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## **A COMPARATIVE LOOK AT VICARIOUS LIABILITY FOR INTENTIONAL WRONGS AND ABUSES OF POWER IN CANADIAN LAW**

Nikolas De Stefano\*

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*This paper examines the theoretical underpinnings of vicarious liability in the Canadian common law as well as in Quebec's civil law tradition. It then goes on to trace how each legal tradition has responded to employees' intentional wrongdoing. More specifically, the paper analyses the scope of employment in cases of fraud, theft and sexual violence. The paper then identifies a developing trend in Quebec's law through which judges adopt the approach of the common law in an attempt to find liability where the traditional civilian test is of no use. Ultimately, a comparison between the civilian approach and the common law approach is made. This paper argues that the common law approach is more responsive to the policies justifying the institution of vicarious liability and that Quebec courts should be more willing to adopt this.*

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*Cet article discute des assises théoriques de la responsabilité du fait d'autrui en common law canadienne ainsi que dans la tradition civiliste du Québec. L'auteur retrace ensuite la manière dont chacune des traditions juridiques a traité l'inconduite délibérée de la part des employés, en centrant son analyse sur « l'exercice des fonctions » en cas de fraude, de vol et d'agressions sexuelles. L'auteur de l'article souligne qu'en droit québécois, les tribunaux ont de plus en plus tendance à adopter l'approche de la common law pour tenter de*

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\* BCL/JD McGill University, Law Clerk at the Supreme Court of Canada for Justice Rosalie Abella in 2020–21, and student-at-law at IMK LLP. The author would like to thank Shauna Van Praagh for her thoughtful comments for their discussions throughout the drafting process. The author would also like to thank the anonymous editors at the CBR for their invaluable feedback.

*conclure à l'existence d'une responsabilité lorsque le critère traditionnel de droit civil ne s'avère d'aucune utilité. En dernière analyse, l'auteur compare l'approche fondée sur le Code civil et celle de la common law. Il soutient que cette dernière est mieux adaptée aux considérations de politique qui justifient le concept de la responsabilité du fait d'autrui et que les tribunaux du Québec devraient être plus enclins à l'adopter.*

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## Introduction

The basic premise of vicarious liability is well entrenched in Canadian law. While there is controversy as to its scope and breadth, few would question the idea that an employer should be liable for the wrongdoing of its employees. Nonetheless, the law of vicarious liability has generated debate and confusion in both the jurisprudence and scholarship. Both the Anglo-Canadian common law and Quebec's civil law have an established system of vicarious liability and, in general, the applicable law in both of these legal traditions is somewhat similar. Across Canada, in order to ground a claim in vicarious liability, claimants must show that they have a valid cause of action against an employee for a fault he committed within the scope of his employment.<sup>1</sup>

In both Quebec's civil law and Canada's common law, establishing whether or not the fault in question occurred within the scope of employment, however, is a difficult task—especially in cases of intentional wrongdoing. This paper aims to compare how Quebec's civil law and the rest of Canada's common law have delineated the scope of employment in cases of intentional or voluntary wrongdoing. In particular, this paper

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<sup>1</sup> Art 1463 CCQ; See generally *Bazley v Curry*, [1999] 2 SCR 534, 174 DLR (4th) 45 [*Bazley* cited to SCR].

studies how civilian courts have responded to the Supreme Court of Canada's landmark judgments in *Bazley* and *Jacobi* and then considers how effectively each legal regime serves the principles underlying vicarious liability and the law of extra-contractual obligations generally.<sup>2</sup> Ultimately, this paper argues that the approach developed by the Supreme Court of Canada in *Bazley* and *Jacobi* offers a more principled, just, and appropriate framework for the analysis of the scope of employment in cases of intentional wrongdoing.

