

ARCHDIOCESE FOUND VICARIOUSLY LIABLE IN MOUNT CASHEL SEXUAL ABUSE APPEAL

*By Sean S. Carter, Jennifer M. Leddy and Terrance S. Carter**

A. INTRODUCTION

On July 28, 2020, the Court of Appeal of Newfoundland and Labrador released an important decision in *John Doe (G.E.B. #25) v The Roman Catholic Episcopal Corporation of St. John's* (the “Appeal Decision”),¹ overturning a trial decision (“Trial Decision”)² and holding the Roman Catholic Episcopal Corporation of St. John’s Newfoundland (the “Archdiocese” or “Diocese”) vicariously liable for sexual and physical abuse committed by a civilian employee and members of the Christian Brothers Institute Inc. (“Christian Brothers”) against four former residents of the Mount Cashel orphanage in St. John’s (the “Appellants”) in the late 1940s and 1950s.

This *Bulletin* provides a brief overview of the court’s decision with respect to its findings on the Archdiocese’s vicarious liability. It is an important decision because it is an example of the danger in assuming that an organization has mitigated its liability to the fullest extent possible by simply focussing on its internal policies with respect to the conduct of its employees, members and volunteers. In this regard,

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¹ 2020 NLCA 27 [“Appeal Decision”] available at <https://records.court.nl.ca/public/supremecourt/decisiondetails?decision-id=6941>.

² *John Doe (G.E.B. #25) v The Roman Catholic Episcopal Corporation of St. John's*, 2018 NLSC 60 [“Trial Decision”]. For further information on the Trial Decision, see Jennifer M Leddy & Sean S Carter, *March 2018 Charity & NFP Law Update*, “Newfoundland Court Finds Archdiocese Not Liable for Child Abuse” online: Carters Professional Corporation <<http://www.carters.ca/pub/update/charity/18/mar18.pdf#j11>>.

many organizations may assume that they are adequately protected because they have taken steps to protect against liability for the direct actions of that organization or its employees. However, this Appeal Decision demonstrates that vicarious liability can be interpreted and applied to find that an organization may become liable for unauthorized acts of employees, volunteers or members of other organizations, particularly when it concerns vulnerable persons, depending on the facts and the relationship between organizations.

B. BACKGROUND

The Christian Brothers were a lay religious order of teachers whose work was dedicated, among other things, to the education of boys. They were a separate entity brought to Newfoundland from Ireland by the Diocese to teach in its schools pursuant to an agreement dated September 8, 1875, between the Bishop of the Diocese and the Assistant to the Superior of the Christian Brothers (“1875 Agreement”). Mount Cashel was subsequently established in 1898, and in 1903, the Diocese conveyed the Mount Cashel property to the Christian Brothers in trust for the purpose of establishing “an Industrial Home and Orphanage”, on the condition that the property would revert to the Diocese if the Christian Brothers ceased to operate the orphanage.

At the trial level, the Appellants had argued that the Archdiocese was vicariously liable for the abuse, claiming that the Archdiocese had sufficient control over Mount Cashel to make it vicariously liable for the Christian Brothers’ actions. They also argued that the Archdiocese was vicariously liable for the failure of its employee, Monsignor Ryan, whom it assigned as Mount Cashel’s chaplain, to intervene to prevent the abuses based on his knowledge of the abuses, and further that the Archdiocese was negligent through its inaction in light of the abuses of which it had knowledge. The evidence before the court included that some of the Mount Cashel resident boys had told Monsignor Ryan during confession that they had been sexually abused by the Christian Brothers and by a civilian employee. In addition to the Archdiocese’s vicarious liability, the Appellants argued that Monsignor Ryan was negligent and breached his fiduciary duty to the Appellants when he failed to act after being informed of the abuse.

In the Trial Decision, the court found that the Archdiocese and the Christian Brothers were separate organizations, that the Archdiocese was not involved in the management of Mount Cashel, and that the Archdiocese’s role was limited to advocacy on behalf of Mount Cashel and assisting with financial

support. The trial judge found that there was “little doubt about the imposition of liability on the Christian Brothers organization”,³ and dismissed the suit, finding that the Archdiocese was not liable in negligence. The trial judge also found that that Monsignor Ryan owed no fiduciary duty to the Appellants and therefore was not liable to the Appellants. Not only did the trial judge find that Monsignor Ryan was not liable to the Appellants, but the trial judge also determined that the Archdiocese would not have been vicariously liable for the actions of Monsignor Ryan.

The Appellants consequently appealed the Trial Decision, arguing that the trial judge erred in dismissing their vicarious liability claims against the Archdiocese, both with regard to the Christian Brothers’ abuse as well as to the conduct of Monsignor Ryan. The Archdiocese, on cross-appeal, argued that it should not be held vicariously liable for the Christian Brothers’ wrongdoings.

