THE LIABILITY STRUCTURE OF NONPROFIT ASSOCIATIONS: TORT AND FIDUCIARY LIABILITY ASSIGNMENTS

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Members of unincorporated nonprofit associations are subject to an array of liability rules that define their contract, tort and fiduciary responsibilities. This liability structure is relatively new to the common law. The contract rules developed first, but only in the nineteenth century. Today the contract rules are largely settled. The tort and fiduciary liability assignments, on the other hand, are less developed, or problematic in certain respects. The author explains how the need to regulate the risk-taking and opportunism of members justifies a particular rule structure for tort and fiduciary responsibility.

Les membres d'association non-incorperée et à but non-lucratif sont sujets à une multitude de règles qui définissent leur responsabilité contractuelle, délictuelle et fiduciaire. Cette structure de responsabilité est relativement nouvelle à la Common Law. La règle des contrats a été la première à se développer, mais seulement au dix-neuvième siècle. Aujourd'hui, les règles des contrats sont en grande partie établies. L'assignation de la responsabilité délictuelle et fiduciaire sont quant à elles moins développées au problématiques dans certains aspects. L'auteur explique le moyen par lequel le besoin de réglementer les risques pris et l'opportunisme des membres justifient la structure particulière de la règle de la responsabilité délictuelle et fiduciaire.

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I. *Introduction*

The rules that determine the tort and fiduciary liabilities of members of unincorporated nonprofit associations have only infrequently been examined by commentators. The reason for this academic inattention to the liability structure is not clear. The judiciary, for its part, has produced a body of work that invites comment. The following discussion explores the nature of the basic liability structure the English, Canadian and American courts have constructed to govern tort and fiduciary responsibility in associations. The investigation is preceded by a brief review of contractual responsibility, a topic elsewhere addressed in detail by the author.[1] This preliminary material describes the agency analysis applied to contract liability issues and the risk regulation foundation for that approach. The treatment of tort liability in the first part of the essay then begins with an explanation of how the risk regulation policy is manifested in tort law. This is followed by an examination of the common law authorities that define the tort liability of members to third parties and to each other. Reference is also made to the statutory provisions in some American states which recently have conferred tort immunity on association members. The second part of the article addresses the assignment of fiduciary liability. The need to deter opportunism is identified as the social basis for the application of this obligation. The limited jurisprudence is shown to be consistent with a status fiduciary obligation for committee members and a fact-based obligation for ordinary members who participate in controlling the affairs of the association. The elaboration of these matters should provide a comprehensive picture of, and justification for, the liability structure that ought to regulate the actions of association members.

II. *Contract Liability*

The liability exposure of association members was first explicitly addressed in the contract context. Once confronted with the issue in the nineteenth century, the English courts chose to characterize the contract liability assignment as a question of agency, rather than partnership. The courts examined the internal control arrangements of the association to determine which of the members could properly be characterized as the principals of the person who had purported to contract in the name of the association.[2] The association itself could not be responsible, for it was not a legal entity. Creditors were entitled to judgment against only the real principals, and that invariably meant either the committee members or the ordinary members.

Upon the formation of an association, it is common to provide that a committee of members will manage the undertaking on behalf of the general

[1] R. Flannigan, "Contractual Responsibility in Nonprofit Associations" (forthcoming, (1998) 18 O.J.L.S.).

[2] See *Steele* v. *Gourley* (1887), 3 T.L.R. 772.

membership. This may involve arranging for the committee to manage the association free from any interference by the ordinary members. Alternatively, the functioning of the committee may be subject in important respects to the approval of the other members. These are substantively different power arrangements which, under the agency analysis, result in different conclusions as to who may be characterized as a principal for the purposes of contractual liability. According to the original English jurisprudence, and subsequent Canadian and American authorities, those members who participate in controlling the affairs of the association will be held responsible as principals for contractual obligations.[3] In practice, this usually means that the committee members will be liable. However, it is clear that ordinary members will be characterized as principals if they possess rights to participate in managing the undertaking.[4]

The justification for the agency (principal) analysis of contractual liability is found in the public policy of risk regulation.[5] It is a basic social proposition that risk-taking should be disciplined by the effects it produces. This is achieved through the device of a default liability assignment. The risk-taking of actors is disciplined *ex ante* by initially assigning to them the adverse consequences of their actions. Members who control are projecting their risk through the employment of association assets and, consequently, this control attracts liability for the costs imposed on others. Without this minimal level of regulation, the risk-taking of members would be insulated, resulting in a greater level of risk for those parties contracting with the association. This is not generally permitted in the common law. The risk regulation policy is applied universally by judges to discipline the projection of risk. Those who participate in control, whatever the legal context, will attract the open contractual responsibility of principals.

III. *Tort Liability*

(a) *Tortious Risk Regulation*

The risk regulation policy is manifested in tort law by two familiar liability assignments. First, actors are required to bear the cost of their personal tortious conduct. This assignment of liability is designed to discipline the risk-taking of the actor, and, in that respect, is identical in function to the corresponding rule for breach of a contractual duty. This is readily comprehensible. The second manifestation of the risk regulation policy is the doctrine of vicarious liability.[6]

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[3] Flannigan, *supra* footnote 1.

[4] Eg *Cockerell* v. *Aucompte* (1857), 140 E.R. 489.

[5] Flannigan, *supra* footnote 1.

[6] See R. Flannigan, "Enterprise Control: The Servant-Independent Contractor Distinction" (1987) 37 U.T. L.J. 25 at 26-37; L. Klar, *Tort Law*, 2d ed. (Toronto: Carswell, 1996) at 478; J.G. Fleming, *The Law of Torts*, 8th ed. (Brisbane: Law Book Company, 1992) at 366.

Under this doctrine, actors are made liable for the projection of their risk-taking through agents or employees. Again the function of the liability assignment is to discipline the risk-taking of the actor. This perhaps requires a more extended explanation.

Where actors employ intermediaries, they often retain control over the performance of the work or the management of the assets used to do the work.[7] If they do control either one of these elements in any significant way, they project their risk-taking through the worker or the assets, and thereby determine in part the level of risk associated with the work.[8] An actor who decides where and when workers will do their work (e.g., street work during a parade) will affect the probability of injury to other parties. The risk level will also be affected if an actor purchases machinery which is inadequate for the given task, neglects to purchase safety equipment or fails to properly train or instruct workers. Each decision made by the actor will have effects throughout the undertaking. Inadequate machinery may cause a worker to force the task or simply not perform parts of it. A decision to increase inventories may leave fewer funds for safety equipment, inspection or training. Thus, through such powers of control, the actor will affect the general level of risk associated with the undertaking, and, coincidentally, the probability of loss from a tortious act or omission, whether intentional or negligent.[9]

If the risk-taking of an actor could be recognized in every case where it contributed to a loss, there would be no need for a doctrine of vicarious liability. There is a difficulty, however, where risk-taking is projected through intermediaries. The initial determination that the agent or employee is personally responsible for the tort tends to overwhelm or mask the contribution the actor makes to the probability of loss. It may be difficult to discern how the tort is partly attributable to effects produced by the exercise of the actor's control. The concern here may be understood either as a causation problem or a detection problem. It may be difficult to establish how the control of the actor, in combination with the act of the agent, caused the loss (eg. the mechanism of fault). Alternatively, this is simply a detection problem in the sense that it may be difficult to prove, or, often, even to appreciate, that the risk-taking of the actor contributed to the loss.

The doctrine of vicarious liability does away with the need to demonstrate a precise causal connection between the conduct of the actor and the actual event that caused the damage. The linkage required for the application of vicarious liability is less specific to the actual tortious act. It must instead be shown that

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[7] If the actor has no significant control, the worker is classified as an independent contractor. The risk regulation basis for vicarious liability can only apply where the actor has some ability to project risk. Nevertheless, independent contractors may still be liable in limited circumstances. See Fleming, *supra* footnote 6 at 388-94.

[8] Flannigan, *supra* footnote 6 at 30-35.

[9] The analysis has been framed in terms of negligent conduct. It is not difficult, however, to comprehend the ways in which the control of the actor may contribute to the risk of workers committing intentional torts (eg trespass, defamation).

the actor participated in establishing the level of risk associated with the undertaking generally, rather than the particular tortious event. This is accomplished by finding that the actor had the right to control the assets or the performance of the worker. It is then assumed that the control of the actor has effects throughout the structure of the undertaking and that this ultimately is reflected in the level of risk associated with every tortious event within the scope of that undertaking. Thus, vicarious liability is designed essentially to regulate those actors who, through an intermediary, possess the power to determine the level of risk associated with an undertaking.[10] If this doctrine were not in place, the risk-taking of those actors would be insulated or unregulated.

The doctrine of vicarious liability is currently implemented in the law through the device of a status determination.[11] Vicarious liability attaches to employers in either an agency or employment relationship.[12] Although these status determinations are only proxies for the direct question, the legal tests which define these relationships in fact incorporate the relevant control analysis.[13] If the workers, or the assets used by the workers, are controlled in significant ways by the employer, they will be characterized as agents or employees and the employer will be fixed with vicarious liability. This will discipline the risk-taking of the employer and avoid the effects of an insulated projection of risk.

The significance of this in the association context should be apparent. Members (and non-member agents or employees) who commit tortious acts will be directly and primarily liable for their conduct. Where those acts are within the scope of the undertaking of the association, the possibility of vicarious liability will also arise. The appropriate analysis will then be to determine which members participated in generally controlling the management of association affairs. Those members will be vicariously liable. The analysis, in this way, replicates the contractual analysis. Only those members who participate in control will be held vicariously liable. There is no risk regulation basis for assigning liability to members who have no rights of control.[14]

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[10] Query the rationales for vicarious liability described in the symposium articles published at (1996) 69 S. Cal. L.R. 1679-1780.

[11] The status determination is sometimes seen to be indispensable. See, for example, *Delk* v. *Board of Commissioners of Delaware County*, 503 N.E. 2d 436 at 440 (Ind. App. 2 Dist. 1987) ("it is axiomatic an agency relationship must exist before imputed liability under the principle of *respondent superior* is applicable"). The application of vicarious liability, however, could be premised directly on the power to control the employment of assets. The status is only a proxy for the direct control analysis.

[12] Or any other arrangement which, through formally characterized by the parties as something else, is in fact an agency or employment relationship.

