Case Comments
Commentaires d'arrêt

Unjust Enrichment – Restitution – Absence of Juristic Reason: *Campbell* v. *Campbell*

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I. *Introduction*

Twenty years ago, in *Pettkus* v. *Becker*,[1] Justice Dickson stated authoritatively that the cause of action in unjust enrichment consists of:

(i) an enrichment to the defendant,

(ii) a corresponding deprivation to the plaintiff, and

(iii) absence of any juristic reason for the defendant's enrichment.

Unfortunately, notwithstanding the Supreme Court of Canada's attempt at clarification, that action remains poorly understood.[2] Specifically, while difficulties occasionally arise with respect to the elements of enrichment and deprivation, judges and lawyers most frequently struggle with Dickson J.'s statement that restitutionary relief is premised upon proof of an "absence of any juristic reason for the enrichment." The Ontario Court of Appeal's recent decision in *Campbell* v. *Campbell*[3] provides an especially disturbing illustration of that proposition.

II. *Campbell* v. *Campbell*

Gordon Campbell operated a dairy farm for many years. Shortly before his death in 1977, he transferred his milk quota, which was essential to the business, to

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[1] *Pettkus* v. *Becker* (1980), 117 D.L.R. (3rd) 257 at 274 (S.C.C.).

[2] The cause of action in unjust enrichment invariably entails restitutionary relief – *i.e.* a remedy, in either personal or proprietary form, that requires the defendant to give back the enrichment that she received from the plaintiff. It must be distinguished from the concept of unjust enrichment by wrongdoing, which supports the remedy of disgorgement. In the latter situation, the plaintiff establishes a cause of action (*e.g.* breach of confidence, breach of fiduciary duty) *other* than unjust enrichment and compels the defendant to give up any gain that she received from someone (not necessarily the claimant) as a result of her wrongful behaviour: see *e.g. LAC Minerals Ltd.* v. *Intl. Corona Resources Ltd.* (1989), 61 D.L.R. (4th) 14 (S.C.C.); *Soulos* v. *Korkontzilas* (1997), 146 D.L.R. (4th) 214 (S.C.C.). Following *Campbell* v. *Campbell*, this comment will not address the issue of unjust enrichment by wrongdoing.

[3] (1999), 173 D.L.R. (4th) 270 (Ont. C.A.).

his sons, John and Robert, and drafted a will that left his land and equipment to his wife, Laura. After Gordon's death, his family maintained the business. John and Robert assumed responsibility for day-to-day operations; Laura consented to their use of her land and equipment, and provided bookkeeping and household services for them. Although each of the parties initially drew $500 per month from the farm account, Laura gave up her income in 1988 when she fell into poor health. John and Robert continued to receive a monthly draw after that time and also periodically withdrew larger sums for investment purposes.

In 1988, John and Robert recognized that the farm required modernization in order to remain economically viable. To that end, they used a portion of their investments to replace several pieces of equipment, to renovate an existing barn and to construct a new barn. The farm was operated in its improved state for three more years until Robert's death in 1991. At that point, John sold the milk quota to a third party and informed his mother that she consequently no longer would be able to sell milk to the marketing board. Shortly thereafter, he and Robert's executor brought an action against her for restitutionary relief under the cause of action in unjust enrichment.[4]

The trial judge agreed that the defendant was unjustly enriched by the retention of property that her sons had purchased or improved, and imposed liability in the amount of $151,200. In the course of his brief reasons, he found that the farm continued to enjoy enhanced value at the time of trial as a result of the expenditures. He further found that while Laura took no active part in the decision to upgrade operations, she "chose not to ... speak out against this modernization" despite the fact that "she had every opportunity to object to, or at least decline, the improvement being made to the farm."

The Ontario Court of Appeal rejected the trial judge's factual finding that the defendant had acquiesced in her sons' expenditures. To the contrary, the evidence unequivocally indicated that Laura: (i) was not of sound mind at the time when the farm property was improved, (ii) had neither requested, nor consented to, the expenditures, and (iii) in fact was "not agreeable" to her sons' plan to construct a new barn.[5] Indeed, John admitted at trial that he and his brother simply had chosen to ignore their mother's objections because "her mind was so screwy." Given its re-interpretation of the facts, the Court of Appeal also reversed the trial judge's decision to impose liability. Borins J.A., writing for the court, accepted for the sake of argument that the first and second elements of the cause of action in unjust enrichment had been established in so far as Laura had received an enrichment and her sons had suffered a corresponding

[4] The plaintiffs sought in the alternative a declaration that the farm assets were partnership property held equally between themselves and the defendant. That claim was dismissed at trial and was not pursued on appeal.

[5] Apparently, no evidence was adduced with respect to Laura's position regarding the acquisition of new equipment or the renovation of the old barn. The bulk of the claim in unjust enrichment, however, pertained to the expense incurred in constructing the new barn.

deprivation.[6] He nevertheless rejected the claim for restitution on the basis that the plaintiffs had not satisfied the third element – *i.e.* an absence of juristic reason for their mother's enrichment.

III. *Reasons for Reversing Enrichments*

The Court of Appeal undoubtedly reached the correct conclusion. Even if Laura enjoyed an enrichment corresponding to her sons' deprivation, restitutionary relief was not warranted. As Dickson J. stated in *Pettkus* v. *Becker*, "the common law has never been willing to compensate a plaintiff solely on the basis that his actions have benefited another. ... It must, in addition, be evident that the retention of the benefit would be 'unjust' in the circumstances of the case."[7] Consequently, to succeed under the cause of action in unjust enrichment, the plaintiffs in *Campbell* v. *Campbell* also had to establish a reason as to why the defendant's enrichment was "unjust" and hence reversible. While Canadian courts have not formally accepted such a scheme, the possible reasons, as distilled from the case law, are best considered under three categories: (i) impaired intention, (ii) unconscientiousness, and (iii) public policy.[8]

With respect to the first category, it is clear that John and Robert's intention to improve their mother's property was not impaired. Certainly, it was not *vitiated* in the sense of being induced by, say, compulsion or mistake.[9] John and Robert freely decided to incur the expenditures with full knowledge of the facts. Moreover, while their intention to confer an enrichment upon their mother may have been *qualified* in so far as they expected her to retain the benefit only if she

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[6] Later in his judgment, Justice Borins in fact doubted that John and Robert suffered any deprivation: *supra* note 3 at 283. His reason for doing so is somewhat unclear. He appears to suggest that it lies in the fact that the sons received a benefit from the expenditures to the extent that modernization increased the profits that they derived from the farm: at 284. That explanation, however, is unconvincing. As the Supreme Court of Canada has stated, the first and second elements of the cause of action in unjust enrichment involve a "straightforward economic approach": *Peter* v. *Beblow* (1993), 101 D.L.R. (4th) 621 at 645. The simple question is whether or not the defendant's economic enrichment arose as a result of the plaintiffs' economic deprivation: did John and Robert pay for the improvements to Laura's property? Considered in those terms, it may be that the lack of a corresponding deprivation was attributable to the fact that the farm account, from which money for the improvements was drawn, was held jointly by all three parties. If so, Borins J.A. may have concluded that Laura should not be held liable for benefits acquired in part with her own money. Unfortunately, the case report provides little information in that regard.

As discussed below (Section IV(d)), notwithstanding the receipt of an objective benefit, it also is doubtful that Laura was enriched in a legally relevant sense.

[7] *Supra* note 1 at 274.

[8] P. Birks & R. Chambers, *Restitution Research Resource 1997* (Oxford: Mansfield Press, 1997) at 2-3; P. Birks, "The Law of Restitution at the End of an Epoch" (1999) 28 U. of Western Australia L. Rev. 13 at 24-49.

[9] See *Knutson* v. *Bourkes Syndicate*, [1941] 3 D.L.R. 593 (S.C.C) (practical compulsion); *Air Canada* v. *Ontario (Liquor Control Board)* (1997), 148 D.L.R. (4th) 193 (S.C.C.) (mistaken payment).

allowed them to use her property for the purpose of operating a dairy farm, that expectation was met.[10] As Borins J.A. noted, Laura never objected to her sons' use of her land and equipment. Rather, it was John who, after his brother's death, sold the milk quota to a third party and brought the family business to an end.

Whereas the first category of unjust factor pertains to the integrity of the plaintiff's state of mind, the second pertains to the propriety of the defendant's conduct. Canadian courts frequently impose liability under the cause of action in unjust enrichment on the ground that the defendant *freely accepted* a benefit from the plaintiff, despite an opportunity to reject and despite knowledge that payment was expected. In such circumstances, having chosen to receive the benefit, the defendant cannot in good conscience refuse to pay for it.[11] While the trial judge in *Campbell* v. *Campbell* appeared to impose liability on that basis, the Court of Appeal properly held that the theory of free acceptance was inapplicable on the facts. There was no evidence to suggest that John and Robert, at the time of effecting the improvements,[12] expected to receive payment from their mother. Moreover, even if such an expectation did exist, the evidence indicated that Laura lacked the mental capacity required to exercise a choice between acceptance and rejection.

The third category of unjust factor reverses enrichments on the basis of overriding public policy considerations. As it has the potential to subsume all other grounds of relief and to provide judges with a virtually unfettered discretion, that category must be carefully confined to anomalous instances in which restitutionary relief clearly is justified regardless of the integrity of the plaintiff's intention or the propriety of the defendant's behaviour.[13] While the list of such situations remains somewhat unsettled and open-ended, the facts of *Campbell* v. *Campbell* certainly did not fall within an established class of public policy, nor did they demand recognition of a new one.

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[10] The concept of qualified intention traditionally was discussed under the label "failure of consideration": see *Palachik* v. *Kiss* (1983), 146 D.L.R. (3rd) 385 (S.C.C.). It is preferable to avoid terminology that misleadingly suggests a contractual analysis.

[11] See *Pettkus* v. *Becker*, *supra* note 1; *Sorochan* v. *Sorochan* (1986), 29 D.L.R. (4th) 1 (S.C.C.). Interestingly, while the concept of free acceptance plays a central role in the Canadian law of unjust enrichment, it has been subject to sustained academic criticism and seems unlikely to gain similar status in English law: M. McInnes, "Reflections on the Canadian Law of Unjust Enrichment: Lessons from Abroad" (1999) 78 Can. Bar Rev. 414 at 426-31.