C. OVERVIEW OF VICARIOUS LIABILITY

The court first considered the law regarding vicarious liability.⁴ Quoting the Supreme Court of Canada decision in *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*,⁵ the court found that vicarious liability “is not a stand-alone tort, in the traditional sense. It is a theory that holds one person responsible for the misconduct of another because of the relationship between them.”⁶ It found that vicarious liability cases are relationship-based, with liability ensuing where the relationship between an entity and the wrongdoer is close enough to warrant liability. Further, it found that vicarious liability is based on two underlying policy considerations: “(1) a just and practical remedy for people who suffer harm as a consequence of wrongs perpetrated by an employee and (2) deterrence of future harm.”⁷

The court then outlined the test for vicarious liability set out by the Supreme Court of Canada in *Bazley v Curry*⁸ and summarized in *K.L.B. v British Columbia*⁹ as follows:

³ *Ibid*, para 189.

⁴ For further discussion on vicarious liability, see Terrance S. Carter, *Strategies for Protecting Charitable Assets Through Multiple Corporate Structures*, (Paper presented at The Canadian Institute’s 8th National Summit, Toronto, 31 March 2008), online: Carters Professional Corporation.

⁵ 2001 SCC 59.

⁶ Appeal Decision, *supra* note 1, para 46.

⁷ *Ibid*, para 47.

⁸ [1999] 2 SCR 534

⁹ 2003 SCC 51.

First, they must show that the relationship between the tortfeasor and the person against whom liability is sought is sufficiently close as to make a claim for vicarious liability appropriate. [...] Second, plaintiffs must demonstrate that the tort is sufficiently connected to the tortfeasor's assigned tasks that the tort can be regarded as a materialization of the risks created by the enterprise. [...] These two issues are of course related. A tort will only be sufficiently connected to an enterprise to constitute a materialization of the risks introduced by it if the tortfeasor is sufficiently closely related to the employer.¹⁰

D. VICARIOUS LIABILITY FOR THE CHRISTIAN BROTHERS' SEXUAL ABUSE

1. Relationship Between the Parties

The court applied the two-part *Bazley* test to determine whether the Archdiocese was vicariously liable for the Christian Brothers' sexual abuse. It first considered whether the relationship between the Archdiocese and the Christian Brothers at Mount Cashel was sufficiently close as to justify imposing vicarious liability on the Archdiocese. To determine this, it considered whether the Archdiocese created and maintained an ongoing relationship of authority over the Christian Brothers. The court reviewed the 1875 Agreement and found that the Christian Brothers had been installed at Mount Cashel and introduced into the community by the Archdiocese, and that they operated under the Archdiocese's auspices to further its social and religious objectives. Further to this, the court found that the general public perception, as well as that of the Appellants and the Government of Newfoundland (which communicated almost exclusively with the Archdiocese on matters related to Mount Cashel), was that there was a close relationship between the Archdiocese and the Christian Brothers at Mount Cashel, which it indicated "lends inferential support to the imposition of vicarious liability on the Archdiocese."¹¹

The Appeal Decision accepted that the Christian Brothers was the entity that controlled the day-to-day operations at Mount Cashel, but held that the trial judge erred in focusing on the fact that the Archdiocese was not itself in control of the day-to-day activities of the Christian Brothers at Mount Cashel, noting that an entity can be found vicariously liable when the entity actually supervised the wrongdoer or when the entity's authority over the wrongdoer was such that it had the responsibility to supervise.¹² With respect to the Archdiocese's authority, the court found that the Archdiocese represented "the ultimate authority of the Catholic Church and that it exercised a

¹⁰ Appeal Decision, *supra* note 1, para 63.

¹¹ *Ibid*, para 151.

¹² *Ibid*, paras 106, 79.

degree of authority over the Brothers at Mount Cashel.”¹³ The court also considered other factors that it found were all indicative of “not just a close, but an integrated, relationship”¹⁴ between the Archdiocese and the Christian Brothers, concluding that the Archdiocese established Mount Cashel and staffed it with the Christian Brothers; assigned them the task of caring for the resident boys; had authority over the Christian Brothers with respect to their care of the boys; remained highly involved with Mount Cashel’s administration and operation; exercised authority and control over fundraising; set policies concerning admissions and child welfare; facilitated admissions; and ensured that the education and religious training of the residents was informed by the Roman Catholic faith.¹⁵ It therefore found that “the Brothers at Mount Cashel were working on the account of the Archdiocese when they were caring for the appellants, and that the relationship between the Brothers and the Archdiocese was sufficiently close to make the imposition of vicarious liability on the Archdiocese appropriate.”¹⁶

2. Connection of the Wrongdoing to the Brothers’ Assigned Task

The court then considered whether the sexual abuse of the Appellants was sufficiently connected to the assigned tasks of the Christian Brothers to justify imposing vicarious liability on the Archdiocese, *i.e.* whether the sexual abuse was “a materialization of the risk the Archdiocese placed in the community.”¹⁷ It considered five factors outlined in *Bazley*, including:

- (a) the opportunity that the enterprise afforded the employee to abuse his or her power;
- (b) the extent to which the wrongful act may have furthered the employer’s aims (and hence be more likely to have been committed by the employee);
- (c) the extent to which the wrongful act was related to friction, confrontation or intimacy inherent in the employer’s enterprise;
- (d) the extent of power conferred on the employee in relation to the victim;
- (e) the vulnerability of potential victims to wrongful exercise of the employee’s power.¹⁸

¹³ *Ibid*, para 143.

