"The Course of Employment": Policy or Principle?

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A Fundamental Conflict

The history of the law of torts is replete with situations of uncertainty and difficulty.[1] Another such situation has emerged in cases in England and Canada dealing with the problem of determining whether an employer is vicariously liable for sexual battery committed by an employee upon someone with whom the employee has come into contact as a consequence of his employment. Some typical cases involve relationships between a priest and a chorister,[2] a foster-parent and a child placed in care,[3] the manager of a school for aboriginal children and a pupil,[4] a male nurse and a patient in a hospital,[5] and a corporal and a private soldier.[6]

The issue raised in these cases is whether to impose liability on the employer – the ascertainment of whom is itself sometimes a problem[7] – in liability for such acts. Why, and on what legal grounds should the employer be held responsible in such circumstances? The answer to these questions turns on the issue of an employee's "course of employment",

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1 On the method of dealing with such situations, by making a choice between applying the principles of corrective justice and those of distributive justice, see *Lord Steyn in McFarlane v. Tayside Health Board* [2000] 2 A.C.59 at 83, and Lord Hoffman in *White v. Chief Constable of South Yorkshire Police* [1999] 2 A.C.459 at 503-504.

2 *McDonald v. Mombourquette* (1996) 152 N.S.R.(2d) 109 (N.S.C.A.); cf. *K.(W.) v. Pornbacher* (1997) 32 B.C.L.R.(3d) 360 (S.C.).

3 *B.(K.L.) v. British Columbia* (1998) 51 B.C.L.R.(3d) 1 (S.C.)

4 *B.(W.R.) v. Plint* (1998) 161 D.L.R.(4th) 538 (B.C.S.C.); cf. *A.(C.) v. Crutchley* (1998) 166 D.L.R.(4th) 475 (B.C.C.A.).

5 *Boudreau v. Jacob* (1998) 192 N.B.R.(2d) 216 (Q.B.).

6 *Scaglione v. Mclean* (1998) 38 O.R.(3d) 464 (Gen.Div.).

7 As in *B.(W.R.) v. Plint*, Above at n 3.

since, to make an employer vicariously liable for something done by an employee, the act in question must have been committed in the course of the employee's employment.

In two recently published discussions of this problem[8] the writers seem to base their views as to the right approach on some desirable policy rather than on precedents. They justify that approach by arguing that these assaults are so abhorrent that the problem they raise must be dealt with in a unique manner, rather than in the way vicarious liability for the commission of other torts has been resolved, namely by determining whether the facts of an individual case fall within the scope of a previously decided case on ether side of the line.

This conflict between policy and principle is evident in a recent House of Lords decision, *Lister and others v. Hesley Hall Ltd.*[9] and in two cases decided by the Supreme Court of Canada, *Bazley v. Curry* [10]and *Jacobi v. Griffiths.*[11] There is a marked difference in the way in which these courts dealt with the problem. That difference raises the debate as to whether it is possible to decide cases of vicarious liability for sexual battery by the application of previous decisions or only by creating new principles derived from some legal policy.

Sooner or later this issue will be faced by Australian and New Zealand courts. In view of its importance some discussion of these decisions, from the point of view of this conflict, deserves to be undertaken.

The Triumph of Policy

The first occasion upon which the Supreme Court of Canada was required to determine whether an employer was liable for sexual batteries perpetrated by an employee was *Curry.* A non-profit children's Foundation which operated residential care facilities for the treatment of emotionally troubled children, was sued in respect of sexual abuse committed against a child in one of the homes. The perpetrator was an employee named Curry who, unknown to the Foundation, was a paedophile. A case was stated by the parties to determine whether the Foundation was vicariously liable for what Curry had done. The chambers judge held that it could.[12] The British Columbia Court of Appeal agreed.[13] A unanimous Supreme Court composed of seven judges agreed with the lower courts. Therefore the matter was remitted to trial.

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8 R.Townshend-Smith, "Vicarious Liability for Sexual (and other) Assaults", (2000) 8 *Tort L.R.*108; B. Feldthusen, "Vicarious Liability for Sexual Torts", Chapter 12 in Mullany and Linden, *Torts Tomorrow,* Sydney: LBC Information Services, 1998.

