R. 570. [*Jacobi*]

state that non-profit employers should not be held vicariously liable; nor do they affirm the old doctrine of charitable immunity.¹¹

c) Analysis

In the *Bazley* decision, the SCC provided a two-part approach for determining whether and when vicarious liability should be imposed on an employer. This two-part approach involved: (1) a court determining if there are any precedents which determine whether vicarious liability should be imposed under the circumstances in the case; and (2) if the wrongful act can be sufficiently connected to the conduct authorized by the employer or principal. In determining whether a sufficient connection exists under item (2), the factors set out in *Bazley* to be considered include, but are not limited to, the following:

- The opportunity that the enterprise of the employer or principal affords to the employee or agent to abuse his or her power;
- The extent to which the wrongful conduct may have furthered the employer's enterprise;
- The extent to which the wrongful act was related to friction, confrontation or intimacy inherent in the employer's enterprise;
- The extent of power conferred on the employee in relation to the victim;
- The vulnerability of potential victims to wrongful exercise of the employee's power.

In applying the two-part *Bazley* test to the facts of the *Bennett* case, the SCC found that there was a sufficient connection between Bennett's wrongful conduct as a parish priest and the conduct authorized by the Diocese as Bennett's employer. In this regard, the SCC noted that the origins of Bennett's influence and power over his victims were inherent in his role as priest, which role was conferred through the authority by the Bishop. Despite a lack of evidence to establish that the Bishop was actually aware of the abuses being committed by Bennett, the SCC held that the Diocese was vicariously liable because of the nature of the relationship between the employer Diocese and the employee priest.

The *Bennett* case clearly affirms that charities and non-profit organizations can be held vicariously liable for the conduct of their employees and agents. As a result, charities and non-profits have a

¹¹ *Bennett*, *supra* note 5 at para. 24.

significant obligation to carefully supervise and monitor the conduct of their employees, especially where those employees are in a position of power and authority over others. In addition, this case indicates that a lack of awareness by the employer over the wrongdoing being committed by its employee will not necessarily relieve the employer organization from being held vicariously liable for the misconduct of its employees or agents.

2. The *Blackwater* decision

a) Background

In *Blackwater v. Plint*,¹² a decision released on October 21, 2005, the SCC provided further comments on the issue of vicarious liability in the context of charitable organizations. This case involved sexual abuse perpetrated by Plint at a residential school in British Columbia, as described in greater detail below.

b) Court Decisions

As outlined in CLB No. 19, the judge at the trial level in *Blackwater* held that both the United Church of Canada (“UCC”) and the Federal Government of Canada (“Government”) were vicariously liable for the sexual assaults committed by Plint, a dormitory supervisor at a residential school in British Columbia. The school was not incorporated and did not exist as a separate legal entity from the UCC and was jointly operated by the UCC and the Government.

The trial judge examined whether the UCC or the Government could be properly characterized as the directing or controlling entity of the residential school. In reaching its finding of vicarious liability, the court stated that vicarious liability is entirely dependent upon the relationship between the wrongdoer and the person or entity to whom a party seeks to attribute vicarious liability. In this regard, the court found that the UCC and the Government had jointly controlled the activities of the dormitory supervisor through the office of the principal and they were therefore jointly liable for the actions committed by Plint. In determining whether vicarious liability would attach to the UCC, the court in *Blackwater* appeared to view the issue of separate incorporation as secondary to the issue of the exertion of actual control over the operations and activities of a separate entity.

¹² *Blackwater*, supra note 6.

The case was subsequently appealed to the British Columbia Court of Appeal (“BCCA”).¹³ The UCC’s appeal was allowed while the Government’s appeal was dismissed. The BCCA held that the UCC was not vicariously liable for the actions of Plint, due to the application of the doctrine of charitable immunity which provides for the immunity of charitable organizations from tort liability. The Court of Appeal held that the school employees were employees of the Crown, and as such, the injured parties could fully recover from the Government.