¹⁴ *Ibid*, para 173.

¹⁵ *Ibid*, para 181.

¹⁶ *Ibid*, para 185.

¹⁷ *Ibid*, para 186.

¹⁸ *Ibid*, para 187.

In this regard, it found a strong connection between the risk of harm introduced by the Archdiocese to the community (*i.e.* establishing an orphanage) and the materialization of that risk (*i.e.* sexual abuse). While the Archdiocese exercised authority over the Christian Brothers, the court also found that the Archdiocese “provided the Brothers staffing Mount Cashel with the power, environment and tools to carry out their wrongdoing virtually undetected, while they were supposed to be carrying out the Archdiocese’s legitimate objectives of caring for and educating the appellants.”¹⁹ It therefore found a strong link between the Archdiocese’s introduction and perpetuation of the risk of harm and its manifestation. In finding a sufficiently strong relationship between the Archdiocese and Christian Brothers, and that the Christian Brothers’ sexual abuse was sufficiently connected with their assigned tasks to run Mount Cashel and care for the boys there, the court concluded that the imposition of vicarious liability was justified, and found the Archdiocese vicariously liable for the Christian Brothers’ acts of sexual abuse, overturning the trial judge’s decision on this matter.

E. VICARIOUS LIABILITY FOR MONSIGNOR RYAN’S CONDUCT

On the matter of Monsignor Ryan’s conduct, the court considered whether a fiduciary relationship existed between him and the Appellants. It found that a *per se* fiduciary relationship could be presumed as a result of the relationship between Monsignor Ryan and the Appellants as priest and penitents. It further found that an *ad hoc* fiduciary relationship may also have arisen from Monsignor Ryan’s role as chaplain, though it indicated that it was not necessary to determine if such relationship existed. This is because the court found, based on the evidence, that no breach of fiduciary duty had occurred in any event. It was the Appellants’ onus to prove such a breach by proving that the fiduciary abused or betrayed the fiduciary relationship.²⁰ However, the court found that the Appellants could not prove on a balance of probabilities that Monsignor Ryan’s duty of care was breached. As such, given that Monsignor Ryan’s duty of care had not been breached and no tortious act committed by him; the Archdiocese could not be vicariously liable for Monsignor Ryan’s actions.

¹⁹ *Ibid*, para 200.

²⁰ *Ibid*, para 309.

F. DIRECT NEGLIGENCE OF THE ARCHDIOCESE

Finally, the court considered whether the Archdiocese was directly negligent, given the Appellants' allegations that the Archdiocese knew about the sexual abuse and failed to take action in light of its knowledge. To be found negligent, it needed to be proved that the Archdiocese had knowledge of the abuse and that it breached its duty of care to the Appellants by failing to act appropriately given its knowledge.

Examining the evidence, the trial court found that a former civilian employee of Mount Cashel had reported that another civilian employee had sexually abused a Mount Cashel resident, and that the police were aware of the matter. In the Archbishop's absence, his secretary documented the allegation and advised the Archdiocese's administrator, who met with the Superior of Mount Cashel. The civilian employee was removed from Mount Cashel several days later. In this regard, the trial court found that the Archdiocese had responded appropriately and satisfied any duty that existed in civil law. The appeal upheld this decision, finding that the Appellants did not establish that the trial judge had erred in its decision.

With respect to the allegation that the Archdiocese had direct knowledge of the Christian Brothers' sexual abuse, the appeal court found that there was nothing evidencing the Archdiocese's direct knowledge of the Christian Brothers' abuse. Further, even on the presumption that the Archdiocese had knowledge of the abuse through Monsignor Ryan (despite any evidence thereof), the appeal court found, as stated above, that there was no evidence that Monsignor Ryan breached his duty of care by failing to take appropriate action. Accordingly, the appeal court upheld the trial court's decision in finding that there was no basis to find the Archdiocese directly negligent.

G. CONCLUSION

Although this case is not binding, but only persuasive in any other province in Canada outside of Newfoundland and Labrador, its reasoning, based on Supreme Court precedent, is instructive of how an organization, whether a religious organization (as in this case) or not, could be vicariously liable not only for employees and volunteers acting within the scope of their duties but also for the actions of the employees and religious leaders of distinctly separate organizations which it may work with, in the context of its programs.

Given the expansive application and interpretation of vicarious liability in this appellate level case, and the uncertainty concerning how other provinces (or potentially the Supreme Court) may treat similar cases, this case underscores the necessity for comprehensive proactive due diligence measures to limit liability involving relationships with other organizations. This is true especially when working with vulnerable persons like children. It is a reminder that due diligence measures cannot simply be limited to an internal organizational policy but must also extend to other organizations when there is a close working relationship.

The Archdiocese in this case was not found to have done anything negligent on its own. It was because of the specific facts of its involvement with another distinct entity, and the actions of that other entity's members that resulted in the Archdiocese being found vicariously liable. It is likely that many organizations have close relationships with other entities and should be cognizant of the risks and the need for due diligence policies when working with them.



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