[13] The direct question is whether a person contributes to the risk associated with an undertaking. The "enterprise control" test returns the analysis to this question. See Flannigan, *supra* footnote 6 at 37-55.

[14] Nor is there a "receipt of benefit" basis. That is the effect of the established proposition that membership alone does not attract vicarious liability.

(b) *The Agency Test*

The majority of association tort cases in England[15] and Canada[16] have been concerned with standard tort issues or procedural aspects of representative actions and only vaguely suggest the nature of the association liability structure. Few cases directly address the proper approach to take to the question of the substantive tort liability of members.[17] Even in these latter cases, the judges have offered little in the way of justification for their approach. Nevertheless, the cases are generally consistent with each other and do conform to the risk regulation analysis. Members may be found jointly and severally liable as co-principals,[18] personally or vicariously, although not by reason of their membership alone.[19]

The possibility of an agency characterization, and hence vicarious liability, is established by a number of cases. In *London Association For Protection of Trade* v. *Greenlands, Limited*, Lord Parker adopted the view of one commentator that "[i]f liabilities are to be fastened on [members of associations] it must be by reason of the acts of those members themselves, or by reason of the acts of their agents; and the agency must be made out by the person who relies on it, for none is implied by the mere fact of association."[20] This same statement was

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[15] See, for example, *Mercantile Marine Service Association* v. *Toms*, [1916] 2 K.B. 243 (C.A.); *Hardie and Lane, Limited* v. *Chiltern*, [1928] 1 K.B. 663 (C.A.); *Campbell* v. *Thompson*, [1953] 1 Q.B. 445 (see case note at (1953) 16 Mod. L.R. 359); *Egger* v. *Viscount Chelmsford*, [1964] 3 All E.R. 406 (C.A.); *Kennaway* v. *Thompson*, [1980] 3 All E.R. 329 (C.A.); *Tetley* v. *Chitty*, [1986] 1 All E.R. 663 (Q.B.). For the Australian authorities, see *City of Gosnells* v. *Roberts* (1994), 12 W.A.R. 437 (S.C.).

[16] See, for example, *Small* v. *Hyttenrauch* (1903), 6 O.L.R. 388 (C.A.); *Metallic Roofing Co. of Canada* v. *Local Union No. 30, Amalgamated Sheet Metal Workers' International Association* (1905), 9 O.L.R. 171 (C.A.); *Canaday's Apparel Ltd.* v. *Ross* (1960) 30 W.W.R. 697 (Q.B.) Some courts fabricated a requirement for a trust fund. See *Robinson* v. *Adams* (1924), 56 O.L.R. 217 (C.A.); *Body* v. *Murdoch*, [1954] O.W.N. 658 (H.C.); *Seafarers International Union of Canada* v. *Lawrence* (1978), 92 D.L.R. (3d) 116 (Ont. C.A.). Contrast *Smart* v. *Livett*, [1951] 2 D.L.R. 47 (Sask. C.A.); *National Bolt & Nut Corp.* v. *McDermott* (1974), 51 D.L.R. (3d) 191 (Ont. Div. Ct.) and see the analysis by J.S. Elder & D.M. O'Rorke, "Representative Suits in Tort in Ontario: Unincorporated Associations and the 'Trust Fund' Doctrine" (1960) 18 U.T. Fac. L.R. 128.

[17] The literature is also very thin. See H.A.J. Ford, *Unincorporated Non-Profit Associations* (Oxford: Clarendon Press, 1959); J. Warburton, *Unincorporated Associations: Law and Practice*, 2d ed. (London: Sweet & Maxwell, 1992).

[18] *London Association For Protection of Trade* v. *Greenlands, Limited*, [1916] 2 A.C. 15 at 29 (H.L.). See also G. Williams, *Joint Torts and Contributory Negligence* (London: Stevens & Sons, 1951) c.1.

[19] The words of the court in one of the very earliest cases are ambiguous with respect to whether the liability of committee members was direct or vicarious. The court, in *Brown* v. *Lewis* (1896), 12 T.L.R. 455 at 455, stated that the committee had "employed an incompetent man to repair the [football] stand." This is consistent with either liability, though the case is usually cited as an example of direct liability. See also *Kinver* v. *Phoenix Lodge, I.O.O.F.* (1885), 7 O.R. 377 (Q.B.)

[20] *Supra* footnote 18 at 39 (quoting from the eighth edition of *Lindley on Partnership*).

approved by the Manitoba Court of Appeal in *Issac* v. *Toews*.[21] Then, in *Bradley Egg Farm, Ltd.* v. *Clifford*, the English Court of Appeal held the members of a committee vicariously liable because they controlled the affairs of the association.[22] Goddard L.J. stated that the tortfeasor "was their servant or agent and they are therefore liable for his negligence."[23] In the Supreme Court of Canada case of *Orchard* v. *Tunney*, committee members were personally liable, but a representative action against all of the members was disallowed because the tortfeasors "had no authority from their fellow members to act in the manner complained of, either by the constitution of the Union or by any course of conduct of the other members."[24] More recently, in the English Court of Appeal decision in *The Hibernian Dance Club* v. *Murray*, Hutchison L.J. would have allowed a representative action since it appeared that it was "open to the plaintiffs to contend that the committee members named as defendants were the agents of the members in relation to the occupation of the premises, the employment of staff and the exercise of care toward visitors to the club premises".[25] Accordingly, although these various judicial comments were not further developed, it seems clear enough that the agency proxy will operate to fix vicarious liability on those members who participate in managing the affairs of the association.

Several courts in the United States have also adopted the agency analysis.[26] In a few cases, however, there has been a reluctance to recognize the vicarious liability that normally accompanies the agency characterization. In *Pittman* v. *Martin*, the issue was said to be "whether traditional agency principles can and should be applied in the context of a political campaign where tort liability is invoked."[27] The majority judges were of the view that the application of agency principles would have a "chilling effect" on the exercise of basic constitutional rights.[28] This, however, is the extent of the proffered justification. There is no analysis of any kind beyond the "chill" incantation.[29] The dissenting judges

[21] [1929] 1 W.W.R. 817 at 819 (C.A.).

[22] [1943] 2 All E.R. 378 (C.A.).

[23] *Ibid.* at 381.

[24] (1957), 8 D.L.R. (2d) 273 at 291 (S.C.C.).

[25] *The Times*, 24 July 1996 (C.A.).

[26] See *Wilson & Co., Inc.* v. *United Packinghouse Workers of America*, 181 F. Supp. 809 (N.D. Iowa 1960); *Lyons* v. *American Legion Post No. 650 Realty Co., Inc.*, 175 N.E. 2d 733 (Ohio 1961). On tort liability generally, see E. Garfinkle, "Liability of Members and Officers of Non-Profit Unincorporated Associations for Contracts or Torts (1954) 42 Cal. L. R. 812 at 825-27; F.W. Mebs, "Tort Liability of the Unincorporated Association and its Members" (1950) 11 U. Pitt. L.R. 308 and the annotations at 15 A.L.R. (3d) 1013; 82 A.L.R. (3d) 1213; 62 A.L.R. (3d) 1165; 25 A.L.R. (4th) 517; 8 A.L.R. (5th) 1.

[27] 429 So. 2d 976 at 978 (Ala. 1983).

[28] *Ibid.* at 979.

[29] The case involved the potential liability of the candidate himself, rather than the campaign workers. Consider also whether there is truly any relevant connection between exercising one's constitutional rights (right to vote, freedom of expression) and failing to take reasonable care.

bluntly stated that there was no basis for excusing political candidates from "the classic rules of agency with regard to vicarious liability."[30] They observed that the intentions of the parties are irrelevant if an agency relationship actually exists and stated that "liability is imputed to the principal, regardless of the actual participation in the intentional, wanton, or negligent act or omission, under the doctrine of respondeat superior."[31] In the result, without a substantial justification, the majority decision is a weak one. There is no obvious reason why political candidates or their committees ought to escape the ordinary civil burdens of citizens.[32] The dissenting judgment more credibly assessed the relative mischiefs and, coincidentally, conformed in every respect with the risk regulation analysis.

The issue in *Guyton* v. *Howard* was whether Shrine members who had participated in an initiation ceremony were liable for an injury suffered by the prospective member.[33] Hoping to "lay to rest some of the evident confusion regarding unincorporated associations", the court first observed that membership alone is not a basis for liability.[34] Members of associations were, however, liable "for tortious acts which they individually commit or participate in, or which they authorize, assent to, or ratify".[35] Members would only be liable without personal participation in the tortious act if they set the proceedings in motion or agreed to a course of action which culminated in wrongful conduct. The court then asserted that these were the *only* circumstances where members would be held liable. It characterized those circumstances as situations of "direct, active negligence" and not instances of "vicarious liability".[36] The doctrine of vicarious liability was not to be applied because, in the court's view, it would result in liability for all members of every association. This view appears to have been derived from an extract in a textbook cited in the judgment indicating that vicarious liability arises "by reason of some relationship existing between A and B."[37] Apparently the court assumed that the relevant relationship was the *membership* relationship between members. It refused "to craft a hybrid form of 'associational liability' which holds even non-negligent members of such unincorporated associations liable for the negligent acts of other members."[38] It will be appreciated that this is an unsatisfactory analysis. The

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[30] *Supra* footnote 27 at 979.

[31] *Ibid.* at 979-80.

[32] Consider whether the immunity is justified in relation to contractual obligations. See *Karl Rove & Company* v. *Thornburgh*, 39 F. 3d 1273 (5th Cir. 1994) and *Hafenbraedl* v. *LeTendre for Congress Committee*, 213 N.W. 2d 353 (Wis. 1974).

[33] 525 So. 2d 948 (Fla. App. 1 Dist. 1988).

[34] *Ibid.* at 956.

[35] *Ibid.*

[36] *Ibid.* See also *Thomas* v. *Dunne*, 279 P. 2d 427 (Colo. 1955) and *Joseph* v. *Collis*, 649 N.E. 2d 964 (Ill. App. 1995), app. denied, 660 N.E. 2d 1270 (Ill. 1995). The *Guyton* case was subsequently taken as authority for this view in *Airington* v. *Juhl*, 883 S.W. 2d 286 (Tex. App. 1994) at 290.