[12] It is irrelevant that John and Robert subsequently may have formed the intention to be paid. Restitutionary relief is justified under the theory of free acceptance on the ground that the defendant initially chose to receive services from the plaintiff knowing that he expected payment; having received the benefit, she cannot in good conscience withhold remuneration. The situation is different, however, if she believed that the services were offered gratuitously; she is not obliged by conscience to pay for a benefit that she cannot return *in specie* and that she received as a gift.

[13] See *Matheson* v. *Smiley*, [1932] 2 D.L.R. 737 (Man. C.A.) (encouragement of necessitous intervention); *Air Canada* v. *British Columbia* (1989), 59 D.L.R. (4th) 161 *per* Wilson J. (S.C.C); *Woolwich Equitable Building Society* v. *Commissioners of Inland Revenue*, [1993] A.C. 70 (H.L.) (recovery of money paid under *ultra vires* taxing legislation).

IV. *Critique of Campbell* v. *Campbell*

Campbell v. *Campbell* ought to have been an easy case. As the preceding section suggests, the claim should have been rejected for the simple reason that the plaintiffs failed to establish any justification for reversing the defendant's alleged benefit. Unfortunately, however, while the Court of Appeal ultimately arrived at the correct conclusion, its interpretation of the third element of the cause of action in unjust enrichment is flawed in four respects.

(a) *Absence of Juristic Reason – Defences*

The Court of Appeal's first error lies in its (perhaps unintentional[14]) suggestion that the relevant inquiry under the third element of the cause of action in unjust enrichment pertains to reasons *for not awarding* restitution, rather than to reasons *for awarding* such relief. Justice Borins quoted approvingly from an article in which Professor Litman argued that the plaintiff's proof of an enrichment and a corresponding deprivation raises a *prima facie* case and shifts the burden onto the defendant to justify her retention of the benefit.[15] Litman based that proposition in part on a passage in *Goff & Jones* that lists six possible reasons for denying liability in unjust enrichment:[16]

(i) the plaintiff conferred the benefit as a valid gift or in pursuance of a valid common law, equitable or statutory obligation which he owed to the defendant;

(ii) the plaintiff submitted to, or compromised, the defendant's honest claim;

(iii) the plaintiff conferred the benefit while performing an obligation which he owed to a third party or otherwise while acting voluntarily in his own self interest;

(iv) the plaintiff acted officiously in conferring the benefit;

(v) the defendant cannot be restored to his original position or is a *bona fide* purchaser;

(vi) public policy considerations preclude restitution.

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[14] As will be seen, the general tenor of the Court's analysis is inconsistent with the suggestion that the third element of the cause of action in unjust enrichment pertains to reasons for *not awarding* restitution.

[15] M.M. Litman, "The Emergence of Unjust Enrichment as a Cause of Action and the Remedy of Constructive Trust" (1988) 26 Alta. L. Rev. 407 at 431-37.

[16] Sir Robert Goff & G. Jones, *The Law of Restitution* (2nd ed.) (London: Sweet & Maxwell, 1978) at 24. See now G. Jones, *Goff & Jones: The Law of Restitution* (5th ed.) (London: Sweet Maxwell, 1998) at 46-47.

Although there is some precedent for Litman's view,[17] it should not be followed. *Goff & Jones* does not support the proposition that, unless the defendant establishes a justification for her retention of the benefit, restitution is available upon mere proof of an enrichment and a corresponding deprivation. To the contrary, that text forcefully argues that relief is available only if the plaintiff additionally proves that the benefit was conferred upon the defendant as a result of an unjust factor "such as mistake, compulsion or necessity."[18] Moreover, possible justifications for the defendant's enrichment become relevant only at a subsequent stage of analysis. Properly interpreted, the list upon which Litman relied pertains not so much[19] to the constituent elements of the plaintiff's three-part cause of action, but rather to defences that the recipient of an enrichment may invoke in order to defeat a true *prima facie* claim. For example, if, contrary to the evidence, the plaintiffs in *Campbell* v. *Campbell* satisfied the court that the defendant freely accepted their expenditures with knowledge that they expected reimbursement, she still might have been able to avoid liability by showing that her sons acted out of self-interest[20] or that they acted officiously by improving her property despite her objections.[21]

The Canadian action in unjust enrichment reflects the approach advocated in *Goff & Jones*. Confusion occasionally arises on that point[22] because of Justice Dickson's infelicitous choice of terminology in *Pettkus* v. *Becker*. To ask of "an absence of any juristic reason for the enrichment" may seem to point the judicial inquiry toward reasons for denying, rather awarding, restitutionary relief. Consequently, it is understandable that the phrase might be misinterpreted as essentially referring to defences. However, as Dickson J. clearly indicated, his intention in formulating the action in unjust enrichment was not to create a new head of liability, but rather to succinctly restate "general principles ... that

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[17] For example, McLachlin J.'s judgment in *Peter* v. *Beblow*, upon which Borins J.A. relied, focussed on reasons for denying restitution (such as moral obligation), rather than positive reasons for awarding relief (such as free acceptance): *supra* note 6 at 644-45 (S.C.C.). See also *Murray* v. *Roty* (1983), 147 D.L.R. (3rd) 438 (Ont. C.A.); *Duncan* v. *Duncan* (1987), 78 A.R. 171 (Alta. Q.B.).

[18] Goff & Jones, (2nd ed.) *supra* note 16 at 24. The position is even clearer in more recent editions: Jones, *Goff & Jones* (5th ed.) *supra* note 16 at 41-46.

[19] The qualification is necessary to the extent that defences to an claim in unjust enrichment often negate liability by rebutting *prima facie* proof of one of the three elements of the cause of action: *infra* at note 53.

[20] Just as relief is denied to the person who, while removing water from his own land, incidentally drains his neighbour's quarry (*Ulmer* v. *Farnsworth* 15 A. 65 (1888 Me S.J.C.)), so too relief might have been denied if John and Robert improved their mother's property because they hoped to receive greater profits from a modernized dairy operation: *Ruabon Steamship Co.* v. *The London Assurance Co.*, [1900] A.C. 6 at 12 (H.L.).

[21] *Cf.* P. Birks, "In Defence of Free Acceptance" in A. Burrows (ed.) (Oxford: Clarendon Press, 1991) 105; A. Burrows, *The Law of Restitution* (London: Butterworths, 1993) 316.

[22] See J. Beatson, "Restitution in Canada: A Commentary" in *Restitution: Past, Present & Future* W. Cornish, *et al.*, eds., (Oxford: Hart Publishing, 1998) 297 at 298.

have been fashioned by the Courts for centuries."[23] And, as he undoubtedly was aware, in contrast to the civil law doctrine of unjustified enrichment, which does impose a burden upon the defendant to justify her retention of an enrichment,[24] the common law claim traditionally required the plaintiff to justify the imposition of liability by reference to a specific unjust factor.[25] That approach was followed in *Pettkus* v. *Becker* itself; Dickson J. permitted recovery only because the plaintiff proved that the defendant freely accepted her services. Subsequent decisions from the Supreme Court of Canada consistently have adopted the same approach.[26]

(b) *Absence of Juristic Reason – Subjective Justice*

The Court of Appeal's second error in *Campbell* v. *Campbell* lies in its suggestion that the third element of the action in unjust enrichment largely involves an *ad hoc* determination as to "whether it would be just and fair to the parties, considering all of the relevant circumstances, to permit the recipient of the benefit to retain it without compensation."[27] In support of that proposition, Borins J.A. again relied upon Litman.

> In formulating juristic justification, the primary focus of the courts should be the narrow question of fairness between the parties. Courts should consider whether, having regard to the particular circumstances giving rise to an enrichment and to subsequent events, it is fair for the defendant to retain the enrichment.[28]

Nothing could be worse. Unjust enrichment long struggled for acceptance precisely because it commonly was believed to require individual assessments

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[23] *Supra* note 1 at 274.

[24] In *Cie Immobilière Viger Ltée.* v. *Lauréat Giguère Inc.*, on which Dickson J. sat four years prior to *Pettkus* v. *Becker*, Beetz J. explained that "[i]t is ... for the enriched party to find a legal justification for its enrichment" under the civil law doctrine: [1977] 2 S.C.R. 67 at 79. See further L.D. Smith, "The Province of the Law of Restitution" (1992) 71 Can. Bar Rev. 673 at 677; McInnes, *supra* note 11 at 420-21.

[25] Thus, in the leading case of *Moses* v. *Macferlan*, Lord Mansfield stated that the ancient action for money had and received (which underlies much of the modern law of unjust enrichment) "lies for money paid by mistake; or upon a consideration which happens to fail; or for money got through imposition, (express or implied) or extortion; or oppression; or an undue advantage taken of the plaintiff's situation": (1760), 97 E.R. 676 at 681 (K.B.). See also *Deglman* v. *Guaranty Trust Co.*, [1954] 3 D.L.R. 785 (S.C.C.) (free acceptance/qualified intention); *County of Carleton* v. *City of Ottawa* (1965), 52 D.L.R. (3rd) 220 (S.C.C.) (mistake); *Storthoaks* v. *Mobil Oil Canada Ltd.* (1975), 55 D.L.R. (3rd) 1 (S.C.C.) (mistake).

[26] See *e.g. Nepean Hydro Electric Commission* v. *Ontario Hydro* (1982), 132 D.L.R. (3rd) 193 (S.C.C.) (mistake); *Sorochan* v. *Sorochan*, *supra* note 11 (free acceptance); *Air Canada* v. *British Columbia*, *supra* note 13 (mistake *per* LaForest J., *ultra vires* demand *per* Wilson J.); *Air Canada* v. *Ontario (Liquor Control Board)*, *supra* note 9 (mistake). See further L.D. Smith, "The Mystery of Juristic Reason" (2000) 12 Supreme Court L. Rev. 211.

[27] *Supra* note 3 at 281.