## 1. The Basics of Vicarious Liability

Vicarious liability, across Canada, is a form of strict liability. As such, even in the absence of personal wrongdoing, employers may be called to account for the faults of their employees. Vicarious liability does not aim to assess the blameworthiness of an employer, rather, it imposes liability once a certain factual situation may be established. As one author writes, vicarious liability “describes the responsibility that one person may have for the torts of another because of the relationship between them.”<sup>3</sup>

In general, the principle of vicarious liability may be succinctly stated as “employers are liable for the torts of their employees committed within the course of employment.”<sup>4</sup> Quebec's *Civil Code*, at article 1463, affirms that “the principal is bound to make reparation for injury caused by the fault of his subordinates in the performance of their duties.”<sup>5</sup> It may be deduced from these statements that the attribution of vicarious liability rests on three essential elements. The first is the existence of an employer-employee relationship, the second is the commission of a tort by an employee—or, as the *Civil Code* puts it, a subordinate—and the third is a certain degree of connection between the employee's tasks and the tort he committed.

In typical negligence cases, the scope of employment criterion is uncontroversial and somewhat of an afterthought for judges. These cases occur where employees simply make a mistake in the way they do the exact thing they have been hired to do. For example, it would be admitted without much debate that municipal employees who accidentally give erroneous information about a town by-law or building inspectors who

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<sup>2</sup> *Bazley*, *supra* note 1; *Jacobi v Griffiths*, [1999] 2 SCR 570, 174 DLR (4th) 71 [*Jacobi* cited to SCR].

<sup>3</sup> Philip H Osborne, *The Law of Torts*, 3rd ed (Toronto: Irwin Law, 2007) at 344.

<sup>4</sup> Keith N Hylton, *Tort Law: A Modern Perspective* (Cambridge: Cambridge University Press, 2016) at 185.

<sup>5</sup> Art 1463 CCQ.

do not respect industry standards while drafting their reports are acting within the scope of their employment.<sup>6</sup>

In cases of intentional, voluntary, and—occasionally—criminal wrongdoing however, the analysis becomes more complex. These cases are particularly problematic because courts must determine when employees' acts are so far removed from their employment that it can no longer be said that they are doing their job at all. Historically, purely individualistic acts committed by employees have been labelled “frolics of their own” and have been considered to be outside the scope of employment and therefore not subject to vicarious liability.<sup>7</sup> The rule was that employers are only liable for acts which are committed in the course of employment because it is these acts that the employer commissioned and stands to benefit from.<sup>8</sup> So, when an employee ceases to be carrying out an employer's business, in fulfillment of personal motives, the employee's acts no longer fall within the scope of employment and no longer trigger vicarious liability.

The difficulty with this, however, is that antisocial voluntary acts like assault and theft appear to be considered “quintessential independent act[s]”, a “‘frolic of his own’ which would bar vicarious liability.”<sup>9</sup> However, accepting that such acts should never lead to vicarious liability ignores the “general environment created by the employer, and which provided the setting within which the employee exercised his or her job-conferred power” and how that environment may have led to the wrongful act.<sup>10</sup> As such, voluntary acts are uniquely difficult for the law of vicarious liability because, while employers often explicitly prohibit these acts, they may also benefit from the fact that they have placed employees in positions which facilitate them.

In order to provide an approach which is fair to both plaintiffs and defendant employers, courts have had to develop tests to delineate which conduct is sufficiently related to a wrongdoer's employment to elicit his employer's liability. On this point, Quebec and the rest of Canada have

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<sup>6</sup> *Bolduc c Lévis (Ville de)*, 2015 QCCA 1428 at paras 38–39; *Rivest c Vachon*, 2006 QCCS 1377.

<sup>7</sup> Anthony Gray, *Vicarious Liability: Critique and Reform* (Oxford: Hart Publishing, 2018) at 24; See generally *Curley c Latreille* (1920), 60 SCR 131, 55 DLR 461 [*Curley*].

<sup>8</sup> *Co-Operators Insurance Association v Kearney*, [1965] SCR 106 at 123–24, 48 DLR (2d) 1; *Edmonton (City) v WW Sales Ltd*, [1942] SCR 27, [1942] 4 DLR 196; *Battistoni v Thomas*, [1932] SCR 144, [1932] 1 DLR 577.

<sup>9</sup> Margaret Hall, “Liability Without Fault: *Bazley v Curry*” (2000) 79:3 Can Bar Rev 474 at 476 [Hall, “Liability Without Fault”].