[37] *Ibid.*

[38] *Ibid.* at 956-7.

relevant relationship is not the membership relation. The relationships which carry vicarious liability with them are agency and employment. The issue in a given case is whether such a relationship exists. If the control tests that define those relationships are satisfied, vicarious liability is imposed as a matter of law. The *Guyton* court failed to construct its analysis in this way.

In *Ermert* v. *Hartford Insurance Company*, the court concluded that a group of hunters were not liable for a shooting accident because they had not intended to form a separate juridical entity.[39] The court determined that each hunter had contracted separately with the owner for the use of the hunting camp and that "the parties to such a contract do not incur any vicarious liability for one another's tortious acts."[40] The case is a curious one because the civil law of Louisiana apparently allows the informal creation of a separate legal entity if the requisite intent exists.[41] Apart from that, however, the result would likely be the same in any common law jurisdiction. The case is simply an illustration of the principle that persons (not being partners) who combine together to pursue a common interest without controlling or delegating control to one another are not agents of each other and can not be vicariously liable to each other.[42]

A more recent case of interest is the decision of the Indiana Court of Appeals in *Hatton* v. *Fraternal Order of Eagles, Aerie #4097*.[43] The case is remarkable for both its simplicity and its unerring implementation of the risk regulation policy. The question was whether all of the Eagles were liable for the negligence of their servants in serving alcohol to an individual who subsequently injured the plaintiff in a motor vehicle accident. The court stated that in order to fix the members with vicarious liability, a principal-agent or employer-employee relationship must exist. The necessary element required to establish either relationship was the ability to control the work of the agent or employee. The court concluded that, on the facts, "the individual members had no degree of control" and, consequently, the negligence of the employees could not be imputed to them.[44] This represents a seamless doctrinal application of the risk regulation policy. Vicarious liability depends on the existence of an agency, which, in turn, depends on the right to control the servant (or

[39] 559 So. 2d 467 (La. 1990).

[40] *Ibid.* at 475.

[41] The case is interesting in another respect. The court stated (at 476) that the "master's vicarious liability for the acts of its servant rests not so much on policy grounds consistent with the governing principles of tort law as in a deeply rooted sentiment that a business enterprise cannot justly disclaim responsibility for accidents which may fairly be said to be characteristic of its activities." Query what difference there is between "policy grounds consistent with the governing principles of tort law" and the "deeply rooted sentiment" identified by the court? See Flannigan, *supra* footnote 6.

[42] They may be directly liable as individual or joint tortfeasors for their own acts or omissions, but not vicariously liable.

[43] 551 N.E. 2d 479 (Ind. App. 1 Dist. 1990).

[44] *Ibid.* at 482. The club room was managed exclusively by the Board of Trustees, who would therefore have been liable.

assets).[45] In this case, the members had no power to project their risk-taking through the undertaking, and, accordingly, could not be held vicariously liable. There is no confusion in this judgment as to the proper application of the agency analysis.

The last matter to mention in this section is that, once the agency (or employment) relationship has been established,[46] it is occasionally necessary to inquire whether the tortious act is within the scope of the relationship.[47] This, of course, is a standard agency issue and the association cases are merely additional illustrations of the general rule.[48] Authorizing an act (which can be performed negligently by the authorized person) brings that act within the scope of the agency. Thus, in *Steuer* v. *Phelps*, members of a church group were held liable for authorizing one of their members to operate a vehicle subsequently involved in an accident.[49] The court pointed out that it was not necessary to show that the other members authorized the driver's "negligent acts."[50] Nor is it necessary that the negligent actions be within the agent's actual authority. The act may be within the agent's general apparent authority[51] or it may be an act within the general purposes of the association or which furthers the associations' objectives.[52] It is also possible for an act to "be considered within the scope of employment even though it is done in part to serve the purposes of the servant or of a third person."[53] The question is whether "the purpose of serving the master's business actuates the servant to any appreciable extent."[54] These latter propositions are taken from *Ermert* v. *Hartford Insurance Company*, mentioned

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[45] Bear in mind that the doctrinal analysis is a proxy for the direct question. It would be a doctrinal improvement if vicarious liability were made to depend simply on the existence of a control relationship. This would avoid the additional step of attempting to characterize the relationship in a given case as an "agency" relationship. As it is, the control tests used to define agency and employment accomplish the analytical task in a serviceable way.

[46] The relationship may be with someone other than the formal employer. See *Weese* v. *Stoddard*, 312 P. 2d 545 (N.M. 1957).

[47] *Orchard* v. *Tunney, supra* footnote 24; *Pandolfo* v. *Bank of Benson*, 273 F. 48 (9th Cir. 1921); *Cox* v. *Government Employees Ins. Co.*, 126 F. 2d 254 (6th Cir. 1942).

[48] This issue is often treated as distinct from the question of the creation or existence of agency. However, both the existence and scope of agency are determined on the same basis. To ask whether the relation extends to a particular act is simply to ask if the relation existed at that point. Disputes are often formulated as issues of scope when the existence of the agency relation (but not its scope) is initially conceded.

[49] 116 Cal. Rptr. 61 (C.A. 1974).

[50] *Ibid.* at 63.

[51] *American Bridge Division, U.S. Steel Corporation* v. *International Union of Operating Engineers*, Local 487, 772 F. 2d 1547 (11th Cir. 1985). See also *Jund* v. *Town of Hempstead*, 941 F. 2d 1271 (2nd Cir. 1991) and *Eisert* v. *Town of Hempstead*, 918 F. Supp. 601 (E.D. N.Y. 1996).

[52] *Torres* v. *Lacey*, 159 N.Y.S. 2d 411 (S.C. 1957); *Fast* v. *Kahan*, 481 P. 2d 958 (Kan. 1971).

[53] *Ermert* v. *Hartford Insurance Co., supra* footnote 39 at 476-7.

[54] *Ibid.* at 477.

above, where the employer of a tortfeasor was found vicariously liable for a shooting accident because he had used the hunting camp to further his employer's business.[55] The court took the view that it "need only determine whether the servant's general activities were within the scope of his employment."[56]

We may summarize at this point by observing that the agency analysis constitutes the largest part of the association liability structure governing contract and tort obligations. It is also apparent that there is a general correspondence in the kind of conduct that will attract each type of liability under this analysis. In particular, there is no requirement in either context that the specific contract or activity must be expressly authorized by a member. It is enough if a member generally participates in controlling the affairs of the association.[57] Accordingly, it is clear that the liability structure regulates both the direct projection of risk (eg. approving the contract, personally committing the tort) and the more remote projection of risk that occurs when an actor participates in the general management of the undertaking. This ensures that the risk-taking of the members, whatever form it takes, will be subjected to the minimal social constraint of risk regulation.

(c) *Member/Member Immunity*

The right of a third party to pursue individual members of an association has never been doubted. This has not been the case, however, for claims made by an injured member. For some time, the courts refused to allow members to sue their fellow members. This was of considerable practical significance, obviously, because it is members who are most likely to be injured in the course of association activities. Only recently have the courts been rejecting this immunity in the tort area.[58]

The original source of the immunity in England appears to be the decision of the Court of Appeal in *Kelly* v. *National Society of Operative Printers*, involving a breach of contract action for wrongful expulsion from a union.[59]

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[55] *Ibid.*

[56] *Ibid.* at 478.

[57] Note that the "participation" term is employed in different ways in the cases. The reference in the contract cases is usually to participation in the general management of the undertaking (eg voting). The reference in the tort cases may be to a personal involvement of the member in the tortious event sufficient to provide a basis for direct liability, rather than vicarious liability. See *Guyton* v. *Howard, supra* footnote 33 at 956. Cf. *Orser* v. *Vierra*, 60 Cal. Rptr. 708 at 716 (Ct. App. 1967). Note also that participation may be inferred from limited evidence, such as, for example, attendance records of meetings at which the event or transaction was planned or approved. See *Libby* v. *Perry*, 311 A. 2d 527 (Me. 1973).

[58] As we shall see, some legislatures have recently been *conferring* immunities. See text *infra* at footnotes 112-18.

[59] (1915), 113 L.T. 1055 (C.A.).

The court dismissed the plaintiff's claim for damages on the ground that the committee members were agents "for him quite as much as for the other members" and "if he sues the trade union for what it has done, he is suing himself among others."[60] Some forty years later, however, this decision was overruled by the House of Lords in *Bonsor* v. *Musicians' Union* in another contract decision.[61] The reasons given by Lord MacDermott and Lord Somervell applied generally to associations.[62] In their view, there could be no immunity where the common agent was acting against the interests of the injured member. Lord Somervell stated that if, "under a contract to which there are a number of parties, the many by themselves, or through the agents of the association, purport to deprive the one of his contractual rights, the one, subject to possible procedural difficulties, must be entitled to the rights, including that to special damage, which our law confers in respect of breach of contract."[63] He added that it would be wrong "to identify the plaintiff in such a case with those of whose acts, or of whose agent's acts, he complains so as to deprive him of his ordinary remedies."[64] This plainly limits, very considerably, the scope of the supposed immunity. There may in fact be some real doubt whether any significant contractual immunity exists today.[65] We turn now to consider the seemingly independent line of authority that arose in England relating to tort claims.

The case of *Prole* v. *Allen* involved a tort action by one member against the members of the committee of a club. The trial judge denied the claim, offering only the laconic statement that the committee members "were members of the club as was the plaintiff, and, as such, they owed her no duties."[66] He concluded that there were "no facts produced which imposes any other relationship between them and the plaintiff than their joint membership of the club, and, therefore, I come to the conclusion that they did not owe a duty to her, and they are entitled to judgment."[67] The obvious difficulty with this analysis is that there is no justification offered for the assertion that no duty existed between the members. The standard default rule of tort law is that individuals are liable for injuries they cause to their "neighbours". There is no indication in the case why this rule is not applicable in the association context. Nevertheless, the effect of the decision was to confer immunity on members for losses suffered by other members.

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[60] *Ibid.* at 1060 (Phillimore, L.J.).

[61] [1955] 3 All E.R. 518 (H.L.).

[62] The majority judgments proceeded on the basis that the union involved could be sued for breach of contract as a legal entity.

[63] *Supra* footnote 61 at 543.

[64] *Ibid.*

[65] Consider the direction of the subsequent judicial analysis in the tort context. Note further that there is simply no agency relationship between passive and active members.