[28] Litman, *supra* note 15 at 451.

of "justice."[29] And indeed, if that perception was accurate, the action should have been abolished altogether. "Justice" *per se* is an unacceptable criterion for determining liability for the simple reason that its meaning is apt to differ from one person to the next.[30] On a theoretical level, a system of rights and liabilities that turns on judicial discretion is difficult to reconcile with the rule of law. On a substantive level, it is intolerable to impose restitutionary relief, perhaps thereby redistributing property through the mechanism of a constructive or resulting trust, wholly or substantially on the basis of a judge's subjective view of "fairness." And on a practical level, it is inexcusable to require litigants to proceed fully through the court system in order to learn whether or not "justice" is thought to demand liability on the particular facts of their case.

Fortunately, the availability of restitution is not truly dependent upon judicial discretion. Indeed, the cause of action in unjust enrichment has emerged in recent years largely because traditional fears of "palm tree justice" have been assuaged by academic proof that, notwithstanding the uncertainty apparently inherent in the term "unjust," liability actually responds to specific criteria.[31] Accordingly, in deciding whether or not an enrichment that a defendant received from a plaintiff is "unjust," in the sense of being reversible, Canadian courts generally rely not on moral intuition, but rather on discrete factual elements which, as a matter of precedent, have been recognized as warranting relief.

Of course, that is not to say that moral precepts are irrelevant to the law of unjust enrichment. Their role, however, properly is confined to the development of the categories of recovery, rather than to the resolution of individual disputes. For example, the general proposition that relief is available for mistaken payments means that it has been decided, at a certain level of abstraction and as a basic matter of fairness, that payments generated by vitiated intention *prima facie* are reversible. It does not mean that when presented with a particular case of mistaken payment, a judge simply enjoys the option of imposing liability if her subjective assessment

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[29] See *Pettkus* v. *Becker*, *supra* note 1 at 260-62 *per* Martland J. ("[The] doctrine of unjust enrichment ... is somewhat nebulous. ... It would clothe Judges with a very wide power to apply what has been described as 'palm tree justice' without the benefit of any guidelines. By what test is a Judge to determine what constitutes an unjust enrichment? The only test would be his individual perception of what he considers unjust."); *Baylis* v. *Bishop of London*, [1913] 1 Ch. 127 at 140 *per* Hamilton L.J. ("[T]o ask what course would be *ex æquo et bono* to both sides never was a very precise guide."); *Holt* v. *Markham*, [1923] 1 K.B. 504 at 513 *per* Scrutton L.J. ("[T]he whole history of this form of action has been what I may call a history of well-meaning sloppiness of thought.").

[30] On the inherent subjectivity of judging, see *R.* v. *R.D.S.* (1997), 151 D.L.R. (4th) 193 (S.C.C.).

[31] See especially American Law Institute, *Restatement of the Law of Restitution: Quasi-Contracts and Constructive Trusts* (St. Paul, Minn.: American Law Institute Publishers, 1937); R. Goff & G. Jones, *The Law of Restitution* (1st ed.) (London: Sweet & Maxwell, 1966); P. Birks, *An Introduction to the Law of Restitution* (Oxford: Clarendon, 1985).

of the circumstances favours such a result.[32] Thus, while Justice McLachlin has conceded that the courts may consider "the balance of equities between the parties" when determining the scope of governing principles,[33] she also emphatically has rejected the proposition that "recovery can be awarded on the basis of justice and fairness alone,"[34] and has cautioned against the "tendency ... to view the action for unjust enrichment as a device for doing whatever may seem fair between the parties."[35]

(c) *Absence of Juristic Reason – Legitimate Expectations*

Notwithstanding its belief that liability in unjust enrichment involves a subjective assessment of fairness, the Court of Appeal in *Campbell* v. *Campbell* also invoked two other criteria: (i) the reasonable expectations of the parties, and (ii) a relationship of bilaterality. Both are problematic.

As to the former, Borins J.A. echoed McLachlin J.[36] in holding that "at the heart of the third requirement [of the action in unjust enrichment] is the reasonable expectations of the parties."[37] That statement is either trivially true or untenably broad. Granted, the reasons for reversing enrichments invariably fulfil the parties' reasonable expectations in so far as those expectations are engendered by the law of unjust enrichment. Because the availability of restitution turns on a stable catalogue of unjust factors, rather than on subjective assessments of justice, litigants legitimately can assume that relief presumptively will follow if a judge determines that their case falls within a recognized category of recovery. There is, however, little analytical purchase in that observation. While it describes the law of unjust enrichment at a structural level, it says nothing meaningful about the precise reasons for imposing liability. It certainly does not identify the parties' reasonable expectation as the factual element to which restitutionary relief responds.

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[32] "The recovery of money in restitution is not, as a general rule, a matter of discretion for the court. A claim to recover money at common law is made as a matter of right; and even though the underlying principle of recovery is the principle of unjust enrichment, nevertheless, where recovery is denied, it is denied on the basis of legal principle": *Lipkin Gorman (a firm)* v. *Karpnale Ltd.*, [1991] 2 A.C. 548 at 578 *per* Lord Goff (H.L.).

[33] *Peel (Regional Municipality)* v. *Canada* (1992), 98 D.L.R. (4th) 140 at 164 (S.C.C.). For example, the Supreme Court of Canada expanded the scope of relief for mistaken payments to include not only mistake of fact, but also mistake of law, largely because justice demands recovery regardless of the nature of the plaintiff's error: *Air Canada* v. *British Columbia* (1989), 59 D.L.R. (4th) 161 (S.C.C.); *Canadian Pacific Airlines Ltd.* v. *British Columbia* (1989), 59 D.L.R. (4th) 219 (S.C.C.).

[34] *Peel (Regional Municipality)* v. *Canada*, *ibid.* at 164.

[35] *Peter* v. *Beblow*, *supra* note 6 at 643-44.

[36] *Ibid.* at 645 ("In every case, the fundamental concern is with the legitimate expectation of the parties").

[37] *Campbell* v. *Campbell*, *supra* note 3 at 281.

Borins J.A. did not confine himself to the trivial truth discussed above. Rather, it seems quite clear that he intended to stake the substantive position that the factual element to which restitutionary relief invariably responds indeed is the parties' reasonable expectation. Interpreted in that manner, however, his statement is far too broad. True, the unjust factor of free acceptance, as formulated in *Pettkus* v. *Becker*,[38] does turn on the fact that the defendant knowingly received a benefit for which she knew that the plaintiff expected payment. Moreover, in such circumstances, it may be appropriate to say that the imposition of liability is triggered by the fact that the parties were joined by a reasonable expectation that payment would occur. However, the same cannot be said with respect to other unjust factors. For example, in the paradigm case of a mistaken transfer of money, the plaintiff by definition does not expect, at the operative moment of enrichment,[39] to receive anything in return for his action. Likewise, the defendant may be held liable even though she received the money in the honest belief that she was entitled to retain it without recompense.[40] Accordingly, in that type of case, the specific factual event to which restitution responds has nothing to do with the parties' reasonable expectation. Rather, relief is available simply because the plaintiff's intention in conferring the benefit upon the defendant was impaired. It is sufficient for him to say to her, "I didn't really mean to do it"; he need not say, "I expected reimbursement and you knew it."

(d) *Absence of Juristic Reason – Bilateral Relationship*

The Court of Appeal's final error in *Campbell* v. *Campbell* lies in Justice Borins' statement that because "liabilities are not to be forced upon people without their consent, and without their knowledge," the law of unjust enrichment "refuses recovery in cases where the benefits conferred are unrequested."[41] Taken at face value, that assertion is untenable. It simply is not true that the law of unjust enrichment invariably refuses recovery of unrequested benefits. As explained in the preceding section, the plaintiff need not necessarily prove that the defendant freely accepted a benefit; *a fortiori*, he need not necessarily prove

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[38] *Supra* note 1 at 275:

"[W]here one person in a relationship tantamount to spousal prejudices herself in the reasonable expectation of receiving an interest in property and the other person in the relationship freely accepts benefits conferred by the first person in circumstances where he knows or ought to have known of that reasonable expectation, it would be unjust to allow the recipient of the benefit to retain it."

[39] While the point cannot be pursued in this brief note, it is clear that in such circumstances, a cause of action in unjust enrichment arises immediately upon the defendant's receipt; the plaintiff's right to recovery is not postponed until, say, the defendant becomes aware of her receipt or wrongfully refuses to make restitution: M. McInnes, "Unjust Enrichment: A Reply to Professor Weinrib" [2001] Restitution L. Rev. (forthcoming).

[40] *Air Canada* v. *Ontario (Liquor Control Board)*, *supra* note 9.

[41] *Supra* note 3 at 282-83.

that she requested it. It is obvious, for example, that the recipient of a mistaken transfer of money cannot avoid liability on the simple basis that she never asked to receive the payment. Canadian courts quite rightly have recognized that the reason for restitution in such circumstances lies in the plaintiff's impaired intention; the availability of relief is not premised upon proof that the defendant requested the benefit or otherwise was complicit in the operative error.[42]

Given that a literal interpretation of his statement is wholly indefensible, Borins J.A. presumably intended to subscribe to a less extreme position. That possibility finds support in the fact that Professor Drassinower,[43] upon whom he relied, draws a distinction between monetary and non-monetary benefits: while a mistaken payment of money is recoverable regardless of request, restitution lies with respect to services only if the defendant was privy to the plaintiff's non-donative intent. Justice Borins likely intended to confine his comment to the latter proposition. However, it too is unsustainable.

Drassinower argues that the law of unjust enrichment is based on relationships of mutual autonomy. A person is entitled to retain what is his until he freely parts with it, but as a matter of integrity, he must extend the same right to others. Moreover, the justifications for reversing enrichments must be bilateral, rather than unilateral, in the sense that they must implicate both parties. Thus, the mere fact that the plaintiff conferred a benefit without a donative intent may explain why he seeks recovery, but it cannot explain why the defendant should be held liable. Respect for the recipient's autonomy requires that she bear responsibility only if she effectively exercised a choice to retain the enrichment despite knowledge that recompense was required.