The *Blackwater* case was thereafter appealed by the plaintiff to the SCC. The plaintiff’s appeal was dismissed. The Government’s appeal was allowed in part and the trial judge’s decision relative to the apportionment of liability between the UCC and the Government, *i.e.*, 75% to the Government and 25% to the UCC, was restored.

The SCC in *Blackwater* applied the two-part *Bazley* test in finding that the UCC exerted sufficient control over the operations at the residential school that gave rise to the harm caused, to warrant a finding of vicarious liability to the UCC. The SCC noted that the UCC was Plint’s immediate employer, and as such, in carrying out his responsibility for overseeing the dormitory in which the plaintiff slept, Plint was answerable to the UCC.

In its decision, the SCC noted a number of factual findings made by the trial judge which supported the proposition that the UCC was one of Plint’s employers and should therefore be vicariously liable for Plint’s assaults. The factual findings noted by the SCC in this regard included the following:

- The principal who hired, fired and supervised the dormitories was hired by the UCC;
- The UCC was involved in all aspects of the operation and management of the residential school, in making grants to the school’s operations, conducting annual inspections of the school and had appointed an advisory committee to ensure that the UCC’s policies were being properly carried out at the school.

¹³ [2003] B.C.J. No. 2783.

- The SCC also noted that in its 1993 Brief to the Royal Commission on Aboriginal Peoples, the UCC “described that it was responsible for ‘day-to-day atmosphere and activity’ of the schools as ‘implementing agents.’”

c) Analysis

The SCC found that the UCC played an active role in the operation of the residential school in question, “...for its own end of promoting Christian education to Aboriginal children” and therefore should be found vicariously liable for the actions of Plint.

The SCC rejected the Court of Appeal’s application of the doctrine of charitable immunity on the basis that continued usage of this doctrine would not motivate non-profit organizations to take necessary precautions by screening their employees in order to protect children from sexual abuse.

The SCC decision in the *Blackwater* case affirms that cross-over liability can occur where harm arises from the actions of an affiliated organization, where a charity exerts direct control and supervision over the day-to-day matters over the affiliated organization. Indicia of control that can be considered by a court in reviewing whether vicarious liability should be imposed, includes but is not limited to, the following: direct supervision over activities carried out by the employees; financial contributions to the general operating expenses; responsibility for hiring and firing of the manager who oversees the employees; contributions to the pension plan for employees; annual inspections of the program; and appointment of committees to monitor implementation of policies.

The *Blackwater* case also serves as a warning to charities and non-profit organizations, in that communications made to the public concerning the organization’s involvement in a given program, even external comments made in a report to a Royal Commission, can be taken into consideration by a court as it reviews the extent of the organization’s involvement and duties in relation to such a program.

3. The Order of the Oblates decision

a) Background

In *E.B. v. Order of the Oblates of Mary Immaculate in the Province of British Columbia*,¹⁴ the appellant, E.B., attended a residential school for First Nations children run by the respondent Order of the Oblates of Mary Immaculate in the Province of British Columbia. The plaintiff E.B. was repeatedly sexually abused by a lay employee, Martin Saxey, who had resided on the school grounds and worked at the school as a baker, operated the school motorboat and also served as an odd-job labourer. While the SCC noted that Saxey had been imprisoned due to a conviction for manslaughter prior to his employment at the school, it also stated that there was no finding that the Oblates were “negligent either in hiring Saxey or in supervising his conduct.” The assaults had taken place in Saxey’s living quarters over the course of several years. Students were not allowed to be in or around staff quarters and were not supposed to be in the bakery in which Saxey worked, due to the danger of the hot appliances and dough-making machinery.

