

## **SUPREME COURT OF CANADA BRINGS CLARITY TO VICARIOUS LIABILITY OF CHURCHES IN CANADA**

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### **A. INTRODUCTION**

In *John Doe v. Bennett*<sup>1</sup> the Supreme Court of Canada has tackled the thorny issue of when a church will be vicariously liable for the sexual misconduct of its employees. This case involved abuse by a parish priest in a Roman Catholic Diocese in Newfoundland against a number of young boys who were under his charge and care over a thirty-year span. Bennett ultimately admitted to using various means; including money, alcohol and intimidation to abuse his victims. All of the abuse occurred while the offender was employed as a parish priest.

### **B. VICARIOUS LIABILITY**

The doctrine of vicarious liability imposes liability upon an employer or principal for the conduct of an employee or agent, on the grounds that the employer or principal should be held accountable for losses to third parties that arise from the actions of the employer or principal. Unlike the principle of direct liability, vicarious liability does not require that the employer or principal actually cause the loss sustained by the third party. Liability is imposed on the employer or principal with the rationale that the loss is the result of a

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<sup>1</sup> [2004] S.C.J. No 17. [*"Bennett"* decision]

reasonably foreseeable risk and attributable to the employer's or principal's activities, and that it is reasonable that the employer or principal should be liable for the risk.

From a public policy point of view, vicarious liability is designed to ensure that parties undertaking risky enterprises take all reasonable measures to reduce the risk. It is a form of risk allocation, in keeping with the logic behind tort law in Canada; namely, losses will be suffered in our modern world, and we should be aware of the losses we cause, and should try to reduce the risks of such losses, or compensate for such losses when appropriate. As Chief Justice McLachlin stated in *Bennett*:

“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 a 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.”<sup>2</sup>

A recent string of decisions by the Supreme Court of Canada have brought clarity to the issue of when the doctrine of vicarious liability will be imposed on a church, and presumably any non-profit or charitable organization, for losses arising from the misconduct of its employees or agents, including sexual misconduct.

In *Bazley v. Curry*,<sup>3</sup> the Supreme Court of Canada provided a two part approach to determining whether and when vicarious liability should be imposed on an employer. The two part approach involved firstly; a court determining if there are any precedents which determine whether vicarious liability should be imposed under the circumstances in the case, and secondly, if the wrongful act can be sufficiently connected to the conduct authorized by the employer or principal. In determining whether a sufficient connection exists, the factors set out in *Bazley*<sup>4</sup> to be considered include, but are not limited to:

- 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;

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<sup>2</sup> *Supra* note 1 at par. 20.

<sup>3</sup> [1999] 2 S.C.R. 534. [“*Bazley*” decision]

<sup>4</sup> *Supra* not 3 at par. 41.

- 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.

The Supreme Court of Canada rejected arguments in *Bazley* that non-profit organizations should be protected from tort liability in the public interest. However, in the case of *Jacobi v. Griffiths*,<sup>5</sup> a majority of the Supreme Court of Canada suggested that the non-profit status of an employer may negatively affect the policy rationales underlying the imposition of vicarious liability. To address this apparent inconsistency, Chief Justice McLachlin of the Supreme Court of Canada held in *Bennett* that:

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 state that non-profit employers should not be held vicariously liable; nor do they affirm the old doctrine of charitable immunity.<sup>6</sup>

### C. THE BENNETT DECISION AND IMPLICATIONS

In the *Bennett* case the Supreme Court of Canada, applying the first part of the two-phased *Bazley* test mentioned above, noted that there were no precedent cases decided directly on point. The decision mentioned a Nova Scotia Court of Appeal case which held that an episcopal corporation was not vicariously liable for sexual assaults committed by one of its priests, primarily because the priest had acted "totally contrary to the religious tenets" of the church, that he had sworn to uphold.<sup>7</sup> However, the Supreme Court noted this was not followed by other courts,<sup>8</sup> and concluded that the relevant case law supported the imposition of vicarious liability on Episcopal corporations. In applying the second part of the test to establish a sufficient connection between the wrongful conduct and the conduct authorized by the Diocese as employer for the parish priest, the Supreme Court of Canada focused on the following three indicia:

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<sup>5</sup> [1999] 2 S.C.R. 570. ["Jacobi" decision]

<sup>6</sup> *Supra* note 1 at para. 24.