> The law of unjust enrichment construes the absence of donative intent not unilaterally, as a subjective matter taking place in the plaintiff's head, but rather bilaterally, as an intersubjective matter taking place between the plaintiff and the defendant. Forcing the defendant to disgorge the benefit received in the absence of this bilaterality would amount to granting the plaintiff the privilege of unilaterally constructing another's obligation.[44]

According to Drassinower then, restitution invariably presumes bilaterality. The implications of that requirement, however, are said to differ according to

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[42] Although earlier cases held the recipient of a mistaken payment liable only if she was "in some way party to the mistake, either as inducing it, or as responsible for it, or connected with it" (*Royal Bank.* v. *The King*, [1931] 2 W.W.R. 709 at 713 (Man. Q.B.)), recent decisions properly have rejected such a requirement and merely have required proof that the plaintiff's intention was vitiated by error: *Central Guaranty Trust Co.* v. *Dixdale Mortgage Investment Corp.* (1994), 121 D.L.R. (4th) 53 at 65 (Ont. C.A.).

[43] A. Drassinower, "Unrequested Benefits in the Law of Unjust Enrichment" (1998) 48 U.T.L.J. 459. Drassinower's thesis, in turn, is based closely on Professor Weinrib's theory of unjust enrichment: E.J. Weinrib, *The Idea of Private Law* (Cambridge, Mass.: Harvard Univ. Press, 1995); E.J. Weinrib, "The Gains and Losses of Corrective Justice" (1994) 44 Duke L.J. 277. Weinrib's theory is critiqued in McInnes "Unjust Enrichment: A Reply to Professor Weinrib," *supra* note 39.

[44] Drassinower, *ibid.* at 460, quoted by Borins J.A. in *Campbell* v. *Campbell*, *supra* note 3 at 282.

whether a dispute involves money on the one hand or services on the other. Because money is fungible, liability can be reconciled with the recipient's autonomy interest even if she neither requested nor freely accepted the benefit, and indeed even if she initially was unaware of its receipt. Regardless of prior knowledge, when she eventually learns of her enrichment, she enjoys the option of retaining or returning it. It is irrelevant that she no longer may possess the exact same coins and notes that she received from the plaintiff because, given the nature of money, others effectively can be provided in substitution.[45] The situation is different, however, in the case of services. Services are not fungible and they cannot be returned *in specie*. For that reason, unless the recipient is implicated at the outset, she never enjoys the freedom to decide whether or not she wishes to retain the benefit. As Baron Pollock said, "One cleans another's shoes; what can the other do but put them on?"[46] Accordingly, given the insistence upon bilaterality, Drassinower, and hence Borins J.A., claim that services cannot support a right to restitution in the absence of a request or free acceptance.

That claim is incorrect. Liability undoubtedly may be imposed with respect to services even if the defendant was not implicated in their initial receipt. In the leading case of *County of Carleton* v. *City of Ottawa*,[47] the plaintiff cared for an indigent woman by both spending money and providing services. It acted in the mistaken belief that it statutorily was obliged to do so; responsibility for the woman actually fell upon the defendant. In upholding a claim in unjust enrichment, the Supreme Court of Canada drew no distinction between the different forms of enrichment and was not deterred by the fact that the defendant had neither requested nor freely accepted the plaintiff's services. Similarly, in *Matheson* v. *Smiley*,[48] the plaintiff physician was awarded remuneration for his efforts even though the defendant patient, who had attempted suicide by shotgun blast, lacked the mental capacity to request or freely accept services. Other cases are to the same effect.[49] It therefore is clear that the grounds for relief are not limited by the nature of the enrichment. More specifically, in principle,

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[45] Moreover, as Drassinower agrees, the recipient's autonomy interest is further protected by the change of position defence. She is relieved of responsibility to restore the money to the extent that she in good faith incurred an exceptional expenditure in reliance upon her receipt: *infra* at note 53.

[46] (1856), 25 L.J. Ex. 329 at 332.

[47] *Supra* note 25.

[48] *Supra* note 13.

[49] See *Jenkins* v. *Tucker* (1788), 1 H. Bl. 90, 126 E.R. 55 (C.P.) (woman's funeral expenses incurred on husband's behalf in his absence); *Greenwood* v. *Bennett*, [1973] Q.B. 195 *per* Lord Denning M.R. (C.A.) (plaintiff improving vehicle in mistaken belief of ownership). Admittedly, there are decisions suggesting that restitution can be awarded for services only if the parties shared a pre-existing relationship capable of supporting a request or free acceptance: see *Nicholson* v. *St. Denis* (1975), 57 D.L.R. (3rd) 699 (Ont. C.A.); *Gidney* v. *Shank*, [1996] 2 W.W.R. 383 (Man. C.A.). For the reasons discussed, however, those decisions are unpersuasive.

there is nothing inherent in the nature of services that demands the defendant's participation in the reason for restitution.[50] As explained below, once the difficult issue of enrichment has been satisfied, the value of both money and services properly are recoverable under any of the three categories of unjust factors.

Although Justice Borins' and Professor Drassinower's assertion to the contrary is wrong, it does properly highlight the need within the law of unjust enrichment to protect the defendant's autonomy. That need generally is fulfilled, however, at the first, rather than the third, stage of analysis; the recipient's freedom of choice primarily involves a matter of enrichment, rather than injustice. Given the focus of this paper, that issue can be addressed only briefly.

The first element of the cause of action in unjust enrichment is not satisfied by mere proof that the defendant received an objective benefit. Precisely because the common law is concerned to protect freedom of choice,[51] the recipient of a benefit *prima facie* is entitled to plead *subjective devaluation*[52] – *i.e.* to argue that regardless of the fact that the purported enrichment holds market value, she personally did not, and need not, value it as something worthy of expenditure.[53] To succeed, the plaintiff must

[50] The results otherwise would be indefensible. Consider two situations. In the first, the plaintiff pays $5000 to the defendant. In the second, the plaintiff effects repairs worth $5000 to a car belonging to the defendant, who subsequently sells the vehicle in its improved state and thereby realizes a profit in that amount. In both cases, the plaintiff acted in mistake; in neither case did the defendant request or freely accept the benefit. There is no justification for allowing relief with respect to the payment of money but not with respect to the provision of services.

[51] See *Falke* v. *Scottish Imperial Insurance Co.* (1886), 34 Ch. D. 234 at 248 (C.A.) ("liabilities are not to be forced on people behind their backs any more than you can confer a benefit upon a man against his will").

[52] See *Gidney* v *Shank*, [1995] 5 W.W.R. 385 at 400 (Man. Q.B.); *Olchowy* v. *McKay*, [1996] 1 W.W.R. 36 at 46 (Sask. Q.B.); Birks, *An Introduction to the Law of Restitution*, *supra* note 31 at 109-17.

[53] The recipient's freedom of choice also is protected by the defence of change of position. The defendant to a *prima facie* claim in unjust enrichment is relieved of liability to the extent that she incurred an exceptional expenditure in reliance upon her receipt prior to learning of the plaintiff's claim: *Storthoaks (Rural Municipality)* v. *Mobil Oil Canada*, *supra* note 25. While Drassinower suggests that change of position pertains to the element of injustice, the better view is that it pertains to the element of enrichment: P. Birks, "Change of Position: The Nature of the Defence and its Relationship to Other Restitutionary Defences" in M. McInnes (ed.) *Restitution: Developments in Unjust Enrichment* (North Ryde, N.S.W.: Law Book Company, 1996) c. 3. Suppose, for example, that in the honest belief that she was entitled to retain a mistaken payment of $5000, the defendant spent that amount on a trip to Tahiti that she otherwise would not have taken. She will not be held liable to the plaintiff because, given the doctrine of subjective devaluation, she was not *legally* enriched. She is entitled to argue that while she enjoyed a holiday objectively valued at $5000, her decision to incur that expense was impaired by her belief that she was entitled to retain the plaintiff's payment. She therefore never freely chose to spend her own money on the vacation.

overcome that hurdle. That task easily is achieved in a case involving money for the simple reason that "[m]oney has the peculiar character of a universal medium of exchange."[54] It cannot be subjectively devalued because it is the very means by which the law recognizes value. Consequently, there never is any need for the plaintiff actually to show that the recipient believed herself to be enriched by the receipt of money – the law irrebuttably presumes that fact on his behalf.

The situation with services is different. Because they possess no inherent value, the law requires the claimant positively to prove his case. Exceptionally, he may be able to do so without implicating the recipient in the events that resulted in the benefit being conferred.[55] If so, he clearly is entitled to demonstrate the reversibility of the enrichment under any of the three categories of unjust factor: impaired intention, unconscientiousness or public policy.[56] Typically, however, the plaintiff must overcome the defendant's subjective devaluation by showing that she accepted his services with knowledge that he expected payment and thereby sufficiently exercised her freedom of choice. But significantly, even if he does so, he need not invoke the same evidence at the third stage of analysis. In principle, he remains free to rely upon any category of unjust factor. It is only because claimants are not inclined to complicate matters unnecessarily that they do tend to use free acceptance to prove injustice if they already have used it to prove enrichment. That practical tendency perhaps explains why Borins J.A. and Drassinower mistakenly believe that restitution for services invariably presumes the recipient's involvement in the initial receipt of the enrichment.

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[54] *BP Exploration Co. (Libya) Ltd.* v. *Hunt (No. 2)*, [1979] 1 W.L.R. 783 at 799 *per* Goff J. (Q.B.).

[55] Although the defendants in *County of Carleton* v. *City of Ottawa* (*supra* note 25) and *Matheson* v. *Smiley* (*supra* note 13) neither requested nor freely accepted the plaintiffs' services, they were legally enriched on the basis that they received *incontrovertible benefits*. An incontrovertible benefit is one which no reasonable person can dispute; it overcomes the doctrine of subjective devaluation by preempting the recipient's argument that she did not choose to place value on the claimant's services: *Peel (Regional Municipality)* v. *Canada*, *supra* note 33. Thus, the City of Ottawa undeniably was enriched in so far as its statutory obligation to care for the indigent woman was discharged, and Mr. Smiley undeniably was enriched in so far as he received medical attention for a shotgun wound.