9 [2001] 2 All E.R.769, hereafter *Lister*

10 [1999] 2 S.C.R.534, hereafter *Curry.*

11 [1999] 2 S.C.R.570, hereafter *Griffiths.*

12 (1995) 9 B.C.L.R.(3d) 317 (S.C.).

13 (1997) 30 B.C.L.R. (3d) 1 (C.A.), *sub nomine B.(P.A.) v. Curry,* Above at n. 10.

To reach this conclusion the starting point of the court's analysis was what was said in the original edition of *Salmond on Torts* in 1907,[14] which has been repeated in every subsequent edition.[15] Except where the commission of the tort was authorised by the employer (which is rarely, if ever, a situation arising in cases of sexual abuse or assaults), an act is deemed to be in the course of an employee's employment, according to Salmond, only if it is "a wrongful and unauthorised mode of doing some act authorised by the master". To this Salmond[16] added that a master would be liable even for unauthorised acts "provided they are so connected with acts which he has authorised that they may rightly be regarded as modes – though improper modes – of doing them". In *Curry* both parties and the court accepted that this statement represented the applicable law. Disagreement arose, however, on what such "connection" meant.[17]

Two possible ways of resolving the issue were raised by the court. The first was by looking at decided cases of similar facts. If this proved to be unhelpful, the court went on, it might be possible to adopt a suggestion made by Salmond which was to make out a prima facie case of liability of the employer and shifting the evidentiary burden so as to oblige the employer to establish the lack of any connection.[18] But this approach was considered by the court to be unhelpful. Instead, where there was no clear precedent by which the issue of vicarious liability could be determined, it was said, the court had to turn to "policy" for guidance, examining the purposes such liability serves and asking whether the imposition of such liability in a new case would serve those purposes.[19]

It is unnecessary to examine in detail the way the court dealt with the first method stated above, the examination of precedents. Suffice it to say that its conclusion was that precedents did not resolve the issue.[20] Therefore policy reasons behind vicarious liability had to be looked at to discern a principle to guide courts in future cases. The court stated:

> "[I]n areas of jurisprudence where changes have been occurring in response to policy considerations, the best route to enduring principle may well lie through policy".[21]

The law of vicarious liability was just such an area.

The court then went on to identify two ideas that embraced the main

14 Above at 83.
15 *Salmond on Torts*, 21st ed., Sweet & Maxwell: London: 1996 at p.443.
16 *Salmond on Torts*, 1st ed. 1907, 83-84; 19th ed. 1987, 521-522; 20th ed. 1992, 457, as quoted and approved in *Canadian Pacific Railway v. Lockhart* [1942] A.C.591 at 599; *Racz v.Home Office* [1994] 2 A.C.45 at 53.
17 Curry [1999] 2 S.C.R.534 at 543.
18 Above at n.10, at 544-545.
19 Above at n. 10, at 545.
20 Above at n. 10, at 545-550.
21 Above at n. 10, at 551.

policy considerations underlying the concept of vicarious liability. They were (1) provision of a just and practical remedy for people suffering harm as a consequence of wrongs committed by an employee and (2) deterrence of future harm.[22] These policy grounds for liability, fair compensation and deterrence, were related, linked by "the employer's introduction or enhancement of a risk".[23] Someone who introduced an enterprise into the community with an attendant risk, in turn was obliged to manage that risk so as to minimize the costs of harm flowing from it. However this would not go so far as to make an employer liable for acts, even on working premises and during working hours, so unconnected with the employment that it would be unreasonable to make the employer responsible.[24] Such would be the result, said the court, citing an Alberta decision [25] (but ignoring or forgetting the contrary conclusion of the House of Lords in the frequently-followed contract case of *Photo Production Ltd. v. Securicor Transport Ltd.* [26]) where a security guard for his own amusement committed arson of the premises he was guarding. This "negative policy consideration", as it was called by the Supreme Court,[27] was nothing more than the absence of the twin policies of fair compensation and deterrence. To impose liability on an employer for a wrong coincidentally linked to the employer's activities and the employees' duties did not respond to common sense notions of fairness or serve to deter future harm. The court said:

> "Because the wrong is essentially independent of the employment situation, there is little the employer could have done to prevent it".[28]