<sup>7</sup> *McDonald v Mombourquette* (1996), 152 N.S.R. (2d) 109 at para. 47.

<sup>8</sup> See *K. (W.) v Pornbacher* (1997), 32 B.C.L.R. (3d) 360 (S.C.) where the Catholic Church, through its Bishop of Nelson, was held to be vicariously liable for sexual assaults committed by a priest.

- The Bishop provided the offender with the opportunity to abuse his power, and Canon 528 of the Code of Canon Law of the Roman Catholic Church directs a parish priest “to have a special care for the catholic education of children and young people,”<sup>9</sup>
- The offender’s wrongful acts were strongly related to the “psychological intimacy inherent in his role as priest,”<sup>10</sup>
- “The Bishop conferred an enormous degree of power on [the offender] relative to his victims.” To make this finding, the Supreme Court of Canada noted that the power imbalance was intensified in the diocese involved, due to a number of factors, including but not limited to, its geographic isolation, the fact that the communities in the diocese were entirely and devoutly Roman Catholic, and that there were few authority figures other than the offender as parish priest.<sup>11</sup>

The Supreme Court of Canada noted in its decision that the offender had “enormous” stature because of his position as parish priest and held:

*“While Bennett has a particularly forceful personality, the root of his power over his victims lay in his role as a priest, conferred by the bishop.”<sup>12</sup>*

Further, the Supreme Court of Canada noted in the *Bennett* decision that the relationship between the Bishop of the Diocese and a parish priest of the Diocese is based not only on a spiritual relationship, but also on a temporal relationship. The parish priest takes a vow of obedience to the Bishop and the Bishop exercises extensive control over the parish priest. The relationship was described by the Supreme Court of Canada as being akin to an employment relationship.

What is important to note in this part of the *Bennett* decision, is that there was no evidence presented to establish that the Bishop was aware of what the offender was doing, that he turned a blind eye to it, or failed to properly supervise the offender. The Supreme Court of Canada clearly stated that in the present case, the nature of the relationship between the employer Diocese and the parish priest, regardless of negligence on behalf of the Diocese in supervising his conduct, was sufficient to establish a proximate relationship and meet the second part of the test.

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<sup>9</sup> *Supra* note 1 at para. 28.

<sup>10</sup> *Supra* note 1 at para. 29.

<sup>11</sup> *Supra* note 1 at para. 30.

<sup>12</sup> *Supra* note 1 at para. 31.

This decision should be profoundly disturbing for churches, as well as other charitable, and non-profit organizations (“non profit organizations”), as it clearly affirms that they can be held vicariously liable for the conduct of their employees and agents. As such, it imposes a significant obligation upon them to supervise and control the conduct of employees who are in a sufficient position of power over others. Clearly, it can be assumed that a lack of awareness will not relieve non-profit organizations from being held vicariously liable for the misconduct of their employees or agents.

What should also be clear to non-profit organizations as a result of the *Bennett* decision is that they will be treated no differently from any other type of organization, including for-profit businesses, when it comes to the imposition of the doctrine of vicarious liability. If the two-part test described above is met, vicarious liability will be imposed on non-profit organizations for the intentional torts committed by their employees.

Interestingly, the Supreme Court declined to address the Diocese’s submission that the Roman Catholic Church, and not the Diocese, should be held liable for Mr. Bennett’s conducts. Chief Justice McLachlin stated that the Court would need more information concerning the Church’s hierarchy and relationship with individual constituents before such a question could be answered, and left it open for a future date.