Interestingly, although the market value of Laura's property was enhanced by her sons' services in *Campbell* v. *Campbell*, she probably was not legally enriched. While the matter remains somewhat underdeveloped, the common law, for fear of attaching liability to land, generally has been unwilling to characterize improvements to such property as incontrovertible benefits: M. McInnes, "Incontrovertible Benefits in the Supreme Court of Canada" (1994) 23 Can. Busi. L.J. 122.

[56] Thus, the unjust factor was mistake (a species of impaired intention) in *County of Carleton* v. *City of Ottawa*, *supra* note 25 and either moral compulsion (a species of impaired intention) or encouragement of rescue (a species of public policy) in *Matheson* v. *Smiley*, *supra* note 13.

V. *Conclusion*

Campbell v. *Campbell* vividly illustrates the proposition that Canadian courts experience difficulties with the third element of the cause of action in unjust enrichment. Contrary to the Court of Appeal's judgment, the requirement of "an absence of any juristic reason for the enrichment": (i) pertains to positive reasons for reversing enrichments, rather than to negative reasons for refusing relief, (ii) does not permit judges to impose or withhold liability on the basis of subjective assessments of fairness, (iii) does not invariably rely upon the parties' reasonable expectations, and (iv) is not invariably premised upon a relationship of bilaterality.

Responsibility without fault: Bazley v. Curry.

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Vicarious liability- an employer's liability for the torts of its employee- involves (in both definition and application) a balance of sorts between two fairnesses: fairness to the innocent third party who has suffered a loss, and fairness to the faultless employer, who should not be unfairly burdened with liability for events wholly outside of its control. The question of *how* to effect this balance is at the centre of the Supreme Court of Canada's decision in *Bazley* v. *Curry*,[1] which sets out "guiding principles" in the form of a two part test to bring both consistency and policy sensitive flexibility to this often difficult determination.

Vicarious Liability: The Limits That Justice Requires

As a form of "strict" liability- liability without fault- vicarious liability seems to sit somewhat uneasily within the conceptual framework of modern tort law. However, the three way relationship between employer, employee and "innocent" third party introduces a *particular* question of fairness which justifies this disparity. Holt C.J. considered this special fairness in 1701 (*Hern* v. *Nichols*)[2] as a principle of policy that where "somebody must be the loser by [a] deceit, it is more reason that he that employs and puts a trust and confidence in the deceiver should be a loser, than a stranger...". It has long been recognised, however, that this special fairness to third parties must be "subject to the limits that justice requires",[3] preventing the unjust burdening of "innocent" employers. This balance has been effected through the "course of employment" requirement; the employer is not absolutely liable for every tort committed by an employee, but only where that tort is committed in the course of employment. The course of employment requirement establishes a *connection* between the employment and the wrong committed which will mark out the "limits" beyond which vicarious liability will not apply.

Unfortunately, the "course of employment" is not always self-evident, and the point at which an employee steps outside of her employment to commit an

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1 [1999] 2 S.C.R. 534.

2 1 Salk. 289, 91 E.R. 256. And see *Lickbarrow* v. *Mason* (1787), 2 Term. Rep. 63 "whenever one of two innocent persons must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it."

3 "These broad statements do, however, fall to be confined within the limits that justice truly requires." *Armagas Ltd.* v. *Mundogas SA*, [1986] 2 All E.R. 385 (H.L.).

independent act may be clouded with ambiguity. In Canada, this determination has traditionally[4] been made applying the "Salmond test", a formulation which implies the necessary connection through the theoretical mechanism of "modes" of employment:

> An employee's wrongful conduct is said to fall within the course and scope of his or her employment where it consists of either (1) acts authorised by the employer or (2) unauthorised acts that are so connected with acts that the employer has authorised that they may rightly be regarded as modes- although improper modes- of doing what has been authorised.[5]

The Salmond formulation, while generally straightforward when applied to negligence,[6] has proven less than clear when applied to the *intentional* torts of employees, which fit awkwardly into the framework of "improper modes" of performing authorised tasks. The Salmond test has tended to exclude intentional torts from the course of employment, although not consistently- employers have been found liable found vicariously liable for assaults committed by employee bouncers, for example.[7] In the "dishonest employee" cases vicarious liability was found where a solicitor's clerk, who was authorised to draw a mortgage, made a fraudulent conveyance (*Lloyd* v. *Grace, Smith & Co.*[8]), and where diamonds were stolen by a customs officer authorised to deal with dutiable mail (*The Queen* v. *Levy Brother Co.*).[9] It has been suggested that application of the test to "catch" a limited number of intentional employee torts while excluding others indicates the vagueness and unreliability of the test and the semantic exercise it prescribes,[10] although considering these cases together in *Bazley* McLachlin J. is able to detect a common theme running throughout in the creation of *risk*- the keystone of the "guiding principles" set out in that case.

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[4] Since its adoption by the Privy Council in *Canadian Pacific Railway Co.* v. *Lockhart* [1942] A.C. 591 at 599 (P.C.) And see *W.W. Sales Limited* v. *Edmonton (City of)*, [1942] S.C.R. 467.

[5] Taken from *Salmond and Heuston on the Law of Torts*, 18th ed. (Sweet & Maxwell London, 1981) at 437.

[6] As in *Canadian Pacific Railway Co.* v. *Lockhart*, *supra* note 4 itself.

[7] The "creation of friction" cases described by McLachlin J. in *Bazley* at para. 19; *Col (Guardian ad litem of)* v. *California Entertainment Ltd.* (17 November 1989), Victoria No. V00861 (B.C.C.A.); *Wenz* v. *Royal Trust Co.*, [1953] O.W.N. 798 (H.C.); *Lakatosh* v. *Ross* (1974), 48 D.L.R. 93d) 694 (Man. Q.B.); *Verbeek* v. *Stefura* (1981), 26 A.R. 497 (Q.B.).

[8] [1912] A.C. 716 (H.L.).

[9] [1961] S.C.R. 189.

[10] "In dealing with such wilful acts there is no doubt that the Salmond test really cease to be of much help. It is only possible to treat a wilful act as an improper mode of performing an authorised act if a very wide view indeed is taken of what the servant is authorised to do. Although it is possible to do this the exercise is largely a semantic one for... conduct can be correctly described at varying levels of generality, and no one description of the 'act' is necessarily more correct than any other." P.S. Atiyah, *Vicarious Liability in the Law of Torts* (London: Butterworths, 1967) at 263. Atiyah suggests different "tests" as more suitable in intentional tort situations: "similarity" of acts, risk, and the common (or *generally* foreseeable) nature of certain employee wrongs.

If the Salmond test has acted to exclude intentional torts from the scope of vicarious liability with limited exceptions, it has tended to exclude sexual misconduct altogether.[11] The semantics of the Salmond test suggest that sexual assaults will never be within an employee's "scope of employment": we can see how the fraudulent conveyance could be an "unauthorised mode" of drawing a mortgage, and how the customs officer's theft might be an "unauthorised mode" of handling the precious goods he was entrusted with; but how can sexual assault be an unauthorised mode of performing an "authorised act"? Sexual assault would seem the quintessential independent act, the "frolic of his own" which would bar vicarious liability.

This disjunction may be accentuated where the employee is an adult engaged to take care of, counsel or teach a child; assault in this context is not merely unauthorised but appears as the antithesis of what the employee has been engaged to do.[12] In *Boykin* v. *District of Columbia*[13] the District of Columbia Court of Appeal found that the sexual assault of a twelve year old blind, deaf and mute student by the co-ordinator of the educational program in which she was a participant was committed outside the course of employment; the assault was not a "direct outgrowth" or "integral part" of the co-ordinator's employment, nor could it be deemed "a direct outgrowth of a school official's authorisation to take a student by the hand or arm and guide her past obstacles in the building." In *Doe* v. *Village of St. Joseph, Inc.*[14] the Georgia Court of Appeal held that a boarding school was not liable for sexual misconduct between a thirteen year old student and a member of staff, calling the misconduct "personal" and "unrelated to the staff member's employment." In a third American case, *Jeffrey Scott E.* v. *Central Baptist Church*[15] a church was sued for the sexual assault of a young boy by one of its Sunday School teachers. The court found that the teacher's assaults were not within the scope of his employment: "Schwobeda's acts against Jeffrey were neither required, incidental to his duties, nor foreseeable. They were, therefore, not within the scope of his employment." These cases, with the decision of the Nova Scotia Court of Appeal in *Macdonald* v. *Mombourquette* (leave to appeal to the Supreme Court denied), were relied on by the appellant Children's Foundation in *Bazley* v. *Curry* to show that vicarious liability should not apply. In another recent American decision, however, the Supreme Court of California departed from the Salmond test altogether to find the City of Los Angeles vicariously liable for a sexual assault committed by an on duty police officer (*Mary M.* v. *the City of*

[11] See *Barrett* v. *"Arcadia" (The)* (1977), 2 C.C.L.T. 142 (B.C.S.C.) and *Q.* v. *Mint Management Ltd.* (1985), 49 O.R. (2d) 531 (H.C.) involving, respectively, assault of a cruise ship passenger by an officer's steward and the assault of a tenant by a caretaker with access to a master key.

[12] And this was a reason given by the Nova Scotia Court of Appeal for overturning a tria finding of vicarious employer liability for the sexual assault of a priest in *MacDonald* v. *Mombourquette* (1996), 152 N.S.R. (2d) 109 (C.A.), discussed in more detail *infra*.

[13] 484 A. 2d 560 (D.C. App. 1984).

[14] 415 SE 2d 56 (Ga. App. 1992).

[15] 243 Cal. Reporter 128 (Ct. App. 1988).