Even if what the employer undertakes introduces or enhances a risk, there may be little the employer can do to avoid the consequences of the risk. In *Curry*, for example, the employer did not know of the employee's paedophilia. When the employer checked, the employer was told he was a suitable employee. It was never suggested that the employer has been in any way negligent in hiring Curry. In other words the employer could not have prevented the wrong except by not hiring Curry; and there was no reason why Curry should not have been hired. If the cases where vicarious liability was imposed are carefully examined it will be discovered that, just as was the case in *Photo Production*, the employer could have done nothing to prevent the occurrence of the wrong in question once the employer took the tortious employee into employment and gave him or

22 Above at n. 10, at 552.
23 Above at n. 10, at 555.
24 Above at n. 10, at 556
25 *Plains Engineering Ltd. v. Barnes Security Services Ltd.* (1987) 43 C.C.L.T.129 (Alta.Q.B.)
26 [1980] A.C.827, on which see G.H.L. Fridman, *Law of Contract in Canada*, 4th ed., Toronto: Carswell, 1999, 629-631.
27 Above at n. 25, at 556.
28 Above.

her the opportunity and capacity to commit the wrong in question. Like it or not, in imposing vicarious liability, the courts have been relegating employers "to the status of an involuntary insurer", which the Supreme Court of Canada said should not be done, at any rate "where vicarious liability is not closely and materially related to a risk introduced or enhanced by the employer".[29] Hence, it was concluded,[30]

> "a meaningful articulation of when vicarious liability should follow in new situations ought to be animated by the twin policy goals of fair compensation and deterrence that underlie the doctrine, rather than by artificial or semantic distinctions."

To this end the court proceeded to set out some guiding principles by which the "twin policy goals" could be furthered.[31] The enterprise and employment had to materially enhance the risk, in the sense of significantly contributing to it, before it would be fair to hold the employer vicariously liable.[32] This entailed that the court, when determining the issue of liability had to "confront the issue of whether liability should lie" and not hide behind "semantic discussions" of "scope of employment" or "mode of conduct".[33] But this did not involve an appeal to "palm-tree" justice, something dependent on the views or biases of the particular court. The court should examine whether the wrongful act was sufficiently related to the conduct authorised by the employer to justify the imposition of vicarious liability. There had to be a significant connection between the creation or enhancement of a risk and the wrong that accrues therefrom, even if unrelated to the employer's desires.[34] To make this determination where the employee's tort was *intentional* several factors were mentioned by the court. These were:(1) an opportunity for an abuse of power by the employee;(2) the extent to which the wrongful act furthered the employer's aims;(3) the extent to which the wrongful act was related to friction, confrontation or intimacy inherent in the enterprise;(4) the extent of the power conferred on the employee in relation to the victim and (5) the vulnerability of potential victims to a wrongful exercise of power by an employee.[35]

The manner in which the Supreme Court dealt with this case seems to

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29 Above.
30 Above.
31 In this respect the court rejected the sometimes utilised "but-for" test of causation.
32 Above at n. 10, at 558-559. The split infinitive is found in the original text.
33 Above at n. 10, at 559.
34 Above.
35 Above at n. 10, at 560-563, 567-568. Numbers (4) and (5) appear to be very similar in content to, and to add nothing beyond what is contained in (1). Furthermore, while the language of the court may have been intended to be of general application, it does appear to relate more appropriately to cases of sexual abuse or battery, of the kind involved in the case itself.

represent the triumph of policy over principle. However in *Lister*[36] Lord Clyde does not appear to agree. His Lordship was of the opinion that although the judgment of the Supreme Court was presented in the context of policy considerations, the essence of the decision lay in the recognition of a sufficient connection between the acts of the employee and the employment. Hence the decision in favour of vicarious liability in *Curry,* like the decision against such liability in *Griffiths,* as will be seen, were both consistent with the traditional approach recognised in England.[37] In other words, there was no necessity for the Supreme Court to resort to the underlying policies justifying and explaining vicarious liability in order to deal with the particular problem presented by cases of sexual torts by employees. The traditional methodology, as Lord Steyn referred to it in *Lister,*[38] could have provided the same results as were achieved in *Curry* and *Griffiths*. Indeed in the latter case, as will be suggested, the Supreme Court in effect adopted the "traditional" approach and methodology. What the Supreme Court was doing in *Curry,* it is suggested, was treating sexual tort cases as belonging to a special category, requiring the issue of vicarious liability to be determined not by an appeal to precedent and principle but by the invocation of underlying policies, as promulgated by the Supreme Court, an approach which may be regarded as undesirable as well as being incorrect and unnecessary.