While E.B. did not report Saxey to the school, he later sued the school, seeking damages from the Oblates on two grounds: (1) the vicarious liability of the Oblates based upon the contention that the unique circumstances and environment of Christie created and materially enhanced the risk of sexual assaults on the plaintiff by Saxey; and (2) the direct liability of the Oblates arising out of the negligence of Christie's principal for hiring Saxey, a person known to him to have a history of violent homicide.

b) Court Decisions

At trial, counsel for the Oblates submitted that the court must decide the issue of direct liability based on:

... the standard of care expected of the Oblates in the context of operating a residential school in the 1950s and 1960s, and not based upon the current standard of what is known about the nature, degree or extent of sexual assaults upon children. Counsel submitted that the Oblates met this standard of care, and that any damages suffered by the plaintiff as a result of the alleged sexual assaults were not foreseeable.¹⁵

¹⁴ *Order of the Oblates*, *supra* note 7.

¹⁵ *E.B. v. Order of the Oblates of Mary Immaculate in the Province of British Columbia*, [2001] B.C.J. No. 2700 at para. 5.

On the first ground, the trial judge held that the Oblates were vicariously liable for the improper conduct of Saxey. In arriving at this conclusion the trial judge noted that the “operational characteristics” of the school created a risk of sexual abuse and that risk materialized in the harm suffered by E.B. As the judge concluded that the Oblates were vicariously liable to E.B., he did not consider it necessary to consider the second ground, *i.e.*, whether the Oblates were directly liable in negligence.

The Court of Appeal set aside the trial judge’s decision to hold the Oblates vicariously liable, stating that the trial judge had not paid sufficient attention to the absence of any strong connection between the sexual abuse and the nature of Saxey’s employment-related duties, *i.e.*, he was merely a baker at the school. The Court of Appeal did not revisit the second ground of direct liability in negligence.

E.B. appealed to the SCC but his appeal was dismissed. The SCC agreed with the Court of Appeal decision, and held that in order to impose vicarious liability on the defendant school, there had to be demonstration of a strong connection between what the employer asked the employee to do and the wrongful conduct. Liability could not be imposed on the Oblates based on a “mere opportunity” provided to Saxey to commit the wrongful acts. In this regard, in order to arrive at a finding of vicarious liability, there would be a requirement of a clear demonstration that the school had created features of Saxey’s employment relationship that contributed to his ability to assault E.B. The SCC found that mere opportunity to commit the wrongful act was not sufficient and therefore the “strong connection” test was not met. Saxey’s limited duties and his role at the school were conclusive against a finding of vicarious liability against the Oblates since Saxey did not have the authority to “insinuate himself into the intimate life of the plaintiff.” The SCC commented that the vulnerability of the students resulted from the nature of the institution, not from the power conferred by the employer school on Saxey, which could have allowed the SCC to find the Oblates directly liable based on the facts of the case. However, like the Court of Appeal, the SCC declined to revisit the second ground of direct liability in negligence.

c) Analysis

The distinction between “direct liability” and “vicarious liability” in employment settings can best be described as the difference between: (1) the liability imposed directly against an employer for its

negligent conduct; and (2) the liability imposed against an employer for the conduct of an employee who is performing duties on the employer's behalf.

In this regard, direct liability is imposed when the employer directly creates the risk that could potentially cause harm, whereas the imposition of vicarious liability does not require that the employer actually cause the loss sustained through the conduct of its employee. As Mr. Justice Binnie, for the majority of the SCC, wrote at paragraph 22:

... vicarious liability is concerned not with the direct fault of the employer but with making the employer liable for the fault of Saxey. A primary focus, therefore, is on the employment relationship between the respondent employer and its wrongdoing employee. This requires an examination of Saxey's actual powers, duties and responsibilities to determine whether or not there was "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."¹⁶

Vicarious liability is imposed on the employer on the basis that the employment relationship has created a risk which is reasonably foreseeable and attributable to the employer's activities, and that it is reasonable that the employer should be found liable for the risk.