Los Angeles).[16] The officer was patrolling alone in his marked police car, wearing his police uniform with badge and gun, when he stopped Mary M., who had been drinking, for erratic driving. The officer ordered the crying and pleading Mary M. into his car, drove to her home, and sexually assaulted her, explaining that he expected "payment" for not taking her to jail. The California Supreme Court overturned a decision of the California Court of Appeal (applying the Salmond test) that the officer was not acting within the scope of his employment when he assaulted Mary M., relying on principles of "deliberate allocation of a risk" and enterprise causation- that it would be unjust for an enterprise to disclaim responsibility for injuries occurring in the course of its characteristic activities. The risk of assault, including sexual assault, was a characteristic risk of the policing enterprise, derived from and characteristic of the *kind* of authority conferred on police officers by society.[17] *Mary M.* did not involve the abuse of children by caretakers, but the risk creation analysis explained and applied in that case, drawing on a theory of enterprise causation, is closer to the "test" and guiding principles outlined by the Supreme Court of Canada in *Bazley* v. *Curry* than the superficially more similar cases involving child care situations.

The Case: Facts and Judicial History

Bazley v. *Curry* began in the British Columbia Supreme Court with the decision in chambers of Lowry J.,[18] finding the defendant Children's Foundation vicariously liable for sexual assaults committed by its employee Leslie Curry. Lowry J. applied the Salmond test to find that these assaults had been committed in the course of employment.

The Children's Foundation was a non-profit organisation which operated two residential care facilities for emotionally troubled children between the ages of six and twelve. Treatment at the facilities involved "total intervention" in all aspects of the children's lives, with employees acting as parental figures.

Mr. Bazley was apprehended by the State at age five. After placement with a number of foster families he was placed with the Children's Foundation for two years, between ages ten and twelve. During this time the young Mr. Bazley was severely sexually abused by Leslie Curry, who was employed by the Children's Foundation as a childcare counsellor with a range of parent-like duties, including tucking the children in at night, helping with bathing, dealing

[16] 814 P. 2d 1341 (Cal. 1991).

[17] [S]ociety has granted police officers extraordinary power and authority over it citizenry. An officer who detains an individual is acting as the official representative of the state, with all of its coercive power. As visible symbols of that power, an officer is given a distinctively marked car, a uniform, a badge and a gun... Inherent in this formidable power is the potential for abuse. The cost resulting from misuse of that power should be borne by the community, because of the substantial benefits that the community derives from the lawful exercise of police power." *Ibid.* at 1349.

[18] *B.(P.A.)* v. *The Children's Foundation* (1995), 9 B.C.L.R. (3d) 217 (S.C.).

with questions about sexuality and serving as an adult role model. Mr. Curry was eventually charged with 18 counts of gross indecency and two counts of buggery relating to assaults on children at the home. He was convicted on all but one charge. Two convictions related to Mr. Bazley.

The question was, narrowly, vicariously liability; there was no allegation that the Foundation knew or should have known about Curry's conduct, or that it was negligent in hiring him for the position of counsellor; nor was breach of fiduciary duty at issue. Applying the Salmond test, Lowry J. found that Mr. Curry's sexual abuse of the children in his care was an "unauthorised mode" of the physical contact which was a necessary part of his authorised "parental" role, bringing his acts within the course of his employment and so within the limits of vicarious liability. Lowry J. considered the cases characterising sexual assault as an independent act but concluded that they were not applicable to the situation before him, finding the better analogy in the "dishonest employee" cases *Lloyd* v. *Grace, Smith & Co.*[19] and *The Queen* v. *Levy Brother Co.*[20]: "If a postal clerk's theft and a solicitor's clerk's fraud can be said to have been committed in the course of their employment, I can see no sound basis in principle on which it can be concluded that Curry's criminal conduct should not attract vicarious liability. His acts were sufficiently connected to what he was authorised to do that it can be said he was acting in the course and scope of his employment."[21] Lowry J.'s application of the Salmond test was relied on to bring sexual torts involving children within the limits of vicarious liability in *G.T.* v. *Griffiths*,[22] *Macdonald* v. *Mombourquette*,[23] and *K.(W.)* v. *Pornbacher*.[24]

The plaintiff in *Mombourquette*, a former altar server, brought an action for damages against the Roman Catholic and Episcopal Corporation of Antigonish for sexual assaults committed by a parish priest between 1969 and 1971. Relying on the B.C. Supreme Court decision in *Bazley* v. *Curry*, the trial judge applied the Salmond test to find the Corporation vicariously liable for the assaults of the priest; the priest's acts were connected to his authority as a representative of the church, comprising the necessary "connection" between unauthorised acts and authorised duties.[25] The Nova Scotia Court of Appeal overturned the lower court's holding of vicarious liability, finding that the priest's assaults were not only wilful, but the *antithesis* of his authorised role;

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[19] *Supra* note 8.

[20] *Supra* note 9.

[21] *Supra* note 18 at 219.

[22] [1995] B.C.J. No. 2370 (S.C.) (Q.L.).

[23] (1995), 28 C.C.L.T. (2d) 157, 145 N.S.R. (2d) 360.

[24] (1997), 32 B.C.L.R. (3d) 360 (S.C.).

[25] "[I]f a church clothes a spiritual advisor to recruit young people as altar servers and to involve youth in activities that increases [sic] the fiduciary relationship between the advisor and the child, then in circumstances where there is an abuse within the confines of that authority, such is not remote.... Without the authority and power of control over children provided by the Diocese, the wrong could not have occurred." *Supra* note 22 at 363.

"totally contrary to the religious tenets which he has sworn to uphold."[26] Furthermore, Jones J.A. found that the test as applied cast the net too widely: "The test is not simply that an employee is placed in a position of trust and authority that provides the opportunity to do wrong. Applying that test employers would be liable for all wrongful acts of their employees."[27] Appeal to the Supreme Court of Canada was denied. In *K.(W.)* v. *Pornbacher*, however, Quijano J. at the B.C. Supreme Court declined to follow the Court of Appeal decision in *Mombourquette*, following the British Columbia Supreme Court decision in *Bazley* instead to find the Catholic Diocese and the Roman Catholic Archbishop of Nelson vicariously liable for sexual assaults committed by a priest so.*G.T.* v. *Griffiths* (eventually appealed to the Supreme Court of Canada as a companion appeal to *Bazley*) concerned sexual assaults committed by the Program Director of the Boys' and Girls' Club of Vernon (Griffiths) on a brother and sister (R.J and J.S.). Mr. Griffiths had befriended R.J. at the Club, a drop-in centre providing a range of children's activities. The boy was sexually assaulted when he accepted an invitation to visit at Mr. Griffiths' home; R.J. was 10 or 11 years old at the time of the assault. Mr. Griffiths also befriended R.J.'s sister, J.S., proceeding "more gradually" with her than with R.J., beginning with suggestive comments and touches, until, on a Club bus trip, he forced the girl to put her hand on his penis. Subsequently, when J.S. was 14, she had intercourse with Mr. Griffiths at his house. The trial judge found there was no force or violence used on this occasion: "She did not assist and did not resist. She was scared and confused. He had been a mentor to her and had seemed almost god-like and because of that she had some thought that it must be okay."[28] There were no further incidents after this one. Applying the Salmond test, the trial judge found that Griffith's wrongful acts had been committed in the course of his employment; Griffiths had done wrongly the very thing he was supposed to do properly- caring for the children. *Levy Brothers* should be applied, on the basis that there could be no valid distinction between the way society looks after its jewellery and the way it should care for children. *Bazley* v. *Curry* (and its "companion" case *G.T.* v. *Griffiths*) was appealed to the British Columbia Appeal Court.[29] All five appeal court justices- while agreeing that the Children's Foundation should be vicariously liable for the assaults of their employee Leslie Curry- rejected the Salmond test as unsuitable in this context, articulating and applying (at least) two quite different tests: a "conferral of

[26] *Supra* note 12.

[27] *MacDonald* v. *Mombourquette* (1996), 152 N.S.R. (2d) 109 (N.S.C.A.) at 111. The Court of Appeal also found that the Trial Court's finding that Mombourquette's acts constituted negligence (for which the Diocese was vicariously liable) rather than wilful acts was incorrect (as the Nova Scotia Limitation Act has a shorter limitation period for assaults than for negligence, the limitation period had expired). The Court of Appeal distinguished the trial decision in *B.(P.A.)* finding liability on the basis of the Salmond test (not yet appealed to the British Columbia Court of Appeal) on the basis of the greater *control* conferred on the employee over the child by the Children's Foundation.

[28] *Supra* note 22 at para. 12.

[29] *B.(P.A.)* v. *Curry* (1997), 146 D.L.R. (4th) 72 (B.C.C.A.).

authority" test (given by Madam Justice Huddart) and a 'sufficient connection" test (given by Madam Justice Newbury).[30]

Huddart J.A., although not applying the Salmond test, agreed with Lowry J. that the "dishonest employee" cases were more relevant here than the cases involving sexual assault - even those cases involving the sexual assault of children- distinguishing the cases relied on by the Children's Foundation[31] on the basis that there was no comparable conferral of authority. Like the decision of the Supreme Court of California in *Mary M.*, Madam Justice Huddart's "conferral of authority" test/analysis draws on enterprise causation theory, with liability arising from the connection between authority and risk:

> In my view, when the conferral of authority provides not mere opportunity, but the power over another that makes more probable a wrong, that employer should be vicariously liable for any such wrong that results from the abuse of power.... Conferring upon an employee parental authority over children, in my view, provides that employee with power that makes more probable a wrong. This is so because the children are placed in a position where the employee will have complete control over every aspect of a child's life and the child will perceive themselves to be powerless in relation to that parental figure. The child will undoubtedly place his or her complete trust in that employee, since the employee will represent a primary source, in some cases the only source, of parental stability and security in the child's life. Furthermore, the child may not be inclined to report the employee's misconduct, since the employee is a parental figure. This power given to the employee can only serve to increase the probability of misconduct since the employee is given the ultimate control a person can have over a child- parental control.[32]

Madam Justice Newbury's "test" would require "something more" in addition to the "conferral of authority"- more formal connections such as time and space. Newbury J.A. found the "something more" required to establish a "sufficient connection" in the high degree of trust inherent in Mr. Curry's duties, which acted to "cloak" or provide a cover for his wrongful act; "the line was clearly crossed and vicarious liability should be imposed."[33]

Newbury J.A. applied her "sufficient connection" test in the companion appeal *T.(G.)* v. *Griffiths*[34] to allow a partial appeal, remitting the question of damages for the incident involving J.S. on the bus, on the grounds that this assault had a "greater connection" to Griffiths' employment than the others. Madam Justice Huddart, giving reasons for the majority, allowed the appeal in is entirety, applying her own "test" from *Bazely* v. *Curry (The Children's Foundation)*:

> These incidents do not provide evidence of the abuse of job-created authority. I can see nothing in the nature of the objectives of the Club or the group activities it

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[30] Hollinrake, Donald and Finch JJA. found no contradiction between the tests; Hollinrake and Donald, JJ.A., concurring, stressed the connection between the duties of the employee and the wrong occurring; Finch. J.A. advocated a case by case policy oriented approach.