<sup>10</sup> *EB v Order of the Oblates of Mary Immaculate in the Province of British Columbia*, 2005 SCC 60 at para 27.

taken divergent approaches. While common law courts evaluate the connection between the wrongful conduct and the scope of employment through the lens of the risk created by the employer, Quebec's courts typically attempt to determine whether the wrongful conduct serves some distant interest of the employer.

## 2. Canadian Common Law

Vicarious liability arises in the common law when an employee commits a tort, an employment relationship can be established, and the tort occurred within the scope of employment.<sup>11</sup> In cases of intentional torts, the scope of employment branch of the test has generated the most controversy. The seminal definition of the scope of employment test in Canada's common law stems from an early nineteenth-century textbook written by John Salmond. The so called "Salmond test" establishes two broad situations in which an employee's wrongdoing falls within the course of his employment, these are where the act is: "(a) a wrongful act authorised by the master, or (b) a wrongful and unauthorised *mode* of doing some act authorized by the master."<sup>12</sup>

While it is clear that an authorised wrongful act will ground liability, courts have had difficulty delineating between unauthorized *modes* of committing an act and independent employee actions. It is in large part through this delineation that the policy considerations underpinning vicarious liability come to life. Vicarious liability as a legal institution was developed to address a number of policy concerns related to compensation, deterrence, and loss internalization.<sup>13</sup> In determining which acts fall within the scope of employment, and therefore give rise to vicarious liability, courts are essentially deciding when it would be better for the employer to bear the burden of the loss its employee has caused.<sup>14</sup>

Although early Supreme Court and Privy Council decisions rely on Salmond's construction of the test, a strict application of this test is not particularly helpful in giving life to the policy it purports to enact.<sup>15</sup> The claim that a tort was an unauthorized mode of committing an authorized

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<sup>11</sup> Halsbury's Laws of Canada (online), *Negligence and Other Torts*, "Strict Liability" (X.4.(1)) at HTO-203 "Vicarious Liability: General".

<sup>12</sup> John William Salmond, *Law of Torts, a Treatise on the English Law of Liability for Civil Injuries* (London: Stevens and Haynes, 1907) at 83.

<sup>13</sup> *London Drugs Ltd v Kuehne & Nagel Ltd*, [1992] 3 SCR 299 at 336, 97 DLR (4th) 261 [*London Drugs*].

<sup>14</sup> *Ibid.* See generally John G Fleming, "The Collateral Source Rule and Loss Allocation in Tort Law" (1966) 54:4 Cal L Rev 1484.

<sup>15</sup> *Lockhart v Canadian Pacific Railway Company*, [1942] AC 591, [1942] 3 DLR 529 (UK JPC); *Edmonton (City) v WW Sales*, [1942] SCR 467, [1942] 4 DLR 196.

act is more of a conclusion than a principled legal test. As one scholar writes, “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.”<sup>16</sup> The British Columbia Court of Appeal adds, “the Salmond test is of no use at all” in cases where an employee abuses of his functions to commit sexual assault.<sup>17</sup> While the Salmond test is easily applicable in a number of cases, and it may serve as a starting point for the analysis of the scope of employment, it is too restrictive to be the definitive measure of the scope of employment.

In fact, Canadian courts historically struggled with vicarious liability in cases of intentional torts by employees. For much of the twentieth century, the caselaw “expressed some ambivalence about the extension of vicarious liability for deliberate wrongdoing.”<sup>18</sup> This skepticism is closely linked to the narrow formulation of the Salmond test and the limits on the scope of employment it purports to create.

For example, in a case imposing vicarious liability on the state for the sexual assault of children at a wilderness camp, the British Columbia Court of Appeal commented that “predatory sexual molestation is so totally different in kind and quality that what is reasonably to be expected from an experienced care giver.”<sup>19</sup> This comment is an attempt at identifying what can truly be marked as a true *mode* of executing functions. It also suggests that violent assaults are not such a mode as they are way of not doing what a caregiver is hired to do. The focus on the disconnect between the wrongdoing and the employer’s instructions reflects an agency-based view of vicarious liability through which liability is imposed on the employer because the employee, carrying out the employer’s business, is acting as an extension of the employer.<sup>20</sup> Despite reservations about the appropriateness of vicarious liability for sexual assault, the Court of Appeal felt that it was bound by its own recent caselaw and reluctantly held the employer liable, claiming that it was “based upon (a) deep

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<sup>16</sup> Patrick S Atiyah, *Vicarious Liability in the Law of Tort* (London: Butterworth, 1967) at 262–63.