The Oblates decision demonstrates that in determining whether a finding of vicarious liability should occur, the courts will not automatically impose liability on employers for the wrongful conduct of their employees. In this regard, the SCC held that liability would not automatically be imposed on the Order of the Oblates simply because the work environment at the school allowed Saxey to come into contact with the children. Instead, plaintiffs must establish a "strong connection" between the employment duties assigned to the employee and the ensuing risk in order to achieve a finding of vicarious liability. In this regard, the SCC acknowledged that not all employees perform duties which increase the level of the risk posed by their presence.

The SCC noted the very limited contact that Saxey had with children in connection with his job-related duties assigned by the Order of the Oblates. He worked in a bakery, did odd maintenance jobs and drove the school motorboat, none of which called for any degree of intimacy between Saxey and the children residing at the school.

¹⁶ Quoting McLachlin J. in *Bazley*; *supra* note 9 at para. 42.

Notwithstanding the above analysis which would apply to an allegation of vicarious liability, it is important to note that in its comments, the SCC stated that the facts in the Oblates case would have led to a finding of “direct liability”. In this regard, Mr. Justice Binnie also indicated that the trial judge had not taken the analysis of direct liability far enough, and that the trial judge “did not put adequate weight on the school-created features of the relationship between this claimant and this wrongdoing employee, and the contribution of the respondent’s enterprise to enabling the wrongdoer Saxey to do what he did.”¹⁷ In the opinion of the SCC, the analysis of the general “operational characteristics” should have been conducted in connection with the claim of direct liability, not in relation to the claim of vicarious liability.

In his comments, Mr. Justice Binnie noted the following:

Further the appellant himself testified that the students were not allowed to enter the staff living quarters. The respondent thus imposed a degree of geographic separation. With respect to Saxey’s motor responsibilities, school policy required a religious brother (or equivalent) to travel on the boat when boys were present. *If the school can be shown to have been negligent in supervising adherence to these and similar instructions, thereby creating a risk which led directly to the commission of the sexual assault on the appellant, that would nourish the claim in relation to direct liability. At present, however, we are dealing with vicarious liability.*¹⁸ [emphasis added]

In light of the SCC’s above-noted comments, the Oblates decision does not relieve charities and non-profit organizations from having to carefully monitor the actions of employees whose duties do not involve a strong connection with potential risk of harm to vulnerable individuals. Had the allegation of direct liability not been discontinued at the trial level, the Oblates could have been found directly liable, notwithstanding the SCC’s finding that vicarious liability could not be supported.

D. ADDITIONAL CASE LAW REGARDING CROSS-OVER AND VICARIOUS LIABILITY

Highlights from the following four recent lower court decisions also indicate that courts will review the issues of “control” and a “close connection” between a given employee position and potential risk of harm when deciding whether or not to impose vicarious liability on an employer or principal for the wrongful acts against a third party by an employee or agent.

¹⁷ Order of the Oblates, *supra* note 7 at para. 4.

¹⁸ *Ibid.* at para. 36.

1. *Doe v. O'Dell*¹⁹

John Doe (an Anglican) brought an action against O'Dell (a Catholic priest) and the Roman Catholic Episcopal Corporation for the Diocese of Sault Ste. Marie for damages arising from sexual abuse he suffered as a child by O'Dell beginning in 1982. Doe had developed a relationship with O'Dell, a priest in his community, in order to seek answers for questions Doe had about religion. John Doe was awarded general and aggravated damages, damages for loss of income and for future loss of income. O'Dell was held liable for numerous acts of battery and breaches of fiduciary duty. The court did not hold the Diocese directly liable, but held that the Diocese was vicariously liable for the abuse committed by Doe, since the Diocese exercised control over the actions of Doe, under an employer/employee relationship that existed between them. In arriving at this conclusion, the court noted that in order to become a priest, the individual must "...swear an oath of obedience to the Bishop, and the Bishop exercises significant control over his life," through mechanisms such as the ability to exercise removal and discipline of priests, the requirement for the Bishop's approval to enter the priesthood and through other means.