[66] [1950] 1 All E.R. 476 at 477 (Q.B.).

[67] *Ibid.*

The court did distinguish the position of the club steward from the other committee members and found that he was liable.[68] His position made him an agent of all the club members and he therefore owed each of them a duty to take reasonable care. Again, however, there is no mention of a general tort law duty of care. The court apparently associated the existence of the duty here with the steward's agent status. Moreover, having characterized the steward as an agent, the court neglected to explain why this did not result in vicarious liability for his principals. Arguably, the proper conclusion in this case was that the steward (and possibly the committee members) were directly liable under standard tort principles, and either the committee members or all of the members together, depending on the internal control arrangements, were vicariously liable.

Prole v. *Allen* was subsequently followed in both England[69] and Canada.[70] However, in 1990, the English Court of Appeal in *Jones* v. *Northampton Borough Council* essentially rejected this line of cases.[71] Ralph Gibson L.J. stated that, in his opinion, "there is nothing in the case of *Prole* or in *Robertson* v. *Ridley* upon which can be founded a form of immunity available in law to one member of a club against a claim by another member of the club, being an immunity based merely upon their joint membership, if the claimant can demonstrate that, according to ordinary principles of law, the defendant member of the club was under a duty of care in respect of the circumstances which caused the claimant's injury and that the defendant was guilty of negligence."[72] He characterized the earlier cases as "no more than examples of the rule that the mere fact of common membership of a club, even coupled with membership of a committee on the part of a defendant, does not by itself give rise to a duty of care in the defendant to a plaintiff."[73] According to Purchas L.J., "[t]he membership of a club, apart from totally exceptional circumstances not relevant to this appeal, cannot have the effect of excluding ordinary liability in tort of the *Donaghue* v. *Stevenson* ... type once a duty to take care as between 'neighbours' is established."[74] This effectively disposes of *Prole* v. *Allen*, standing as it now does only for the uncontroversial proposition that membership

[68] *Ibid.* at 477-78.

[69] *Robertson* v. *Ridley*, [1989] 2 All E.R. 474 (C.A.). See also *Shore* v. *Ministry of Works*, [1950] 2 All E.R. 228 (C.A.). The *Shore* case was decided very shortly after *Prole* v. *Allen*. The plaintiff, who had been injured by a dislodged brick, framed her action in contract, alleging an implied warranty that the premises were safe for the purposes for which she was admitted as a member. The court declined the implication of such a term. *Prole* v. *Allen* was referred to, but was said not to be relevant. Tucker, L.J. added that "[w]hat the position might be had negligence been alleged does not arise" (at 231).

[70] *Dodd* v. *Cook* (1956), 4 D.L.R. (2d) 43 (Ont. C.A.).

[71] *The Times*, 21 May 1990 (C.A.). The case is not reported in the conventional journals. However, it is extensively quoted in *McKinley* v. *Montgomery, infra* footnote 75.

[72] *Ibid.*

[73] *Ibid.*

[74] *Ibid.* at 18.

per se does not attract liability.[75] We might also ask at this point what implication the *Jones* case has for the doctrine of vicarious liability? Presumably, because it too is an "ordinary" principle of law, it will apply in those cases where an agency relationship exists between the tortfeasor and controlling members of the association. Consequently, while membership alone will not attract liability for the injuries of other members, liability may arise directly for members who are negligent, and vicariously for those who control.[76]

The trend in the United States is also to reject member immunity. American judges originally granted this immunity on the basis of an imputed liability or "vicarious responsibility."[77] The members of an association were regarded as co-principals in a joint undertaking. The agents of the association, accordingly, were as much agents of the injured member as of any other member, and the wrongful conduct of those agents was imputed equally to each of them.[78] American courts have subsequently been very uncomfortable with this immunity and, over time, have been moving away from it. The first significant efforts to circumvent the rule were made in the union context. Initially, relying on the House of Lords decision in *Bonsor* v. *Musician's Union*,[79] the American courts refused to impute liability when the tortious act was committed by the agent while acting adversely to the member.[80] In *Fray* v. *Amalgamated Meat Cutters and Butcher Workmen of North America, A.F.L.-C.I.O., Local Union No. 248,* the court attempted to justify the exception by asserting that a union should be regarded as a separate legal entity in such circumstances, allowing the imputation

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[75] Consider the subsequent decision of the Northern Ireland Court of Appeal in *McKinley* v. *Montgomery* (1993), 4 B.N.I.L. 143 (C.A.). The court dismissed the member's action but appeared to concede that general tort principles would apply if the case had been made out. This appears not to have been appreciated by the author of the case note at (1993) 44 N. Ir. Leg. Q. 388, who stated that the "decision is clearly in line with previous authority and existing legal principle, but it leaves members of unincorporated associations with very little hope of redress if they are injured on association property or when going about association business." The author also characterizes the *Jones* case as involving a "harsh result" (at 391), but this charge was not levelled in connection with the application of general tort principles of responsibility. His general solution to the problem (at 389), like most other commentators, is some sort of quasi-entity status ("legislation providing that unincorporated bodies can be sued by their own members for any breach of duty which can properly be regarded as the fault of the body itself").

[76] See also *Morrell* v. *Owen, The Times*, 1 December 1993 (Q.B.).

[77] *Martin* v. *Northern Pac. Beneficial Ass'n.*, 71 N.W. 701 (Minn. 1897); *Roschmann* v. *Sanborn*, 172 A. 657 (Pa. 1934); *Plasterer* v. *Paine*, 544 A. 2d 985 (Pa. Super. 1988). See also J.A. Crane, "Liability of Unincorporated Association for Tortious Injury to a Member" (1963) 16 Vand. L.R. 319 and the annotation at 14 A.L.R. (2d) 473.

[78] It will be immediately appreciated that the initial premise here, that all of the members were co-principals, is inconsistent with the agency analysis employed generally for liability purposes. In a given case, the agency analysis may or may not result in all of the members being found liable as co-principals. To be consistent, the imputation of the responsibility would have to be limited to members who control.

[79] *Supra* footnote 61.

[80] *Taxicab Drivers' Local Union No. 889* v. *Pittman*, 322 P. 2d 159 (Okl. 1958).

to be blocked and for the injured member to have recourse to union assets.[81] In subsequent union cases, the exception was extended to cover all tortious acts, and not merely those where the agent could be said to be acting adversely to the interests of the member.[82] Then, in *White* v. *Cox*, the court denied the immunity of members of an unincorporated condominium association.[83] The court adopted the view that no immunity could exist where the members had no control over the affairs of the association.[84] The rejection of the immunity beyond the union context continued with the decision in *Tanner* v. *Columbus Lodge No. 11, Loyal Order of Moose.*[85] Following the earlier decisions, the court relied on statutory provisions allowing actions in the name of the association to conclude that the immunity was no longer available to the Moose members.[86]

A number of cases were then decided where the immunity was granted. The different results in these cases may be explained by the control position of the injured member. In *Walsh* v. *Zuisei Kaiun K.K.*, the court referred to the need, discussed in *White* v. *Cox*[87], to assess "the nature and extent of the members ability to affect policy within the association."[88] The court concluded that the fatally injured member "had that amount of control that his negligence must be imputed to the association."[89] In *Calvary Baptist Church* v. *Joseph,*[90] after reviewing the earlier cases, the court conceded the wisdom of an exception to the immunity rule for large associations where members had little real control.[91] Nevertheless, the court accepted the immunity because the repair of the church roof was a true joint enterprise by the church members free of any overriding control.[92] The decision in *Zehner* v. *Wilkinson Memorial United Methodist Church* also has a control justification.[93] Negligence was imputed to the member "particularly" because she "sat on the board of directors during the very

[81] 101 N.W. 2d 782 (Wis. 1960).

[82] *Marshall* v. *International Longshoremen's and Warehousemen's Union, Local 6,* District 1, 371 P. 2d 987 (Cal. 1962); *Miazga* v. *International Union of Operating Engineers, A.F.L.-C.I.O.*, 205 N.E. 2d 884 (Ohio 1965).

[83] 95 Cal. Rptr. 259 (App. 1971). See also *Dutcher* v. *Owens*, 647 S.W. 2d 948 (Tex. 1983); *Murphy* v. *Yacht Cove Homeowners Association*, 345 S.E. 2d 709 (S.C. 1986).

[84] *Ibid.* at 262-63.

[85] 337 N.E. 2d 625 (Ohio 1975).

[86] See case note at (1976) 9 Akron L.R. 602.

[87] *Supra* footnote 83.

[88] 606 F. 2d 259 at 264 (9th Cir. 1979).

[89] *Ibid.*

[90] 522 N.E. 2d 371 (Ind. 1988). See also *Maroney* v. *Fraternal Order of Police Lodge No. 71*, 546 N.E. 2d 99 (Ind. App. 3 Dist. 1989).

[91] The "wisdom" in this proposition has nothing to do with the size of the association per se. Whatever the size, some or all of the members may control the undertaking. The critical question in each case is who controls. An exception based only on the size of the association would fail to accommodate the factual variability of the control arrangements.

[92] *Supra* footnote 90 at 375.

[93] 581 A. 2d 1388 (Pa. Super. 1990), app. denied, 592 A. 2d 1304 (Pa. 1991).

meeting at which the negligence is alleged to have occurred."[94] These decisions are all premised on the idea that the imputed liability doctrine is valid at least where the injured member can be characterized as a co-principal having powers of control. Acceptance of this as the explanation for these cases would diminish substantially the original scope of the imputed liability doctrine, while allowing it to continue to operate as between controlling members of the association.[95] Whether the doctrine should remain even in this form, however, may be doubted.[96]

More recently, a number of courts have challenged the immunity directly. In *Crocker* v. *Barr*, the court turned around the chill argument, using it to justify the denial of immunity.[97] Instead of accepting that increased exposure to liability (by denying immunity) would chill membership, the court asserted that the maintenance of the immunity "chills the very volunteerism [ie. membership] that unincorporated associations require".[98] Potential members would be dissuaded from joining the association if they knew that, having suffered an injury, they would have "no recourse against the wrongdoers".[99] The court asked "why should a church member be precluded from suing an association in tort when a paid workman would be allowed to maintain an action for the very same injury."[100] The judges concluded that the immunity was not available to the members of any kind of association, whatever its objectives.