A Return to Principle?

Not only was *Griffiths*[39] heard at the same time, and by the same judges, as *Curry,* but the decisions in the two cases were handed down on the very same day. In *Griffiths* the defendant was a non-profit children's club – the purposes of which were to provide behaviour guidance for and to promote the health, social, educational, vocational and character development of boys and girls – that operated a recreational facility for children. The wrongdoer who committed the sexual batteries was the club's programme director. His job was to supervise the volunteer staff and to organise after-school recreational activities and occasional outings. He was also encouraged to develop a positive rapport with the children. The plaintiffs were a brother and sister, aged 11 and 13 respectively, who were from a troubled background. They were frequent users of the club and had become friendly with the programme director. All of the sexual acts, except one, occurred away from the club, at the employee's home, and outside working hours.

36 [2001] 2 All E.R.769 at 787.
37 Above at 788.
38 Above at 781.
39 [1999] 2 S.C.R.570.

At trial the club was held vicariously liable.[40] This was reversed by the British Columbia Court of Appeal.[41] By a majority, over the dissent of McLachlin, L'Heureux-Dube and Bastarache JJ., the Supreme Court upheld the decision of the Court of Appeal and remitted the case for determination of whether the club could be held liable on the basis of fault, for negligence or some other (unspecified) breach of duty.

The minority [42] adhered to and applied the doctrine they had already adumbrated in *Curry*. The goals of compensation and deterrence would be satisfied in this case by holding the club liable. In this instance the employment materially and significantly enhanced or exacerbated the risk of the tort. The minority did not need to consult precedents, other than *Curry*. The policy behind the decision and reasoning of that case provided the answer in *Griffiths*.

The majority, while affirming, at the very start of the judgment of Binnie J, in which Cory, Iacobucci and Major JJ. concurred, that the attribution of vicarious liability is not so much a "deduction from legalistic premises" as it is a matter of policy,[43] acknowledged that in *Curry* the court also stated that "a focus on policy is not to diminish the importance of principle". In *Griffiths* both stages in the two-step process propounded by McLachlin for the court in *Curry* produced the same result. The case law "clearly" (to quote Binnie J.[44]) suggested that the imposition of no-fault liability would overshoot the existing consensus about appropriate limits of an employer's no-fault liability.[45] The same conclusion was reached under the second step in which "broader policy rationales" are directly confronted.[46] Before examining both steps in depth to show how those conclusions were reached, Binnie J. referred to, and applied to the facts of this case the "enterprise risk" approach to vicarious liability set out in the accompanying case of *Curry*. In *Griffiths* the characteristics of the particular enterprise, as explained by Binnie J, were plainly different from those in *Curry*, even though in both cases the employment provided the employee with the opportunity to meet children. In *Griffiths*, unlike *Curry*, the functions of the employees, who were Griffiths himself and one other in contrast with the numerous employees in *Curry*, did not entail any involvement in the intimate lives of the children, nor was Griffiths a

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40 [1995] B.C.J. No. 370(QL).

41 (1997) 31 B.C.L.R.(3d) 1, sub nomine *T.(G.) v. Griffiths*, Above at no. 11.

42 Above at n 40, at 578-579.

43 Above at n 40, at 589.

44 Above at n 40, at 590.

45 As explained in *Curry* [1999] 2 S.C.R.534 at 539 vicarious liability is "strict" or "no-fault" liability because it is imposed in the absence of fault by the employer. However it has been suggested by certain writers that vicarious liability should be founded upon the notion of negligence on the part of the employer: see E. Weinrib, The Idea of Private Law Harvard U.P.; 1985 at pp. 185-187; J. Neyers," Canadian Corporate Law, Veil-Piercing, and the Private Law Model" (2000) *University of Toronto Law Journal*, 173 at pp. 197-199; D. Stevens (2001) *The Lawyers Weekly*, June 15 at pp. 9, 18.

46 Above at n 40, at 590.

person endowed with quasi-parental authority like Curry.[47]

Against that background the majority considered the issue of vicarious liability from the point of view first of previous cases and then of policy.