<sup>17</sup> *B(PA) v Children’s Foundation* (1997), 146 DLR (4th) 72, 30 BCLR (3d) 1 (CA).

<sup>18</sup> Gray, *supra* note 7 at 78.

<sup>19</sup> *CA v Critchely*, [1998] BCJ 2587 (QL) at para 108, [1998] CanLII 9192 (CA) [CA *v Critchely*].

<sup>20</sup> Paula Gilliker, *Vicarious Liability in Tort: A Comparative Perspective* (Cambridge: Cambridge University Press, 2010) at 13. See also Jean-Louis Baudouin, Patrice Deslauriers & Benoît Moore, *La Responsabilité Civile*, 8th ed, vol 1 (Cowansville: Éditions Yvon Blais, 2014) at para 819; Guy Pinsonneault, “Notion de commettant et de préposé en droit civil” (1954) 1:1 C de D 77 at 80.

pockets” justification, a rationale often considered to be unsatisfactory in the literature.<sup>21</sup>

On the other hand, that same court also held, in a case involving an employee security guard’s arson, that vicarious liability should lie because the employer put the employee in a position which enabled that very criminality.<sup>22</sup> This reasoning clearly relies on the enterprise risk theory which essentially posits that vicarious liability is appropriate where the employee’s wrongdoing was set in motion by a risk introduced into society by the employer.<sup>23</sup>

It was in the context of the uncertainty relating to the applicability of the Salmond test in the context of intentional wrongdoing and the conflicting policy rationales attributed to vicarious liability that the Supreme Court rendered its judgments in *Bazley* and *Jacobi* in 1998. In both of these cases, the Court was tasked with determining whether a non-profit community organisation could be held to account for the sexual assault of children committed by its employees.

Writing for a unanimous Court in *Bazley*, Justice McLachlin confirmed that the Salmond test was the correct framework through which to define the scope of employment. However, she pointed out that “it is often difficult to distinguish between an unauthorized ‘mode’ of performing an authorized act that attracts liability, and an entirely independent ‘act’ that does not.”<sup>24</sup> In order to alleviate these difficulties, the Court proposed that the second branch of the Salmond test be approached in two steps. First, courts should determine whether the issue has been determined unambiguously by precedent. Second, courts should “determine whether vicarious liability should be imposed in light of the broader policy rationales behind strict liability.”<sup>25</sup> The Court then goes on to identify these rationales as deterrence and fair recovery.<sup>26</sup>

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<sup>21</sup> *CA v Critchely*, *supra* note 19 at paras 118–20. See also Jason Neyers, “A Theory of Vicarious Liability” (2005) 43:2 *Alta L Rev* 287; Claude Masse, “L’abus des fonctions dans la relation préposé-commettant en droit civil québécois” (1978) 19:3 *C de D* 595 at 600; Gray, *supra* note 7 at 151.

<sup>22</sup> *British Columbia Ferry Corp v Invicta Security Service Corp* (1998), 167 DLR (4th) 193, 58 BCLR (3d) 80; Gray, *supra* note 7 at 78.

<sup>23</sup> Harold J Laski, “The Basis of Vicarious Liability” (1916) 26:2 *Yale LJ* 105 at 125; Douglas Brodie, *Enterprise Liability and the Common Law* (Cambridge: Cambridge University Press, 2010) at 31. See also Louise Langevin, “Acte criminel de l’employé et responsabilité objective de l’employeur: pour une redéfinition du critère de rattachement” (2013) 47:1 *RJTUM* 31.

<sup>24</sup> *Bazley*, *supra* note 1 at para 11.

<sup>25</sup> *Ibid* at para 15.

<sup>26</sup> *Ibid* at para 29.