The same conclusion was reached, in very emphatic terms, in *Buteus* v. *Raritan Lodge #61 F. & A.M.*[101] The court stated that the doctrine "serves no useful purpose, results in injustice, and does not advance any public policy."[102] The court observed that "[t]he identity of the victim is ordinarily irrelevant" and that the tortious conduct "does not become less culpable if the injured victim is a member."[103] It was necessary to reject the doctrine in its entirety because it

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[94] *Ibid.* at 1389.

[95] It would appear that the Pennsylvania courts seem firmly committed to applying the doctrine to its full extent, notwithstanding the narrower interpretation that can be given to the *Zehner* case. See *Plasterer* v. *Paine, supra* footnote 77.

[96] There is no risk regulation basis for retaining the immunity, even in this limited form. A risk regulation analysis would require the ascription of liability to all principals, who would each bear the loss to the extent they were unable to obtain contribution or indemnification from the other principals.

Note that the doctrine of "vicarious responsibility" is questioned generally. See W.P. Keeton (ed.), *Prosser and Keeton on the Law of Torts* 5th ed., (St. Paul: West Publishing Co., 1984) at 516. The common employment doctrine, another imputed liability exception to vicarious liability, was earlier rejected. See P.S. Atiyah, *Vicarious Liability in the Law of Torts* (London: Butterworths, 1967) at 415.

[97] 409 S.E. 2d 368 (S.C. 1991).

[98] *Ibid.* at 371.

[99] *Ibid.*

[100] *Ibid.*

[101] 591 A. 2d 623 (N.J. Super. A.D. 1991).

[102] *Ibid.* at 628.

[103] *Ibid.*

"arbitrarily protects a tortfeasor from the consequences of its negligent conduct and arbitrarily deprives an injured victim of the opportunity for fair reparation."[104] While the court did recognize that an injured member might bear some responsibility "by reason of his participation in the management of the association's affairs or in otherwise creating the risk of harm", that provided "no sound basis for barring him from suit any more than any other form of contributory negligence would."[105] The members contribution to the risk could be handled by the application of principles of comparative negligence.

The *Buteus* court, like most courts before it, had relied on procedural legislation to justify its decision. In *Cox* v. *Thee Evergreen Church*, the court did not require that support; it simply flatly rejected the imputed liability doctrine insofar as it applied to ordinary members.[106] The majority was "unable to discern a defensible reply" to the question advanced in *Crocker* v. *Barr*[107] and saw "no compelling reason for retaining this remnant of the original common law rules."[108] The court decided that the member was not precluded from bringing an action against the association solely by reason of being a member and was entitled to recover out of the assets of the association.[109] In a separate concurring judgment written for the purposes of clarification, Justice Cook stated that members of the association would only be *personally* liable to the injured member if they participated in or ratified the negligent conduct. Thus, in his view, the "injured member must look to those members who were actively negligent; those who authorized, assented to, or ratified the negligent act [for personal liability]; or the unincorporated association itself [to reach association assets]."[110] Justice Cook added that the injured member's contributory negligence was to be considered "to the extent she actively participated in the negligence or authorized, assented to, or ratified the association's actions that caused her injuries."[111]

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[104] *Ibid.*

[105] *Ibid.* at 629.

[106] 836 S.W. 2d 167 (Tex. 1992). See case note at (1994) 46 Baylor L.R. 231.

[107] *Supra* footnote 97.

[108] *Supra* footnote 106 at 173. The reasoning of the dissenting judge (at 174-75) was that the decision of the majority "greatly expands the potential personal liability for the hundreds of thousands of volunteers across this state that selflessly give of their time" and would result in the withdrawal of services currently offered by associations.

[109] In this latter respect, the court does rely on the legislation. That is, with no immunity operating, the injured member could use the legislation to sue the association in its name and satisfy the judgment out of association assets.

[110] *Supra* footnote 106 at 174. Here Justice Cook misconceives the jurisprudence if he regards it as establishing a requirement of participation in, or approval of, the specific negligent act. Moreover, he fails to consider the possibility of vicarious liability. The principles of agency apply in the association context in exactly the same way they do in the law generally.

[111] *Ibid.*

If the trend evident in the jurisprudence continues, they will soon be little, if anything, left of member immunity based on imputed liability. This would be a salutary development. It is unexceptional that active members should be held directly or vicariously liable under the standard tests. There is no characteristic of associations that would justify a departure from the minimal conventional controls that regulate the behaviour of all other citizens.

(d) *Volunteer Immunity Legislation*

It is appropriate to conclude this part of the discussion with a brief review of the most recent legislative trend in the United States affecting the liability structure of associations. In roughly the last two decades, several states have passed legislation providing immunity to volunteers, including directors and officers, working for associations.[112] The different statutes are contingent in various respects (such as requiring insurance cover),[113] or limited to certain

[112] There is very little in the literature on these statutes. See, generally, A.G. Peterson, "Recent Developments in Utah Law" (Liability Protection for Volunteers and Nonprofit Organizations) [1991] Utah L.R. 119 at 273; P.J. Whitmore, "Immunities From Liability for Colorado Nonprofit Organizations" (1996) 25 Colo. Lawy. 37. See also S.H. Patton, "Protecting Volunteers and Volunteer Directors Who Help Michigan Nonprofit Corporations" (1995) 17 Mich. Bus. L.J. 6. A review of the American developments is found at (1992) 105 Harv. L.R. 1578 at 1677-1689. See also N. Austin, "The Liability of Good Samaritans and Charities and Their Volunteers" (1989) 8 Philanthropist 3.

The National Conference of Commissioners on Uniform State Law has gone further with its 1992 Uniform Unincorporated Nonprofit Association Act in conferring both contractual and tortious immunity on all members of all associations. See U.L.A., Vol. 6A, 1995, at 513. The uniform statute has been adopted in a few states (eg. Ala., Idaho, W. Va.). See K.D. Lewis, Jr., "The Ramifications of Idaho's New Uniform Unincorporated Nonprofit Associations Act" (1994) 31 Idaho L.R. 297. Surprisingly, the official comments accompanying the statute provide very little in the way of substantive justification for this automatic limited liability. One might have expected an extended explanation of the need for the immunity (other than the cost of insurance), the inapplicability of the risk regulation policy, the created difference between individuals acting in groups and those acting alone, the apparent irrelevance of the extensive regulation of ordinary corporate legislation, the distinction between profit-seeking and nonprofit activity, the inadequateness of insurance or other alternatives and the other factors that properly ought to be considered before jettisoning a basic social instrument designed to ensure a minimal level of individual responsibility. It would appear that the construction and adoption of this uniform legislation has proceeded almost casually, and certainly without articulated reflection on what is truly a radical alteration of the association liability structure.

[113] The Utah legislation (Utah Code Ann. § 78-19-1 to 3 (Supp. 1990)) conditions volunteer immunity on the association providing a financially secure source of recovery (which can be satisfied by an insurance policy). See Peterson, *supra* footnote 112. This particular contingency (insurance cover) may itself provide a measure of justification for the immunity. If the immunity depends on adequate insurance cover, that cover will tend to be obtained — thus ensuring compensation to those who are injured. This would be an improvement over a regime where compensation depends on the solvency of individual tortfeasors. Of course, if there is adequate insurance, the immunity would be redundant.

classes of association (eg. charities),[114] but otherwise offer immunity from ordinary negligence.[115] The rationale for this kind of legislation is described in the preamble to the Texas Charitable Immunity and Liability Act of 1987.[116]

> § 84.002. Findings and Purposes
>
> The Legislature of the State of Texas finds that:
>
> (1) robust, active, bona fide, and well-supported charitable organizations are needed within Texas to perform essential and needed services;
>
> (2) the willingness of volunteers to offer their services to these organizations is deterred by the perception of personal liability arising out of the services rendered to these organizations;
>
> (3) because of these concerns over personal liability, volunteers are withdrawing from services in all capacities;
>
> (4) these same organizations have a further problem in obtaining and affording liability insurance for the organization and its employees and volunteers;
>
> (5) these problems combine to diminish the services being provided to Texas and local communities because of higher costs and fewer programs;
>
> (6) the citizens of this state have an overriding interest in the continued and increased delivery of these services that must be balanced with other policy considerations; and
>
> (7) because of the above conditions and policy considerations, it is the purpose of this Act to reduce the liability exposure and insurance costs of these organizations and their employees and volunteers in order to encourage volunteer services and maximize the resources devoted to delivering these services.

The "halo" effect may be partly responsible for this legislative activity. The popular image of volunteers is one of caring individuals exhibiting selfless devotion to socially valuable undertakings. To the extent that this is true, or perceived to be true, the volunteer class can expect favourable legislative action. Legislators, who want to be seen to be doing the right thing, might find it difficult to question this kind of legislation. Moreover, there are no prospective

[114] The Texas legislation, for example, is limited in scope to charitable organizations (Tex. code Ann. § 84.001 to § 84.008 (1987)). With respect to charitable immunity generally, see the annotations at 82 A.L.R. (3d) 1213 and 25 A.L.R. (4th) 517.

[115] E.g. Colo. Rev. Stat § 13-21-115.7 (Supp. 1996); Fla. Stat. Ann. § 768.1355 (Supp. 1997); Idaho Code Ann. § 6-1605 (1987); N.J. Stat. Ann. § 2A: 53A-7.1 (1990); N.D. Cent. Code § 32-03-44 (1996). A number of other classes of persons have recently been granted immunity from liability. These include school crossing guards (Colo. 1996), athletic coaches and officials (N.D. 1987, Ill. 1990) and persons participating in equine or llama activities (Colo. 1992).

[116] Tex. Code Ann. § 84.002. See also the statements of the Insurance Committee of the New Jersey Assembly at N.J. Stat. Ann. § 2A: 53A-7.1.

tort victims at the table (because victims are unable to self-identity) to challenge the reallocation of loss. The dirty work of fobbing off real victims in real cases comes at a later time and is handled by different persons.