Earlier Canadian, as well as English and American, decisions were categorised under three headings; (1) opportunity, (2) the employer's aims and (3) risks inherent and foreseeable in the nature of the employer's enterprise. The result of this survey, despite the fact that employers had been held responsible for sexual torts by, in one instance a priest,[48] in another a counsellor,[49] in another a police officer,[50] was that "the existing case law did not support the imposition of vicarious no-fault liability" on the part of the club in this case. Such liability could only have been imposed on the club if the court had been willing to overrule the existing law.[51] This the court would not do in *Griffiths*, any more than it would or intended to do in *Curry*, in which the court adopted the "enterprise risk" theory to explain, not reject, the existing case law.

The rationale of that theory was that the employer was vicariously liable because his enterprise introduced the seeds of the potential problem into the community or aggravated risks already there, by materially increasing the risk of the harm.[52] A "strong connection" between enterprise and risk was essential. Once materiality was established by the test of "strong connection" no-fault liability might be justified according to the policy considerations of compensation and deterrence. But these, in turn, had to be balanced by fairness and adherence to legal principle.[53] Without those counterweights there would almost always be vicarious liability. In the context of these counterweights Binnie J. considered whether, in relation to vicarious liability, there was, or ought to be, a distinction between organisations designed to make a profit and non-profit organisations, such as those in *Curry* and *Griffiths*. In *Curry* the court had rejected the argument that non-profit organisations should be exempted by the common law from vicarious liability for sexual battery, saying that if this were desirable it should be effected by legislation.[54] In *Griffiths* Binnie J., speaking for the majority, appears to be suggesting that such exemption might be introduced by the common law, without the need for legislation, on the ground that to impose no-fault vicarious liability on non-profit organisations might not advance the objectives of compensation and deterrence – the underlying policy rationales for such liability. Commercial organisations might be expected to have the prospect of vicarious liability

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47 Above at n. 40, at 591-597.
48 *K.(W.) v. Pornbacher* (1997) 32 B.C.L.R.(3d) 360 (S.C.).
49 *Doe v. Samaritan Counselling Center* 791 P.2d 344 (Alaska 1990)
50 *Mary M. v. City of Los Angeles* 814 P.2d Cal. (1991)
51 Above n. 40, at 610.
52 Above at n.40, at 610-611.
53 Above at n. 40, at 611.
54 [1999] 2 S.C.R.534 at 566-567.

in mind when managing their affairs. Non-profit organisations might not be able to do so.[55]

However Binnie J. concluded[56] that the imposition of no-fault liability on a non-profit organisation such as the club in the instant case would be "of some benefit to *some* victims", but that fairness to such organisations required the establishment of a strong connection between the enterprise risk and the sexual acts. That test was to be applied to such organisations "with appropriate firmness" because of "the weakness of the policy justification".

On the application of the strong connection test, invoking the factors suggested by the Supreme Court in *Curry* outlined earlier, Binnie J. held that the club could not be vicariously liable for Griffiths' acts. In this respect the difference between the majority and the minority would appear to lie in their respective interpretations of, and deductions from, the circumstances involved in this case. It is suggested, however, that underlying this difference in interpretation or deduction is a difference in approach. In *Griffiths* the majority, while paying lip-service to the "policy" approach adopted in *Curry*, were in fact reverting to more traditional analysis, as set out in previous case law. As already noted the majority held that earlier decisions concerning vicarious liability for sexual assaults, with few exceptions based upon special circumstances denied that employers would be responsible for their employees guilty of such wrongs. It was not necessary to appeal to "policy" in order to resolve the issue: the precedents sufficed. That, indeed, was the approach taken by the House of Lords in *Lister*, a case decided subsequent to *Curry* and *Griffiths*.

Policy Rejected

In *Lister*[57] the claimants, residents at a school for boys with emotional and behavioural difficulties, had been systematically sexually abused by Grain, the warden of the school's boarding annex. The school was owned and run as a commercial enterprise by the defendants who had employed Grain but knew nothing of his behaviour towards the claimants. The latter now sought to make the defendants liable for what Grain had done. At trial it was held that the defendants could not be vicariously liable for Grain's torts, because sexual abuse was outside the course of his employment, it was not an improper mode of carrying out acts authorised by his employers. But the defendants were held vicariously liable for Grain's breach of duty in failing to report his intentions before the acts of abuse and the harmful consequences to the children after the acts of abuse. The Court