[31] *Supra* notes 12, 13, 14, 15.

[32] *Supra* note 28 at 93.

[33] *Supra* note 28 at 95.

[34] [1997] 5 W.W.R. 203, 31 B.C.L.R. 1.

> organised for the boys and girls or, most importantly, in the powers that the Club bestowed on Mr. Griffiths that increased the probability of a wrong occurring beyond the risk ordinarily occurring in or community when adults and children come together to participate in common activities. Mr. Griffiths could have been a friendly neighbour in whose house and garden [the children] enjoyed visiting with their mother's permission and the risk would have been the same.[35]

The B.C. Court of Appeal decision in *Bazley*, despite its unclear ratio, was applied to find vicarious liability in a series of cases dealing with broadly similar factual situations: *B. (K.L)* v. *British Columbia*[36] (the Crown vicariously liable for foster parents' abuse and neglect of children in their care); *B. (W.R.)* v. *Plint*[37] (the United Church of Canada and the federal government held jointly vicariously liable for assaults committed by a dormitory supervisor at a residential school for aboriginal children); and the decisions of the British Columbia Supreme Court and the B.C. Court of Appeal in *C.A. et al* v. *Critchley*[38] (vicarious liability of the Crown for sexual assaults committed by a quasi-foster parent owner/operator of a wilderness ranch for troubled youths). Clearly, the Salmond test would no longer work to exclude sexual assaults from the ambit of vicarious liability, but it was not clear how or if that test continued to apply and, if not, what would replace it.

The Supreme Court of Canada: Bazley v. Curry

The B.C. Court of Appeal decision in *Bazley* v. *Curry* was appealed to the Supreme Court of Canada. Madam Justice McLachlin, giving reasons for a unanimous court, agreed with the plaintiff and the defendant that the Salmond test would apply but noted the inconsistency inherent in the *unexplained* "second branch" of that test (when an act would be in the course of employment): "The problem is that it is often difficult to distinguish between an unauthorised "mode" of performing an authorised act that attracts liability, and an entirely independent "act" that does not. Unfortunately, the test provides no criterion on which to make this distinction. In many cases, like the present one, it is possible to characterise the tortious act either as a mode of doing an authorised act (as the respondent would have us do) or as an independent act altogether (as the appellants would suggest). In such cases, how is the judge to decide between the two alternatives?"[39]

McLachlin J. set out the necessary criteria in the form of a two part "test". When asked to determine whether an intentional tort has been committed in the course of employment courts should ask *first* whether there are precedents of sufficient factual similarity to show "unambiguously" whether the case is one

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[35] [1997] 5 W.W.R. 203 at 210.

[36] (1998), 51 B.C.L.R. (3d) 1 (S.C.).

[37] (1998), 161 D.L.R. (4th) 538 (B.C.S.C.).

[38] (1997), 35 B.C.L.R. (3d) 234 (S.C.); (1998), 166 D.L.R. (4th) 475 (B.C.C.A.).

[39] *Supra* note 1 at para. 11.

to which vicarious liability will apply. If not, the *second* step is to inquire about and apply the broader "policy rationales" underlying of vicarious liability: what is the purpose of the doctrine? What outcome here will best accord with that purpose?

McLachlin J. disapproves the one case in which a higher tribunal has considered in depth the question of vicarious liability in a factually parallel situation. In *S.T.* v. *North Yorkshire County Council*[40] the English Court of Appeal reversed a finding of vicarious liability against a school council employer for a teacher's sexual molestation of a mentally handicapped student while on an extended (overnight) school field trip. The Court of Appeal applied the Salmond test to find that the teacher's tort was an independent act, outside the scope of his authority, and outside the course of his employment. The English court did not consider the policy principles underlying the doctrine; the teachers molestation was "independent" in the same way that a store clerk's vengeful assault (*Warren* v. *Henlys, Ltd.*)[41] comprised an "independent act. The "dishonest employee" cases (*Levy Brothers*[42] and *Lloyd*[43]) were interpreted as a "minor off-shoot" involving the entrustment of goods; a departure from the general rule. McLachlin J. was critical of this failure to deal with the meaning of the dishonest employee cases within the overall development of the doctrine of vicarious liability, and the (related) failure to take into account the "trust abusing" nature of the molestation through the inappropriate analogy to the clerk's assault. Furthermore the "general" description of the sexual act in was not adequate, excluding consideration of the teacher's particular duties towards his students. Finally, McLachlin J. notes the "inconsistency" consequent on the reasoning in *S.T.*:

> Lowry J.'s question in the chambers decision... remains unanswered: "If a postal clerk's theft and a solicitor clerk's fraud can be said to have been committed in the course of their employment, I can see no sound basis in principle in which it can be concluded that Curry's criminal conduct should not attract vicarious liability." Or, as Wilkinson J. expressed more bluntly in the companion appeal [Griffiths], "[s]urely a distinction is not to be drawn attributing a higher standard to the way society looks after its jewellery than its children."[44]

Precedent, then, will not decide the question. The one decision of a higher court on point is conceptually flawed, and not to be followed. Other cases finding intentional torts within the course of employment, while not sufficiently similar

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[40] [1999] I.R.L.R. 98.

[41] [1948] 2 All E.R. 935 (K.B.D.). In that case a gas station attendant used violent language to a customer who tried to drive away without paying for his gas. After paying, the customer called the police and threatened to report the attendant to his employers. At that point the attendant assaulted the customer and injured him. Hilbury J. held that the employers were not liable for the assault which was an act of personal vengeance and not done in the course of his employment.

[42] *Supra* note 9.

[43] *Supra* note 8.

[44] *Supra* note 1 at para. 24.

to determine the question, *do* show a common theme, or unifying principle, in the "creation of risk":

> "The common theme resides in the idea that where the employee's conduct is closely tied to a risk that the employer's enterprise has placed in the community, the employer may justly be held liable for the employee's wrong."[45]

The common theme suggests "recurring concepts and policy considerations", going to the next "step" of inquiry; consideration of the policy reasons underlying vicarious liability and showing a line of consistency between policy and principle.

This "second step" requires the decision maker to determine whether vicarious liability for an employee's intentional unauthorised tort should be imposed in light of the broader policy rationales underlying and justifying the doctrine. McLachlin J. sets out "guiding principles" and a set of non-exclusive "subsidiary factors" for courts to follow in making this determination. First, the question of whether liability *should* lie against an employer must be openly faced, overriding the mere semantics of the Salmond formulation (and harking back to Holt C.J.'s bold statement of policy as principle in *Hern* v. *Nichols*).[46] The "limits that justice requires" will be met by requiring courts to show that the wrongful act is sufficiently related to conduct authorised by the employer so as to justify vicarious liability. There must be a significant connection between creation or material enhancement of a risk and the wrong that indeed occurs, even if that wrong is unrelated to the employer's desires. A set of "subsidiary factors" are given which will be relevant to the connection between risk and wrong; these factors will vary with the nature of the case, but when related to intentional torts will include but not be limited to the following:

a) the opportunity that the enterprise afforded the employee to abuse his or her power;
b) the extent to which the wrongful act may have furthered the employer's aims;
c) the extent to which the wrongful act was related to friction;
d) the extent of power conferred on the employee in relation to the victim;
e) the vulnerability of potential victims to wrongful exercise of the employee's power.[47]

These guiding principles should lead to decision making which accords with and works towards the two "fundamental concerns" underlying vicarious liability: provision of just and practical compensation and the deterrence of future harm. Tying compensation to the introduction or enhancement of risk is fair within an enterprise causation analysis (that "a person who employs others to advance his own economic interest should in fairness be placed under a corresponding liability for losses incurred in the course of employment")[48] and

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[45] *Supra* note 1 at para 22.

[46] *Supra* note 2.

[47] *Supra* note 1 at para. 41.

[48] See J. G. Fleming, *The Law of Torts*, 9th ed. (Sydney: LBC Information Services, 1998).

accords with the fundamental tort principle stated by Cardozo C.J. in *Palsgraf* v. *Long Island R.Co.*, that the person who introduces the risk incurs a duty to those who may be injured: "the risk reasonably to be perceived defines the duty to be obeyed, and risk imports relation; it is risk to another or to others within the range of apprehension."[49] Compensation here is also practical, in that the employer will usually be in a better position to provide meaningful compensation- to make up the loss- and to internalise that loss through insurance, prices or rates. With regard to *deterrence*, a risk based theory of liability implies the possibility of risk management to minimise harm. Employers are often best placed to deter wrongs through preventative measures, where the failure to take such measures may not attract negligence- and vicarious liability, within the "just" limits of a risk based connection, will encourage employers to seek out and take such measures:

> If the scourge of sexual predation is to be stamped out, or at least controlled, there must be powerful motivation acting upon those who control institutions engaged in the care, protection and nurturing of children. That motivation will not in my view be sufficiently supplied by the likelihood of liability in negligence. In many cases evidence will be lacking or have long since disappeared. The proof of appropriate standards is a difficult and uneven matter.[50]

Furthermore, vicarious liability in the absence of a risk based connection to employment, would neither conform to common sense ideas of fairness nor serve any deterrent purpose: "where the wrong is essentially independent of the employment situation, there is little the employer could have done to prevent it."[51]

The connection between the employee's duties and the risk created or enhanced must be strong to support vicarious liability in sexual abuse situations, as it was in *Bazley*. Leslie Curry's intimate physical duties regarding the children, including bathing and "tucking into bed", *and* the authority and trust conferred on him in his role as "parental" advisor and role model materially enhanced the risk that the children would be abused.[52] The employment created requirement/opportunity to be alone with the children for extended periods of time enhanced this risk further still. Finally, McLachlin J. (like the chambers judge and Court of Appeal) rejected the Children's Foundation's argument that it should be exempt as a non-profit organisation:

> The suggestion that the victim must remain remediless for the greater good smacks of crass and unsubstantiated utilitarianism. Indeed, it is far from clear to me that the "net" good produced by non-profit institutions justifies the price placed on the individual victim, nor that this is a fair way for society to order its resources. If, in the final

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[49] 162 N.E. 99 (N.Y. 1928).