It may be that this legislation has been insufficiently considered by the American public. A first observation is that conventional tort liability is itself a social construction. It was created to implement the communal view of appropriate responsibility, requiring, currently, only that each of us act in a reasonable manner. There is no obvious reason why volunteers should be excused from complying with this standard.[117] There is nothing that would alter the standard risk regulation analysis. On the practical side, it is evident that there will be a victim. Indeed, there will be *more* victims, at least where it is understood by volunteers that they will not be held responsible for their torts. The nonprofit sector will become a less hospitable sector. Losses that arise will be borne by those who suffer them. If the victim cannot cope, the loss will be socialized to the entire community. Consider also that most persons will regularly come into contact with volunteer workers. Is the public prepared ex ante to give up its right to be compensated for injuries suffered in the course of that contact? Are we prepared to lift the minimal regulation that would otherwise discipline the risk-taking of volunteers? Would it make any difference if the association was the Salvation Army, a private school, a health clinic, a rugby club, a lobby group or a real estate board? What of the volunteers, themselves, given that many injuries will be ones they inflict on each other? On what coherent basis is one volunteer to be protected or favored over another?

If volunteers are withdrawing, it is for the association to convince them to stay, by, for example, providing comprehensive insurance cover, arranging for indemnification, or demonstrating effective implementation of systems for avoiding loss. If insurance is expensive, then it is expensive. The cost, presumably, is justified by the loss experience associated with the particular activity. A higher insurance cost, indicating a greater risk of loss, is no reason to excuse the tortfeasor. It should be added that we do not excuse others from liability simply because they assert that they cannot afford insurance. As for diminished services, if that were ever empirically demonstrated, it would still be necessary to compare the loss of service with the alternative of *diminished care*. Will we accept fewer services, if that would be the true consequence, or must we have more services, provided negligently? Further, if the community really does have an "overriding interest" in the continued and even "increased", delivery of these [unspecified] services, *they will be provided* — either by private enterprise (for a price) or by the government (with taxes contributed by the public for the provision of services of "overriding interest"). It may also be observed that volunteer immunization requires different treatment of victims depending on

[117] Nor is there any basis for an immunity for the nonprofit organization that employs the workers. A request that the court allow a nonprofit organization an exemption from vicarious liability was rejected in *B. (P.A.)* v. *Curry* (1997), 30 B.C.L.R. (3d) (B.C.C.A.). See also (1992) 105 Harv. L.R. 1578 at 1689-1691.

whether or not their tortfeasors are paid. Apart from the more obvious considerations, the union establishment might have something to say about this privileging of volunteer labour.

The trouble with the reasoning of the Texas Legislature is that it fails to identify any feature of volunteerism, as such, that justifies immunity from liability. Rather, the ostensible justification is the need (or government desire) for associations "to perform essential and needed services." This, however, would justify immunity for *anyone* who performed an essential or needed service, whether paid or not. There is no necessary connection here with volunteer immunity. The ostensible justification instead suggests an incentive effect (for legislators) in the form of the potential for a reduced demand for government services. Combined with the "halo" effect on legislators, it begins to look like these statutes are primarily designed to serve narrow political and governmental interests.[118]

IV. *Fiduciary Liability*

(a) *The Regulation of Opportunism*

The conceptual assembly of the association fiduciary structure is straightforward. This is fortunate, we will see, for there are very few decisions dealing specifically with the fiduciary obligations of association members.[119] Before attending to that construction, however, it is necessary to first address the common practice of using trustees to hold association property.[120] Where trustees are expressly appointed, the usual arrangement is to require them to act only in accordance with the directions of either the committee or all of the

[118] Legislators could assist volunteers with a change considerably less radical than the reversal of the fundamental principle of due care. For example, to the extent that coverage is not already in place, each of us might be required to purchase, along with our health care or vehicle insurance, general liability coverage. With such a large class of buyers, the individual cost of coverage would be negligible. Actors would continue to be disciplined by the incentive effects of variable deductibles and premiums, and victims would be compensated. See, alternatively, the proposal in (1992) 105 Harv. L.R. 1578 at 1691-1696.

[119] The reason for the lack of cases is a matter of conjecture. It may be that it has been assumed that the relationship between members is purely contractual (see *Orchard* v. *Tunney, supra* footnote 24). That assumption fails to recognize that contractual arrangements often create fiduciary relations. Other possible explanations might be that nonprofit enterprise usually involves a lesser stake (it is not the livelihood of the members), fewer significant assets, or less concern with "sunk" contributions. The costs of litigation and, quite possibly, the lack of case law itself, may be factors.

[120] The use of trustees provides a convenient, less cumbersome, method for a group of persons to hold property. It also allows for more efficient litigation by and against the association. Trustees have historically been used extensively for these purposes. The use of trustees in joint stock companies was common prior to the advent of accessible general incorporation legislation.

members together.[121] This establishes what is called a "bare" trust, or a combined agent/trustee relation.[122] Such a trust gives rise to liability assignments that differ from a trust where the trustees are autonomous principals.[123] If trustees are truly independent, they bear contractual and tortious liability themselves. Where they are instructed by others, however, they are in fact agents, and the persons who instruct them will be contractually and tortiously liable as principals.[124] For fiduciary liability purposes, on the other hand, the obligation of the bare trustee continues to be defined by the ordinary trustee standard. While the dominant agency character of the relation governs with respect to third party liability issues, the express trustee designation of the parties governs their relations inter se for so long as the legal and equitable interests remain separated.[125] This matters, it will be appreciated, because even puppet trustees holding legal title can divert the value of the assets to themselves. It is otherwise important to understand all of this in order to avoid confusing the general liability configurations of trusts and "bare" trusts. We now consider the potential fiduciary liabilities that may arise in the absence of an express designation of trustee, or other, fiduciary status.

Where persons associate together they often arrange for the creation of a common fund or body of assets to be dedicated to furthering their objectives.[126] In making this arrangement, however, the members expose themselves to the possibility that some of the members may seek to profit personally from their access to the collective property.[127] Individual members might, for example,

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[121] There is a consensus on this in the practical literature. See Warburton, *supra* footnote 17 at 46-47 ("The trustees...normally hold the property...on trust to deal with the property in accordance with the directions of the committee"); D. Field, *Practical Club Law* (London: Sweet & Maxwell, 1979) at 108 ("the trustees should be compelled to act at all times upon the instructions of the committee" and "should have no power and no discretion" and are merely "figureheads"); J.F. Josling, *Law of Clubs* 6th ed. (London: Longman Group, 1987) at 32 ("The terms of their appointment should be such as to render them bare trustees for the members" and this is "best achieved by a rule which binds the trustees always to act in accordance with the directions of the committee").

[122] The "bare trust" terminology is not always consistently applied. See R. Flannigan, "Beneficiary Liability and the Wise Old Birds", c. 13 in *Equity and Contemporary Legal Developments* (Jerusalem: Hebrew University, 1992) at 277-82.

[123] See Flannigan, *ibid.*

[124] *Trident Holdings Ltd.* v. *Danand Investments Limited* (1988), 49 D.L.R. (4th) 1 (Ont. C.A.).

[125] Both trust and agency are status fiduciary characterizations. There is, however, a formal difference in the content of each obligation. While this difference may not be a substantive one (see Flannigan, *infra* footnote 129), it may be important for other purposes to recognize the formal separation of legal and equitable interests.

[126] The default interest of a member in the common property is a right to enjoy or benefit from it while remaining a member. The interest ceases to exist with the termination of membership. Only those who are members at the date of dissolution are entitled to share in the final distribution. See B. Green, "The Dissolution of Unincorporated Non-Profit Associations" (1980) 43 M.L.R. 626.

[127] The access a member possesses is authority over, or proximity to, the physical and intangible assets of the association. See R. Flannigan, "Fiduciary Obligation in the Supreme Court" (1990) 54 Sask. L.R. 45 at 48-49.

employ association assets for personal projects or exploit confidential information (eg. donor lists). They may do this directly, through agents or employees, or while acting themselves as agents for the other members. This mischief is what economists generically refer to as the "agency cost" problem — the opportunism costs of working with co-venturers or intermediaries.[128] The standard social response to the prospect of this mischief is the imposition of a fiduciary obligation.[129] That obligation is to forego any special personal benefit from the assets, except as may be approved after full disclosure. The fiduciary, who has obtained access to the property for the limited or defined purpose of pursuing association objectives, must not subvert or act inconsistently with that limited purpose. The obligation is strictly enforced.[130]

This view of fiduciary responsibility defines a specific test for fiduciary status. A proper test would capture, but not go beyond, the mischief to be regulated. Its range must therefore be defined by the range of the mischief. Accordingly, fiduciary status is imposed when a person has access to property for a defined or limited purpose.[131] If no limitation accompanies the access, the property is a gift. The critical matter is the determination of whether, and how, the access is limited. If the access is limited in some way, a fiduciary obligation arises and applies within a range that corresponds with that limited access. Thereafter, a breach only occurs if the fiduciary acts inconsistently with the defined limitation. This conforms with the standard doctrinal analysis of fiduciary breach. Agents, for example, are fiduciaries because of their limited or defined access. They carry this status at all times. Yet not every act, or even most acts, of the agent will raise a fiduciary issue. It is only when the agent ceases to pursue the defined purpose that liability will arise. The status itself only labels or identifies the relationship as one where the mischief is latent.[132] All of this has been explained in greater detail elsewhere.[133]

The assignment of fiduciary responsibility in the association context depends on how the members arrange their internal management structure. There are three different kinds of physical arrangements the members might adopt. They may retain management in their own hands, delegate ministerial

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[128] The "agency cost" terminology is not limited to the legal class of agent. It refers generally to any circumstance where one actor (the "agent") may act opportunistically towards another.

[129] See generally R. Flannigan, "The Fiduciary Obligation" (1989) 9 O.J.L.S. 285. See E. Brody, "Agents Without Principals: The Economic Convergence of the Nonprofit and For-Profit Organizational Forms" (1996) 40 N.Y.L. Sch. L.R. 457, for a critique of the view that the nondistribution constraint controls agency costs in nonprofit associations.

[130] See Flannigan, *supra* footnote 127 at 46-47.

[131] This is a general test, applying also for the purposes of undue influence and breach of confidence. See Flannigan, *supra* footnote 129 at 286-97.

[132] This status is again merely a proxy for the question that could be asked directly. The question is whether persons have acted inconsistently with the limited purpose for which they were granted access to the assets of another.