55 Above at n.40, at 611-612.
56 Above.
57 [2001] 2 All E.R.769.

of Appeal agreed with the trial judge about liability for the sexual abuse. on the grounds that it was bound by its own earlier decision in *Trotman v. North Yorkshire County Council*[58],a case that was criticised by the Supreme Court of Canada in *Curry*[59] (and mentioned in *Griffiths*[60]).However the Court of Appeal did not agree with the trial judge that Grain's failure to report his wrong conduct was within the course of his employment so as to make the defendants vicariously liable when they could not be so liable for the wrongful conduct itself. The claimants appealed to the House of Lords which unanimously overruled *Trotman,* reversed the decision of the Court of Appeal, and held the defendants vicariously liable for the sexual abuse perpetrated by Grain.

It should be noted that, like in *Curry* and unlike in *Griffiths,* the wrongful conduct took place on the defendants' premises, and, again like in *Curry* and unlike in *Griffiths,* the wrongdoing employee's employment did involve his performing intimate tasks and did result in the employee's occupying something akin to a parental relationship, or a relationship of authority, with respect to the claimants. It is hardly surprising, therefore, that the House of Lords came down on the side of imposing vicarious liability on the facts of this case. What is important for present purposes, however, is that this was achieved by the application of existing case law and established legal principles, not by the annunciation and application of some "policy" underlying when and why vicarious no-fault liability would be imposed on an employer.

While expressing appreciation of what Lord Steyn called the "landmark decisions" and the "luminous and illuminating judgments" in *Curry* and *Griffiths,* which Lord Steyn said would be the starting point for future discussion of these problems in the common law world,[61] the House of Lords was not willing to comment on, much less adopt "the full range of policy considerations examined in those decisions".[62] As previously noted, Lord Clyde thought that the Canadian decisions were consistent with the traditional English approach and did not require any appeal to, or discussion of policy considerations.[63] Nor did Lord Hobhouse consider it was appropriate to follow the lead given in *Curry,* even though he thought the judgment contained a useful and impressive discussion of the social and economic reasons for having a principle of vicarious liability that extended to embrace acts of child abuse.[64] But, he continued,[65]

> "an exposition of the policy reasons for a rule....is not the same as defining the

58 [1999] I.R.L.R.98 (C.A.).
59 [1999] 2 S.C.R.534 at 549.
60 [1999] 2 S.C.R.570 at 605-606.
61 Above at n. 58, at 781.
62 Above.
63 Above at n. 58, at 787-788.
64 Above at n. 58, at 792.
65 Above.

> criteria for its application. Legal rules have to have a greater degree of clarity and definition than is provided by simply explaining the reason for the existence of the rule and the social need for it, instructive though that may be."

The clarity that his Lordship required for legal rules, in this instance, was provided by the application of the criterion derived from the English authorities to which he had previously referred, namely, to ask (a) what was the duty of the employee towards the plaintiff that was broken by the employee and (b) what was the contractual duty of the employee to the employer.

In *Lister*, therefore, the House of Lords considered the issue by reference to the earlier case law, the traditional methodology of the common law. Lord Steyn, for example,[66] starting from the statement of the principle as expressed in *Salmond on Torts*, continued by showing how the Salmond test applied to cases of intentional wrongdoing by an employee, not only where such wrongdoing was meant to be for the benefit of the employer but also, since *Lloyd v. Grace, Smith & Co.*,[67] where the employee was acting solely to benefit himself. His Lordship's examination of English cases in which this extension of vicarious liability was applied[68] led to the conclusion that what was required was "a very close connection" between the torts committed by the employee and the latter's employment.[69] It was the failure to appreciate this, and the determination that the deputy headmaster's employment furnished "a mere opportunity" for the sexual acts which led the Court of Appeal in *Trotman* to the wrong decision.

A sufficient connection is also stressed as the test of liability by Lord Clyde. "The sufficiency of the connection may be gauged by asking whether the wrongful actings [sic] can be seen as ways of carrying out the work which the employer had authorised."[70]In this respect Lord Clyde, citing and relying on decided English, Scottish and other decisions, set out three factors that were relevant to deciding the question whether something was or was not included in the scope, or course of employment. A broad approach was to be adopted; the time at which and place at which the wrongdoing occurred might be relevant, but were not conclusive; and the opportunity provided by the employment for the employee to commit the wrongdoing did not mean that the act was necessarily within the scope of employment.[71] In these respects cases of sexual harassment or sexual abuse by an employee were to be dealt with in the same way; there was no reason for putting them in a special category of their own.[72] In this

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66 Above at n.58, at 775-778.