[50] *Supra* note 1 at para. 32.

[51] *Ibid.* at para. 36.

[52] "Because of the peculiar exercises of power and trust that pervades cases such as child abuse, special attention should be paid to the existence of a power or dependency relationship, which on its own often creates a considerable risk of wrongdoing." *Ibid.* at para 46.

> analysis the choice is between which of two faultless parties should bear the loss- the party that created the risk that materialised in the wrongdoing or the victim of the wrongdoing- I do not hesitate in my answer. Neither alternative is attractive. But given that a choice must be made, it is fairer to place the loss on the party that introduced the risk and had the opportunity to control it.[53]

The cost has been incurred - by Patrick Bazley. On what basis is it more fair that he should bear this loss than the Children's Foundation? Someone must carry this loss- it will not disappear, although Bazley's burden may be socially invisible in a way that the Children's Foundation is not. This insight underlies Mclachlin J.'s critique: if the real cost of their enterprise cannot be borne by non-profit enterprises such as the Children's Foundation the overall benefit they provide- however "selflessly" provided- must be called into question.

Evaluation

Reluctantly applying the British Columbia Court of Appeal's decision in *Bazley* v. *Curry* to find the Crown vicariously liable for the sexual assaults of the wilderness ranch operator John William Critchley, MacEachern C.J.A, regretting this latest expansion of the vicarious liability "net", raised the spectre of the "deviant nanny" to illustrate his point:

> ... it seems to me that predatory sexual molestation is so totally different in kind and quality from what is reasonably to be expected from an experienced caregiver that there may be room for distinguishing these various kinds of cases in a vicarious liability analysis. I pause to note that, absent such a distinction, parents who employ a qualified but secretly deviant nanny could possibly be vicariously liable to their children for damages and interest many years later for harm done to their children by the nanny even though the parents were entirely without fault.

Such fears should be met by the frank appraisal of policy in the second step of McLachlin J.'s "test"- the open consideration of whether vicarious liability *should* lie, a "non-mechanistic" approach, sensitive to context and capable of avoiding such socially destructive outcomes as the 'deviant nanny" scenario posed above. The flexibility of a policy based analysis allows courts to avoid the kinds of unwanted and/or inconsistent outcomes which may result where vicarious liability is determined by a more mechanistic formula.

The net cast by *Bazley* v. *Curry* is not a wide one; and this is immediately apparent in the "companion" appeal in *Jacobi* v. *Griffiths*,[54] although the slim majority (four to three) in that case suggests that the sufficient risk based connection may not be self-evident.

The majority in *Jacobi* found that while the Boys' and Girls' Club's non-profit status would not exempt the organisation from liability (following *Bazley*), it would require the "strong connection" to be established with "greater rigour"; the inability of a non-profit enterprise such as the Boys' and Girls' Club

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[53] *Ibid.* at para. 54.

[54] *Jacobi* v. *Griffiths*, [1999] 2 S.C.R. 570.

to "internalise" the costs of liability weakens the policy justifications underlying vicarious liability, and that weakness must be balanced by a clear, strong and unambiguous connection between wrong and employment. The "strong connection" present in *Bazley* was not present in *Jacobi*: there was no comparable authority conferred on Mr. Grifith's by the Club, nor any parallel between the intimate duties of Mr. Curry's employment and the duties attached to the Club Director's role- indeed, he was only able to commit his abuses when able to subvert the prescribed public nature of his role.[55] The victims' home life was unhappy and they were, for that reason, vulnerable, but the "sexual predator" Mr. Griffiths took advantage of that vulnerability through his *friendship* with the children, not any job created or authorised duties conferred on him by the Club; more like the neighbour described in Huddart J.A.'s decision in the B.C. Court of Appeal, and the priest in *Mombourquette*, and less like Leslie Curry, whose employment combined intimate "parental duties" with a parent-like power and authority, the "most relevant source" of the necessary connectedness in child abuse situations.[56]

The minority concluded that Griffiths' sexual abuse *was* "sufficiently linked" to Griffith's job-related duties to found vicarious liability, emphasising the mentoring aspect of Griffith's position at the Club: "An environment into which children are entrusted not just for adult supervision, but for adult mentoring, is one highly charged with potential for abuse of that trust."[57] When Griffiths used this relationship to cultivate his victims, the sufficient connection was established. The nature of the Club and the vulnerability of its clientele was a significant factor in establishing this connection: "The Boys' and Girls' Club was not a garden variety sports league. It took as its function rather, the goals

[55] "The Club provided the employee with an opportunity to meet children, as does an organisation that deals with children. The Club authorised Griffiths to develop a rapport with these children. This again is inevitable in any such enterprise. The Club offered recreation in a public setting (as opposed to the privacy of Griffiths home) in group activities with other persons including children and volunteers whose continuing presence would have been fatal to Griffiths' personal agenda. Griffiths had no job-created authority to insinuate himself into the intimate lives of these children. Unlike *Children's Foundation* the enterprise here had only two employees and its emphasis was on developing (horizontal) relationships among the members, not (vertical) relationships to persons in authority." *Ibid.* at para 43.

[56] Both majority and minority decisions agreed that the incident on the bus should not be treated differently from the other incidents; the fact that it occurred on the bus, while relevant, was not conclusive in terms of establishing "connection: "I do not think the one act of sexual touching which occurred on the Club van, given that it was a minor and incidental part of Griffiths' ongoing campaign of sexual predation outside Club facilities and outside Club hours was sufficient to trigger no-fault liability. As McLachlin J. pointed out in *Children's Foundation* at para. 45, the mechanical application of time and place obscures the more fundamental analysis." *Supra* note 62 at para. 84. The bus episode was part of the spectrum of Griffiths campaign of cultivation and perverse insinuation into the children's lives. The dissent parts from the majority on the degree of the *connection* between this campaign and the power conferred on Griffiths through his employment at the Club.

[57] *Supra* note 62 at para. 14.

of guidance and moral direction to youths, many of whom had disadvantaged or even troubled backgrounds, like the appellants in this appeal."[58] Emphasising "parent-like" power to the exclusion of other considerations would, the minority warns, unnecessarily restrict the application of the principles articulated in the *Children's Foundation* case.

As the *Bazley* guidelines were applied in *Jacobi*, and subsequently in *F.S.N.* v. *Clarke*,[59] the conferral of parental authority is emerging as the *paradigm* case in which vicarious liability will be found for unauthorised intentional torts such as sexual assault (although the *Jacobi* majority states that vicarious liability should not be *limited* to such parental authority situations). These situations seem likely to attract vicarious liability depending on whether they can be characterised as involving "parental authority", or how closely they can be brought by analogy to "parental authority" situations.[60] It remains to be seen how the guidelines given in *Bazley* will ultimately play out in other contexts. Application of the not dissimilar tests given in the B.C. Court of Appeal's decision in *Bazley* to find vicarious liability in fostering situations (*B.(K.L.)*; *Critchley*)[61] indicate that abuse of children by caretakers *outside* of institutional situations may found vicarious liability, although *Jacobi* shows us that this application will be quite strictly limited.[62]

But however the *Bazley* guidelines ultimately play out in these other contexts, the "test" is a manifestly coherent and fair approach to apportioning liability for the abuse of children in institutional "care" settings. The law is not the only source of redress for victims of institutional abuse; but a risk based doctrine of vicarious liability is both *right* and workable in this context: to provide meaningful compensation; to deter future abuse; and to fairly shift the loss from the innocent third party to the organisation responsible for creating the risk of that loss, a cost internalisation which should lead to more "efficient" (in terms of minimising damage and suffering) means of meeting society's obligations to care for young people.[63]

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[58] *Ibid.* para. 17.

[59] (1999), B.C.J. No. 1973 (QL) (S.C.).

[60] See *J.L.* v. *Canada (Attorney General)* [1999] B.C.J. No. 1306 (S.C.) (Q.L.), the B.C. Supreme Court finding the Department of National Defence vicariously liable for sexual torts committed on a female Master Corporal by her superior (M.T.). *J.L.* applied the B.C.C.A. *Bazley* test to justify vicarious liability: "In my view, it is appropriate to equate this relationship to that of a parent and child... due to the analogy between the situation at bar and that in child care cases, the Department of National Defence must be held vicariously liable for the actions of M.T." [para. 49-55]. And see *Scaglione* v. *McLean* (1998), 38 O.R. (3d) 464 (Gen. Div); *R.E.C.* v. *Canada (Attorney General)*, [1998] F.C.J. No. 1420 (F.C.T.D.) (Q.L.).

[61] *Supra* notes 35, 37.

[62] The Supreme Court of Canada's refusal of leave to appeal from the Nova Scotia Court of Appeal's decision in *Macdonald* v. *Mombourquette* suggests that the *Bazley* net will not reach out to "catch" this kind of figure.

[63] See M.I. Hall "After Waterhouse: Vicarious Liability and the Tort of Institutional Abuse" (2000) JSWFL No. 2.

Cost is, finally, the backdrop- spoken or unspoken- to any discussion of vicarious liability for victims of institutional abuse. The "economic" argument is quickly raised: liability may be justified, but it is not affordable. However, this argument fails to take into account that the "costs" of abuse *have already been incurred*- where they have not been realised as damages through operation of the law, they remain "hidden" as *social costs*, borne by the abused, possibly those around them, and possibly the larger society through the social service and justice system. By attaching those costs to their source- the source of risk- a risk based theory of vicarious liability makes visible the real costs of the various forms and arrangement of "care", a necessary first step to the deterrence of abuse, and towards informed policy making in the endemically troubled area of child protection.