[133] See Flannigan, *supra* footnotes 127, 129.

control to a committee of members or assign complete control to the committee.[134] Each of these arrangements produces technically different liability assignments. In the first arrangement, the members do not appoint a management committee. Instead, they retain management of the undertaking in their own hands, acting directly and jointly in all circumstances. In this case, every member is a fiduciary. Each member has access to the common property and must be forbidden from turning that property away from association objectives to serve personal ends.[135] The fiduciary responsibility here is equivalent to that of partners or joint venturers. The absence of a profit motive in the association context provides no basis for dismissing this fiduciary constraint.

In the second arrangement, the members do appoint a committee but retain ultimate control over the affairs of the association. The functions of this committee are ministerial or managerial in nature. This is simply an agency relationship. The standard agency analysis would identify the members as principals and the committee members as their agents. Opportunism is a basic concern with agents and, consequently, as a matter of law, the agency relationship is deemed to be a fiduciary relationship. In this arrangement, however, the agent fiduciary status is redundant. Because the members as a group retained control, and the coincident power to act opportunistically, their status as fiduciaries to each other has not been affected by the delegation. Accordingly, in this arrangement, all of the members are again fiduciaries, with the committee members being fiduciaries in two capacities (co-principal and agent).

The third physical arrangement also involves the appointment of a committee. In this case, however, the members of the association divest themselves of the power to control the committee. The committee alone is exclusively responsible for the affairs of the association. This creates the equivalent of a trust relationship between the ordinary members and the committee members. When the standard control or principal analysis is applied to this arrangement, the committee members are identified as principals (rather than agents, as in the second arrangement). They are the persons who ultimately control the assets of the association and, as such, are principals. This leaves for consideration the nature of the status of the ordinary members. The circumstances here are that the committee members possess the power of principals, but subject to an obligation to pursue the undertaking for the benefit of the entire

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[134] The second arrangement appears to be the most common management structure. The first arrangement is likely too cumbersome where the association has more than a few members. The third arrangement denies general participation and this tends to be unattractive to members in many nonprofit undertakings. Moreover, while it may appear in some instances that full control has been placed exclusively with the committee, this may not be the case if the general membership has retained structural control powers such as the rights to elect or remove committee members.

[135] It will be appreciated that the members are entitled to benefit mutually as co-principals. The proscription is against serving one's self through the instrument of the common property.

membership.[136] This, by definition, is a trust relationship. As the beneficiaries of the trust, the ordinary members are owed a fiduciary obligation by the committee members. However, the ordinary members owe no duty themselves, having divested themselves of the access (the management power) that would have supported a fiduciary characterization. For this arrangement, then, only the committee members would, as a matter of status, be subject to the fiduciary duty to act selflessly.

It is clear enough that fiduciary analysis in the association context may proceed on the basis of traditional agency and trust characterizations. The question we may now address is whether it is possible or useful to regard either committee membership or ordinary membership as a distinct class of fiduciary status. The answer is that it appears to be possible in the former instance, and impossible in the latter. A committee member, it has been shown, will always be a fiduciary, whether as an agent or a trustee. While the fiduciary content of these two relationships is formally different, this presents no conceptual obstacle to the assignment of fiduciary obligation on a committee member class basis.[137] The general approach of the courts has been to identify a relationship as a fiduciary one and then do whatever was required to protect the integrity of that relationship. Nor will there be an excessive imposition of liability on committee members who have nothing to do with the breach. While every committee member will be a fiduciary, only those who actually breach their obligation will be held to account.

The argument for an "ordinary member" status obligation is less compelling. It is true that the members are fiduciaries as co-principals in two of the three arrangements. However, it is not possible to simply ignore the third arrangement. While not a common arrangement, it is one where the ordinary members will have no capacity, qua member, to act opportunistically. They are, in that instance, passive beneficiaries who have no access to association assets. The utility of a status characterization depends on its general validity and it would not be proper to impose a status that is not generally justified. The third arrangement, it would appear, can not be accommodated in the class proposition. The result is that the fiduciary responsibility of ordinary members should continue to be determined on the more specific basis of whether they are co-principals (subject to a fiduciary duty to each other) or, instead, the beneficiaries of a trust (who are *owed* a fiduciary duty by committee members).

The status characterizations we have discussed above have been recognized by individual judges and commentators. Unfortunately, it is not always clear whether the various observations comprehend the different physical arrangements that are

[136] They are beneficiaries of the trust unless, for example, they have otherwise irrevocably assigned the common property in trust for the purposes of the association. Were they to create a purpose trust, it would be invalid unless for a charitable purpose.

[137] See Flannigan, *supra* footnote 129 at 319-21.

possible.[138] There is, however, a general consensus that the relationship between committee members and ordinary members is a fiduciary one. In *Todd* v. *Emly*, Lord Abinger stated that "those gentlemen who are members of the committee are not in the nature of agents, to bind the club by their contracts [they had no authority]; but that they are trustees, having the management and administration of the funds of the club."[139] He later asked "what is it more than the case of a set of gentlemen being named as trustees to manage a fund?"[140] In *International Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers of America* v. *Becherer*, the New Jersey court stated that "[t]he property accumulated by the local union from contributions made by the individual members is a trust fund for the benefit of those members, and though the legal title to such property may be vested in officers of the local, such ownership is of a trust character for the use of the individual members".[141] In *National Bolt & Nut Corp.* v. *McDermott*, Stark J. was of the view that "all funds held by unincorporated associations are held for the benefit of all their individual members, are impressed with a trust to that extent and those entrusted with disbursing them are correspondingly trustees."[142] One commentator, who was suspicious of the technical correctness of the trustee characterization, nevertheless did not doubt that the position was a fiduciary one. According to Keeler, "[c]learly the position of the committee members as managers of the fund is a fiduciary one, the fiduciary character stemming from the fact that the committee members have the control of property that belongs (either at law or in equity) to other people."[143] With reference to Lord Abinger's remarks in *Todd* v. *Emly*, Keeler observed that "however loose his use of the word 'trustee', his appreciation of the fiduciary position of the committee members is manifest."[144] Other writers share the view that committee members are indeed fiduciaries.[145]

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[138] Consider the unqualified view of one writer that "[d]espite the scarcity of direct precedent, it seems plain that all union officers and employees have always been subject to the usual common-law fiduciary duties of an agent." See A. Cox, "Internal Affairs of Labour Unions Under the Labour Reform Act of 1959" (1959-60) 58 Mich. L.R. 819 at 827.

[139] (1841), 151 E.R. 832 at 835.

[140] *Ibid.*

[141] 61 A. 2d 16 at 20 (N.J. Ch. 1948). See also *Steinmiller* v. *McKeon*, 21 N.Y.S. 2d 621 (S.C. 1940); *Dusing* v. *Nuzzo*, 26 N.Y.S. 2d 345 (S.C. 1941).

[142] *Supra* footnote 16 at 204.

[143] J. Keeler, "Contractual Actions For Damages Against Unincorporated Bodies" (1971) 34 Mod. L.R. 615 at 619.

[144] *Ibid.* at 620. It is unclear why Keeler hesitated to characterize the relationship as a trust. He may have been troubled by the lack of "trust" terminology or a formal appointment of trustees. He might instead have been concerned with accommodating the more common agency arrangement. Or he may have worried that the trust would be characterized as a purpose trust. None of these, however, are significant concerns in a proper analysis.

[145] K.L. Fletcher, "Unincorporated Associations and Contract: The Development of Committee Liability and the Unresolved Issues" (1979-80) 11 U.Q.L.J. 53 at 68-9 ("Committee members as managers of association funds occupy a fiduciary position"); W.A. Lee, "Trusts and Trust-like Obligations With Respect to Unincorporated Associations", c. 10 in P.D. Finn (ed.), *Essays in Equity* (Brisbane: Law Book Company, 1985) at 179 ("it is both comprehensible and convenient to conclude that a trust arises" and "[a]t the very least there is a fiduciary obligation reposed in the officer with respect to those assets").

It has been questioned whether the trust relationship, in particular, is a satisfactory characterization of property-holding in the association context. The critique has been driven, it would seem, by a practical concern that gifts to associations may be invalidated as purpose trusts. It has been suggested that the property relation is best understood as a contractual arrangement amongst the members. The matter is addressed by others at length elsewhere.[146] It is sufficient for present purposes to observe that property contributed by members, and accretions to that property from third parties (gifts), is held either on a trust or agency basis for the benefit of the members.[147] Apart from that, the property-holding discussion is not particularly helpful because it has not been concerned with fiduciary questions. It will be appreciated, moreover, that fiduciary status ultimately does not depend on the nature of the legal form through which the property is held.

It would appear that the office of committee member may be characterized as a status fiduciary obligation, if that were thought to be a convenient analytical economy. It may be noted, in this regard, that the directors of business corporations are fiduciaries as a matter of status, a status originally derived from their role as agents. That same status transfer may be made here. It is also the case that directors of nonprofit corporations are status fiduciaries. There is nothing in the fact of incorporation that provides any additional justification for a status fiduciary obligation. Ultimately, of course, the matter will be resolved elsewhere. In the meanwhile, fiduciary obligation in the association context may properly be imposed as a matter of specific status, whether that is as co-principal, agent or trustee. Should even that be doubted, however, it will likely always be possible to establish that a fiduciary obligation arose on the facts. Whether it has or not will be determined by the test the courts use to identify fact-based fiduciary relationships. Currently there is a considerable measure of uncertainty over the nature of this test. Fortunately, however, we are not dealing here with a marginal circumstance. Whatever boundaries are eventually set for fiduciary status, committee membership will easily fit within them. It seems equally clear that members, who are not committee members, and who have divested themselves of principal status, will not be fiduciaries merely because of their membership status.

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[146] See Green, *supra* footnote 126; C.E.F. Rickett, "Unincorporated Associations and Their Dissolution" (1980) 39 Camb. L.J. 88; P. Matthews, "A Problem in the Construction of Gifts to Unincorporated Associations" [1995] Conveyancer 302.