67 [1912] A.C.716.

68 *Morris v. C.W. Martin & Sons Ltd.* [1966] 1 Q.B.716; *Port Swettenham Authority v T.W. Wu & Co.*(M) Sdn.Bhd. [1979] A.C. 580; *Racz v. Home Office* [1994] 2 A.C. 45.

69 Above at n. 58, at 778.

70 Above at n.58, at 787.

71 Above n.58, at 785-787.

72 Above at n.58, at 787.

context Lord Clyde's remarks about the decisions of the Supreme Court of Canada,[73] referred to earlier, are particularly apposite. The argument has already been made that to put sexual assault cases into a distinct category because they did not fall within the parameters of traditional vicarious liability was incorrect, unnecessary and undesirable. Lord Clyde did not expressly agree with this. However his comments cast doubt on the wisdom of the approach in *Curry*.

Lord Hobhouse dealt with the problem in a different way, choosing a "criterion", to quote his term, that involved the issue of duty. "The liability of the employers", he said, referring to some special categories of employers, such as schools, prisons, hospitals and even occupiers of land,

> "derives from their voluntary assumption of the relationship towards the plaintiff and their choosing to entrust the performance of those duties to their servants."[74]

In such circumstances if the employee does something that is forbidden and for his benefit alone, vicarious liability will not be negated. For Lord Hobhouse, also, the previous case law provided the appropriate test without the need to search for and apply any "policy".[75]

So did it for Lord Millett, who also[76] approved of a test of closeness of connection between the employee's duties and his wrongdoing, culled from and illustrated by decided cases which he cited and discussed.[77] The liability of the defendants in this case was in accordance "not only with the ordinary principles deducible from the authorities but with the underlying rationale of vicarious liability".[78] The latter, as his next sentence reveals, is that in certain institutions, such as schools and prisons, experience showed that there was an inherent risk that indecent assaults on the residents would be committed by those placed in authority over them. In other words certain enterprises involved risks inherent in the nature of the enterprise, which is why the law imposed vicarious liability on those undertaking those enterprises for the acts of those employed by them in carrying out such enterprises, a doctrine that would not appear to be acceptable, at least without more refinement and elaboration, to the Supreme Court of Canada.

The Appropriate Approach

At one and the same time, therefore, the House of Lords approved and

73 Above at n.58, at 787-788.
74 Above at n.58, at 790.
75 Above at n.58, at 792.
76 Above at n.58, at 796.
77 Above at n.58, at 796-800.
78 Above at n.58, at 800.

disapproved of what was said by the Supreme Court of Canada in *Curry*. With the exception of Lord Hobhouse, who based liability on breach of duty, their Lordships applied a test of significant or sufficient connection between the employment and the wrongful acts of the employee that was akin to, if not the same as, what was required by the Supreme Court. However, the House of Lords also rejected the idea, expressed in Canada, that to resolve the issue of vicarious liability in cases of sexual battery it was necessary to examine the fundamental policies which underlay such liability.

Canadian and English judges will not now be concerned with the issue of how to deal with such cases. They have been given guidance by their respective highest courts. Despite their difference of approach, in most if not all instances the result will probably prove to be the same. For a court in Australia or New Zealand, when the question arises, the correct approach to adopt will remain to be settled. The choice will be between the application of some policy, whether as formulated and discussed by the Supreme Court in *Curry* and *Griffiths* or otherwise, on the one hand, and, on the other, adherence to the more traditional analysis that stems from Salmond's original statement of the proper test, as elaborated by the House of Lords in *Lister*. It is the contention of the present writer that when the occasion arises an Australian or New Zealand court should follow the lead of the House of Lords and not that provided by the Supreme Court of Canada.