2. *Doe v. Avalon East School Board*²⁰

This case involved an action by the plaintiff John Doe for a determination concerning whether the defendant, Avalon East School Board (the "Board"), was vicariously liable for sexual assault performed by one of the Board's teachers (Neary) against Doe when he was a teen-ager.

The Board was held vicariously liable for Neary's actions. The court considered the role and mandate of the Board, its connection to the risk of wrongdoing, the relationship between Neary and the Board, whether the Board had control and direction over Neary, and the connection between Neary's actions and the Board's enterprise. The trial judge concluded that the Board exercised the kind of authority that gave it a degree of control over a vulnerable population and that there was a risk that harm might result if an employee abused that authority. In finding the Board vicariously liable for the sexual assaults committed by Neary, the Court noted that Neary was at all times an employee of the Board, and carried out his duties under the Board's supervision and therefore the wrongful act was directly connected with Neary's role as a teacher.

¹⁹ *Doe v. O'Dell*, [2003] O.J. No. 3456 (Ont. S.C.J.).

²⁰ *Doe v. Avalon East School Board*, [2004] N.J. No. 426 (Nfld. S.C.T.D.).

3. Wilson v. United Church of Canada²¹

In this case, the defendant claimed that she was sexually assaulted while she was between the ages of 5 and 13 by an elder of the defendant church. She claimed that the assaults took place within the church and sued the church for damages on the basis of vicarious liability or alternatively for negligence.

The plaintiff's claim was dismissed by the court. In arriving at its decisions, the court stated that the church was not vicariously liable for the elder's actions because the abuser was a lay minister, not a full-time employee of the church. In this regard, the court noted that the elder had no assigned duties with children and had not asserted any influence over the plaintiff in his role as a member of the church. Instead, any influence exercised by the elder had come about as a result of being a member of the community. The claim in negligence failed because no reasonable investigation would have put the defendant church on notice that the abuser was a risk to children within the community.

4. J.R.S. v. Glendinning²²

J.R.S., his three siblings and parents commenced a legal action against Glendinning, a priest of the Roman Catholic Episcopal Corporation of the Diocese of London in Ontario, the Roman Catholic Church and the London Catholic District School Board for damages arising from Glendinning's sexual assaults against the four children over a period of several years.

The Court held Glendinning personally liable in negligence and for breach of fiduciary relationship towards the children. The Diocese was held liable in negligence to the children and was also found vicariously liable for Glendinning's actions. The court noted that the seminary was aware that the priest had children in his room at the seminary, which was a departure from general practice and therefore the potential for abuse should have been obvious to the Diocese. The Diocese was not held to have been in a fiduciary relationship with the plaintiffs but the court held that there was enough of a connection between Glendinning's job-created risk of harm and the sexual assaults for the Diocese to be held vicariously liable for Glendinning's actions. From the standpoint of cross-over liability, it is important to note that neither the Roman Catholic Church in general, nor the London Catholic District School Board, was held liable.

²¹ *Wilson v. United Church of Canada* (2004), 138 A.C.W.S. (3d) 764 (B.C.S.C.).

²² *J.R.S. v. Glendinning*, [2004] O.J. No. 285 (Ont. S.C.J.).

E. LEGAL IMPLICATIONS FOR CHARITIES AND NON-PROFIT ORGANIZATIONS

1. Legal Risk Management

The SCC decisions in *Bennett*, *Blackwater* and *Order of the Oblates*, as well as several lower court decisions, all underscore why churches, charities and non-profit organizations must be proactive in dealing with the risks that their operations pose by implementing internal legal risk management processes. This is especially true where children and youth are involved and where authority is conferred on employees who exercise power over others. As well, as an extrapolation of the principles reflected in the above cases, where organizations are directing individuals to perform tasks which might expose them and others to danger, such as undertaking disaster relief in Canada or abroad, the directing organization must take proactive steps in addressing the risks involved.