#### **D. SUBSEQUENT RULINGS AFFIRMING BENNETT DECISION**

The test for vicarious liability affirmed in the *Bennett* decision has been followed by a number of lower courts in recent cases.<sup>13</sup> Two cases in particular have involved similar fact situations of churches facing vicarious liability for sexual abuse: *P.D. v Allen*<sup>14</sup> and *L.E.W. v. United Church of Canada*.<sup>15</sup>

The plaintiff in *Allen* was a victim of sexual abuses by a priest at the rectory where she worked as a young girl. The Ontario Superior Court of Justice held that the Diocese in question was vicariously liable for the priest’s conduct (the Diocese conceded this in a letter to the court, four days after the *Bennett* decision was released) and accused the Diocese of being wilfully blind.

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<sup>13</sup> See *Doe v. Avalon East School Board* [2004] O.J. No. 3042, where a school board was held vicariously liable for a teacher’s sexual assault of a student; see also *Warren v. Ultramar Canada Inc.* [2005] N.J. No. 114.

<sup>14</sup> [2004] O.J. No. 3042. [“*Allen*” decision]

<sup>15</sup> [2005] B.C.J. No. 832. [“*L.E.W.*” decision]

In *L.E.W.*, the plaintiff sought damages against the United Church for vicarious liability for acts of sexual abuse by an Elder and lay minister named Fred Bolton. The B.C. Supreme Court, however, distinguished the facts of the case from those in *Bennett* and dismissed the claim. Unlike *Bennett*, Bolton was only a volunteer minister at the Church whose duties did not bring him in contact with individual children. The court further noted that, although both cases occurred in isolated communities, *Bennett* exerted a significant amount of influence in his community, while in Bolton's case he was just another community volunteer. The court concluded that "nothing regarding Bolton's authorized role with the defendant church provided him with a greater opportunity than any other member of the community for intimacy with children."<sup>16</sup> Thus, there was no "strong and close connection" between the risk created by the Church and the wrongful act performed by Bolton. The *L.E.W.* decision represents an example of the strong connection test being applied with the "serious vigour" and "appropriate firmness" recommended by Mr. Justice Binnie in *Jacobi*.<sup>17</sup>

#### D. COMMENTARY

*Bennett* is a significant decision, in that it affirms that vicarious liability can be extended to churches, dioceses, and episcopal corporations, even where the wrongdoer is acting contrary to their "religious tenets." All churches, charities and non-profit organizations should review their internal risk management mechanisms to address the possibility of abuses occurring in their organizations. If they fail to do so, they should expect the possibility that they will be held vicariously liable for the wrongful and intentional conduct of their employees who abuse positions of power over others given to them by their employer. This is not to say, however, that child abuse policies, sexual abuse policies and other risk management mechanisms will non-profit organizations from liability for the conduct of their employees. As is clear from the recent decisions of the Supreme Court of Canada holding non-profit organizations vicariously liable for the wrongful and intentional conduct of their employees is viewed as a sensible means of reducing risk as well as an appropriate mechanism by which to ensure victims receive compensation.

All organizations must address the risks that are inherent in their operations, especially those that deal with children, and must take all reasonable steps to reduce those risks. Further, child abuse and sexual abuse

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<sup>16</sup> *Supra* note 15 at para. 81.

<sup>17</sup> *Supra* note 4 at paras. 30 and 78.

policies are often required in order for insurance to be obtained. However this, should be standard practice and driven by compassion for victims, and a sense of responsibility to society at large. Child abuse is a crime which is an especially grave crime when it is occasioned under the apparent auspices of a church, charity or non-profit organization, and through the conduct of a priest, counselor or other employee who is placed in a position of authority over children.

Proper screening of individuals wishing to work with children must, include criminal record checks, which are regularly updated, as well as, obtaining and checking references when such persons apply for work. Organizations should also implement appropriate policies and measures, such as child abuse policies, security at facilities, and have counseling as well as other compassionate mechanisms in order to address the needs of victims if issues do occur. In this way, churches, charities and non-profit organizations can make steps towards limiting the risk of abuse taking place, while at the same time limiting their liabilities.

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