[147] *Re Recher's Will Trusts,* [1971] 3 All E.R. 401 (Ch.); *Re Lipinski's Will Trusts*, [1977] 1 All E.R. 33 (Ch.); *Conservative and Unionist Central Office* v. *Burrell (Inspector of Taxes)*, [1982] 2 All E.R. 1 (C.A.); *News Group Newspapers Ltd. v. S.O.G.A.T.*, [1986] I.C.R. 716 (C.A.). It appears to be conceded in the cases that committee members may hold the contributions of the members on trust, just as they would if expressly appointed as trustees. A gift, it is then said (*Re Recher's Will Trusts, supra* at 408), "takes effect in favor of the existing members of the association as an accretion to the funds which are the subject-matter of the contract which such members have made inter se, and falls to be dealt with in precisely the same way as the funds which the members themselves have subscribed." This would appear to subject the gifted property to the same trust which covers the contributions of the members.

(b) *The Fiduciary Cases*

Reference has been made above to a number of judicial observations about the fiduciary nature of committee membership. All of the observations supported a fiduciary characterization. There are only two other decisions, apparently, which directly consider the issue.[148] One is an older American case, the other a modern Canadian judgment. Neither decision, upon examination, represents a serious challenge to the basic fiduciary analysis.

In *Lumbard* v. *Grant*, a member of a tennis club obtained in his own name a lease of the land upon which the club tennis courts were located.[149] He had joined in forming another tennis club and was intending to transfer the lease to the new club. The claim, essentially, was that he was in a fiduciary relationship with the original club members and that, consequently, they were entitled to the lease. The court refused to grant the relief requested. The critical observation made in the judgment was that the member "was not an officer of the plaintiff club, nor was he a partner with other members of the club."[150] Accordingly, the decision may be taken as authority for two propositions. The first is that ordinary members, as such, are not fiduciaries to other members (assuming they are not principals) and are therefore free to take for themselves opportunities related to the undertaking of the association. The second proposition, implied in the words of the court, is that committee members (officers) would be fiduciaries to the general membership. Both of these propositions, properly understood, are consistent with the opportunism analysis.

The one Canadian case is the decision of the Alberta Court of Appeal in *Evans* v. *Anderson*.[151] A private club had been established to organize golfing activities on a course owned by a construction company. The members of the club annually elected officers to serve two year terms as committee members. Two of these officers purchased the golf course property from the construction company and resold it for a profit to a new golf club. The majority of the court, in a curious analysis, refused to grant equitable relief to the other members of the club. Speaking for the majority, Clement J.A. asserted that:

> A fiduciary relationship arises upon the concurrence of two factors and the interaction between them. The first is the existence of an interest as a beneficiary in the subject-matter of the alleged trust, of such nature that it merits judicial protection. The second is an interference with that interest by an intervenor who owed the beneficiary a duty to support the interest. It is the conflict between the ascertained interest of the beneficiary and the act of self-interest by the intervenor in breach of his fiduciary duty that gives rise to a remedy in equity.[152]

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[148] See also *Barry* v. *Covich*, 124 N.E. 2d 921 (Mass. 1955).

[149] 71 N.Y.S. 459 (S.C. 1901).

[150] *Ibid.* at 460.

[151] (1977), 76 D.L.R. (3d) 482 (Alta. C.A.), leave to appeal to S.C.C. refused [1977] 1 S.C.R. vii..

[152] *Ibid.* at 506-507.

With respect, this is either meaningless, or a candid description of unconstrained judicial power. It simply begs the question to ask whether there is an interest "of such nature that it merits judicial protection." It is to beg the question a second time to then inquire whether there was an interference by a person "who owed the beneficiary a duty to support the interest. " No authority is cited for this general definition of fiduciary status, and none would appear to exist.

Clement, J.A. goes on to investigate the case law to determine whether the "opportunity" was a beneficial interest of the members which the courts would protect. The discussion of the cases quickly becomes confusing, however, because Justice Clement adopts a novel "trust *res*" terminology to refer inconsistently to the business opportunity itself and to, apparently, the scope of the relationship between the parties.[153] Ultimately, Justice Clement took the view that the opportunity to purchase the golf course was "outside the ambit of the activities for which the members were organized" and that the members had no "existing beneficial interest" in the opportunity.[154] The interest of the members was simply in "playing golf at an annual fee" and their arrangement "in no way contemplated or made financial provision for the acquisition of the property by and for the members at the large cost involved."[155] Having decided that no "trust *res*" had "been established", Justice Clement concluded that "no fiduciary relationship can arise in respect of the alleged subject-matter."[156]

Once the majority judgment is sorted out, it appears that the existence of a fiduciary obligation was denied on the ground that the opportunity to purchase the property was not within the scope of the relationship between the members. This, however, is not the proper approach to take to a business opportunity question. Normally, it is first established that the relationship is a fiduciary one. Only then is it determined, on the basis of an "expectancy", "line of business" or other test, whether the subject opportunity is an opportunity that may be taken without consent.[157] In the present case, this analytical approach would have resulted in liability for the two committee members. They were plainly fiduciaries with respect to the club function of organizing the golfing activity. Then, since the subject matter of the opportunity was the very property used for the main club function, it would be an opportunity the committee members ought not to have been able to exploit personally.

The majority failed to appreciate that any beneficial interest of the members in the opportunity is the consequence, rather than the source, of the fiduciary characterization. The "opportunity" is notionally assigned to the members *because* the committee members are fiduciaries.[158] The business opportunity itself, it must be understood, is not an asset which initially is relevant to the

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[153] *Ibid.* at 508, 510, 511.

[154] *Ibid.* at 512.

[155] *Ibid.*

[156] *Ibid.* at 513.

[157] See, for example, *Burg* v. *Horn*, 380 F. 2d 897 (2nd Cir. 1967).

[158] See Flannigan, *supra* footnote 127 at 55 (fn. 28).

fiduciary characterization issue. Fiduciary status is determined by whether an existing access to assets (eg. association property) is for a defined or limited purpose. If it is, fiduciary status arises, and the fiduciary is thereafter prohibited from taking up opportunities related to the subject matter of the defined access. The fiduciary is denied related "opportunities" in order to ensure that the existing undertaking (of the association) is not disserved or forsaken by reason of the prospect of personal gain. If fiduciaries were entitled to take up related opportunities, they might intentionally or unintentionally use their position to find ways for the association to reject opportunities that could subsequently be exploited personally. Or the fiduciary who took up a related opportunity might be less willing or less able, under the tensions of competing interests, to serve the association selflessly. None of this would be easily detected. The mischief is therefore avoided, at least formally, by the notional assignment of the opportunity to the association members. The intention, and effect, is to protect the existing assets to which the fiduciary has access. No undue burden is thereby shouldered by the fiduciary, for the opportunity may always be taken up if the fully informed consent of the other members is obtained.

In his dissenting judgment, Sinclair J.A. first asked whether the committee members were fiduciaries. He initially observed that there was no immunity from fiduciary obligation for volunteers and then concluded that the "mutual sharing of responsibilities" for organizing golf activities imposed a fiduciary obligation on the committee members.[159] While this is a somewhat limited analysis, it seems clear that the fiduciary characterization was correct. The committee members had undertaken to manage the club in the best interests of the members. This defined access could be compromised by the capacity to exploit related opportunities. Justice Sinclair went on to state that it was not necessary to delineate the precise scope of the duty of loyalty owed by the committee members. It was enough to say that "the duty encompassed a responsibility not to become deliberately involved in an activity that would, by destroying or changing the very nature of the club, operate to the detriment of its members in a fundamental way."[160] This having occurred, the committee members had breached their fiduciary obligation. Sinclair added that two other committee members who had knowingly participated in the breach were also liable.

The *Evans* case stands as a solitary authority against the proposition that committee members are fiduciaries as a matter of status. We have seen, however, that basic fiduciary analysis requires the assignment of fiduciary responsibility to a position of this description. There is also significant judicial support for this status and a consensus on the part of commentators that the fiduciary characterization is a correct one. The better view is that committee members, either by status or circumstance, owe a fiduciary obligation to the members of the association. Whether it is regarded as an agency or trust

[159] *Supra* footnote 151 at 502.

[160] *Ibid.* at 503.

classification dependent on the particular physical arrangement, or a distinct "committee member" classification, the obligation arises by reason of a status. Alternatively, an analysis of the circumstances of a particular committee will invariably result in the finding of a fact-based fiduciary obligation.

Conclusion

The liability structure of associations reflects our concerns with unconstrained risk-taking and opportunism. The contract and tort liability rules are intended to discipline our risk-taking, whether conducted directly or through intermediaries. We employ an agency analysis to identify all those who have determined the level of risk associated with the undertaking. These co-principals will be made to bear the consequences of the projection of their risk-taking. The fiduciary liability rule is intended to deter the opportunism of our associates and intermediaries. Those who have a limited access to our assets, as co-principals, agents or trustees, must forego any special personal gain from their position. For each of these rules, the ascription of liability is contextual and conventional. This set of rules locates the association liability structure somewhere between the partnership and corporation structures. All partners are liable for contract and tort obligations of the partnership and each partner is a status fiduciary to all others. Only members of associations who participate in management are liable in contract and tort and only committee members are status fiduciaries. Shareholders share in contract and tort liabilities only to the extent of their subscription and only directors and officers are subject to a status fiduciary obligation. These different sets of default rules, it will be appreciated, are all justified by the consistent application of the risk and opportunism regulation policies, given the assumptions and fictions involved in the case of each form.

A final observation may be made with respect to the contract and tort liability of association members. It is occasionally lamented that the liability of members in contract or tort to third parties is unfair. This charge, however, does not survive a careful analysis of these liability assignments. The fact that outcomes depend on the nature of particular physical arrangements is a virtue. While it may involve marginally greater intellectual labour, the sensitivity of the analysis allows for a more precise targeting of the liability assignment. Members are generally free from liability if they possess no powers of control. If, however, they participate in managing the affairs of the association, they are liable as co-principals for the breaches of duty the undertaking has generated. As between the members and the injured party, the relative fairness of initially placing the loss with those who determined the risk is plain. More generally, the fairness argument fails, as "fairness" arguments often do, for lack of an articulated justification. There is simply no convincing basis for shielding active members of nonprofit associations from default liability rules that apply generally to human endeavor. It may be that the perception of unfairness arises because only the active members are held liable. The active members do the

work for the benefit of all the members, yet carry the liability burden alone. This, however, provides no justification for relieving active members of their ordinary responsibilities (as principals) to third parties. Nor, ultimately, does it require that ordinary members share the liability burden. Passive ordinary members simply do not contribute to the risk of loss.