2. Avoiding Vicarious Liability

Due diligence is a crucial factor in avoiding vicarious liability. It is crucial that internal legal risk management mechanisms be reviewed in order to address the possibility of abuse or injury occurring. Risk management mechanisms include:

- ◆ Written policies, *e.g.*, policies against child abuse;
- ◆ Careful implementation and monitoring to ensure that policies are being complied with;
- ◆ Risk audits to identify, reduce or eliminate potential risks;
- ◆ Proper screening mechanisms, such as police record checks and reference checks;
- ◆ Implementing security measures, such as:
 - locked door access;
 - video surveillance; and
 - a “buddy system”, whereby two adults are always present with children.

3. Avoiding Cross-Over Liability

While the jurisprudence surrounding the liability of charitable and non-profit organizations has grown over the past four years, the practical steps outlined in CLB No. 19 continue to apply. When structuring and operating a large organization composed of numerous branches, divisions or separate entities, in order to avoid a finding of cross-over liability between associated entities, the following steps should be taken:

- ◆ ensure the separate incorporation of each entity;

- ♦ expressly define the limits of power and authority of the entities so that each separate entity is clearly self-contained in its operations; and
- ♦ have each incorporated entity keep up-to-date records of activities in its own corporate minute book to show its independence from other affiliated entities.

As well, there are pitfalls to avoid when trying to limit cross-over liability between separately incorporated yet affiliated entities, such as:

- ♦ avoid having a parent or umbrella entity involved in the licensing, hiring, disciplining, payment or general day-to-day direction and supervision of the employees of the affiliated entity;
- ♦ avoid having a common bank account or other common financial fund between the various affiliated incorporated entities; and
- ♦ avoid having any perception that one separately incorporated entity could be the employer of the employees of another entity as described above.²³

4. Avoiding Criminal Liability

With the changes to the *Criminal Code*²⁴ brought about by Bill C-45,²⁵ there is an increased possibility of criminal charges being brought against churches, charities and non-profit organizations, as well as their directors, officers, employees, agents and volunteers. In instances where an employee, agent or volunteer is performing a task that he or she was directed to undertake by an employer, and another person suffers injury or death, criminal liability can be imposed on the organization and/or the individuals involved. Even where an activity is performed under the care and control of the government and backed by it financially, if the church, charity or non-profit organization is involved in any way with the injury or death sustained, the doctrine of charitable immunity will not apply.

²³ For more information, see Jacqueline M. Demczur and Terrance S. Carter, “Effective Asset Protection Through Multiple Corporate Structures” in *Charity Law Bulletin* No. 115 (April 24, 2007), online: <http://www.carters.ca/pub/bulletin/charity/index.html>.

²⁴ R.S., 1985, c. C-46.

²⁵ See Mervyn F. White, Bruce W. Long and U. Shen Goh, “Bill C-45 and its Effect on Criminal Liability and Insurance Coverage for Charities” in *Charity Law Bulletin* No. 35 (January 30, 2004) and Mervyn F. White, “Update on Bill C-45: Criminal Liability for Workplace Negligence Now in Force” in *Charity Law Bulletin* No. 72 (July 20, 2005), online: <http://www.carters.ca/pub/bulletin/charity/index.html>.

F. CONCLUDING COMMENTS

Over the past decade, especially as a result of several SCC decisions, there have been significant developments in the areas of cross-over liability and vicarious liability applicable to charitable and non-profit organizations. In this regard, it is crucial that such organizations take steps to be aware of how these legal developments may affect their daily operations and long-term programs, especially where vulnerable individuals, such as children and youth are involved. As recent case law indicates that the doctrine of charitable immunity has become outdated, charitable and non-profit organizations must review their internal legal risk management procedures and corporate structure in order to take steps to protect against potential cross-over, vicarious or even criminal liability.