This contention is supported in the first place by the various reasons given by different members of the House of Lords for their rejection of a policy approach. Essentially their Lordships were saying that an appeal to policy would not resolve the question of how to decide when vicarious liability would and would not attach to the employer in such cases. The policy approach adopted by the Supreme Court of Canada was a justification for the imposition of vicarious liability not an explanation of when it will be applied. For that, it was necessary to set out and define the circumstances in which an employer would be held responsible for the intentional acts of an employee even when such acts were not what the employee was hired to perform and, what is more, when such acts contradicted the essential nature of the employment. Only by reference to the decided cases could this be done, as it was by the House of Lords in *Lister* and, in the view of the present writer, by the majority of the Supreme Court of Canada in *Griffiths*.

A more insidious, not to mention dangerous, consequence of accepting that an appeal to policy may be necessary to determine hitherto undecided issues is that it opens the way to judicial activism in respect of matters that perhaps ought to be reserved for a legislature and allows a court to determine a contested issue between litigants otherwise than by the induction or deduction of a rule from previous precedents. In effect, by purporting to discover the rationale or policy behind a rule or doctrine, and then applying it to a novel situation, the court is deciding a case by analogy. Analogies can be misleading. Adjudication by analogy is equally potentially misleading.

In order to avoid the temptation to indulge in judicial activism which may entail usurpation of the legitimate role of a legislature, a rigorous adherence to the true characteristics of the common law system is necessary. That was the message implicit, if not indeed expressly stated, in the speeches in *Lister.* In turn that means endeavouring to elicit from the precedents a principle or principles that do and are capable of applying not only to previous cases but also to novel ones. Where vicarious liability for the intentional wrongdoing of an employee, such as the commission of sexual battery or abuse, is concerned this means that, as the House of Lords did in *Lister,* an Australian or New Zealand court must diligently search and examine prior case law from which may be garnered a valid and generally applicable test whereby instances of liability may be differentiated from those where an employer will not be held responsible.

Post Scriptum

In early September, between the time when the above essay was written and the time when it was sent to be printed for publication in this Review, several appeals from Queensland and New South Wales, involving assaults upon students in schools, were heard by the High Court of Australia, which reserved judgment thereon. The cases in question are *Rich v State of Queensland;*[1] *Samin v State of Queensland;*[2] and *State of New South Wales v Lepore.*[3] The Queensland cases may have raised the question whether a school which employed the teacher who committed a sexual assault on a student and the State which provided the school could be liable vicariously for such an assault. However, those cases, as well as the non-unanimous *Lepore* decision by the New South Wales Court of Appeal, seem to have turned on a very different question, which concerned not vicarious liability but direct liability. Thus the majority of the New South Wales Court held that the State could be liable *directly* for a breach of its non-delegable duty of care owed to the pupils at the school, which occurred when the teacher intentionally committed assaults on a child at the school during school hours. Hence the State was liable without proof of negligence on its part and without the need to establish vicarious liability for the teacher's intentional misconduct. If this approach to the issue in these cases is maintained by the High Court, then, presumably, it will be unnecessary for that court to consider and determine the question that has been raised in this essay.

That issue was also not raised in another case in the High Court

1 High Court of Australia Transcripts, B21/2002 (5 September 2002).
2 High Court of Australia Transcripts, B20/2002 (5 September 2002).
3 High Court of Australia Transcripts, S108/2002 (5 September 2002).

concerned with a somewhat different aspect of vicarious liability. In *Hollis v Vabu Pty. Ltd.*,[4] various members of the majority referred to favourably and invoked some of the remarks made by McLachlin J. in *Bazley v Curry*. In *Hollis* the issue was whether a courier on a bicycle employed by the defendants was an employee or an independent contractor at the time when the courier negligently ran down and injured the plaintiff. Some of the majority held that he was an employee, and made use of McLauchlin's J. ideas about "enterprise risk" and deterrence in the course of their reasons. Justice McHugh also came down on the side of the vicarious liability of the employer, but on the ground that the courier was an agent performing the agency task at the material moment, so that it was not necessary to determine whether he was a servant or an independent contractor. Such a conclusion was dictated by a principle that was consistent with principle and policy, a reasoning that is very relevant to the argument herein. But is it consistent with the *Bazley* judgment which, according to the headnote, was "approved" by the High Court? Moreover, what was approved by the High Court? Was it the reasoning of McLauchlin J.? Or the decision as to vicarious liability? Perhaps the decision in the cases from Queensland and New South Wales, when they appear, will provide the answer.

[4] (2001) 207 C.L.R.21, at 39-40, 55.