Justice McLachlin then adds that these policy rationales are closely linked to the idea that enterprises should be responsible for the risks they introduce into society. In order to ensure a principled approach to defining the scope of employment, courts should attempt to determine whether the employer created such a risk of wrongdoing that it is fair to hold it to account. The list of non-exhaustive factors through which to analyse the degree of risk created by the enterprise are: the opportunity awarded to an employee to abuse his power; the extent to which the wrongdoing furthers the aims of the employer; the extent to which the wrongful act is connected to friction or intimacy; the extent of power the wrongdoer had over the victim; and the vulnerability of the victim.<sup>27</sup> Finally, the Court adds that “there must be a strong connection between what the employer was asking the employee to do (the risk created by the employer’s enterprise) and the wrongful act.”<sup>28</sup>

In *Bazley*, the unanimous Court held that The Children’s Foundation, which asked its employees to undertake parent-like responsibilities towards young children, was liable for a sexual assault perpetrated by one of its employees against one of these children. Notably, the Court held that the high degree of intimacy between the children and the employees, the opportunity for private interactions, and the power of the employees over the children, significantly increased the risk of such an assault. Justice McLachlin went as far as to say that “it is difficult to imagine a job with a greater risk for child sexual abuse.”<sup>29</sup> It was therefore found that fairness and deterrence would be served by imposing vicarious liability on the Foundation.<sup>30</sup>

Although the judgment in *Bazley* purported to clarify the Salmond test and offer a principled way towards defining the scope of employment, the Supreme Court itself demonstrated that its new test is not as straightforward as it seems. In *Jacobi v Griffiths*,<sup>31</sup> a case released with *Bazley*, the Court was divided on what constitutes a material increase in risk.

In *Jacobi*, Griffiths was the director of a Boys’ and Girls’ Club and was responsible for overseeing all volunteer staff and scheduling outings. As director of the club, Griffiths was also in contact with a number of children with whom he developed a relationship. Unfortunately, Griffiths preyed on two of the children he met at the club, inviting them to his home and

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<sup>27</sup> *Ibid* at para 41.

<sup>28</sup> *Ibid* at para 42.

<sup>29</sup> *Ibid* at para 58.

<sup>30</sup> *Ibid*.

<sup>31</sup> *Jacobi*, *supra* note 2.

sexually assaulting both of them. He also engaged in inappropriate sexual touching with one of them in the club's van.<sup>32</sup>

In this case, the Court was split four to three against a finding of vicarious liability. Justice Binnie, writing for the majority, held that the club could not seriously be said to have created a material increase in the risk of assault through its enterprise because the assault was only possible once Griffiths subverted the public nature of the club's activities and lured the victims to his home.<sup>33</sup> Moreover, according to Binnie, the degree of contact, intimacy, and power inherent in Griffiths' tasks was not significantly magnified by the enterprise.<sup>34</sup> Ultimately, the majority held that, although there is a natural inclination to attempt to find vicarious liability in cases of child abuse, such a finding would be unfair in this case.<sup>35</sup>

Writing for the dissent, Justice McLachlin opined that vicarious liability would have been appropriate since the club's activities materially increased the risk of assault. The dissenting judges wrote that the club exists to provide troubled youth with behavioural guidance and that such an "enterprise carries risks". Since those risks materialized, the club should have been liable.<sup>36</sup>

The judgment in *Jacobi* immediately dispelled the notion that *Bazley* opened the floodgates for vicarious liability. In particular, Justice Binnie's comment that the judgment in *Bazley* "was an effort to explain the existing case law, not to provide a basis for its rejection," suggests that the Court did not intend to bring sweeping changes to the regime of vicarious liability, but rather to provide lower courts with a clearer analytical framework through which to interpret the existing rules.<sup>37</sup> In other words, *Bazley* provided a lens through which to analyze the policy concerns inherent to vicarious liability but it did not introduce policy into the equation. As such, while *Bazley* may appear to present a novel, plaintiff friendly approach to vicarious liability, its application has not been a panacea for victims of intentional wrongdoing. Rather, it is a systemization of existing principles.<sup>38</sup>

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<sup>32</sup> *Ibid.*

<sup>33</sup> *Ibid.*

<sup>34</sup> *Ibid* at paras 80–82.

<sup>35</sup> *Ibid* at para 87.

<sup>36</sup> *Ibid* at para 27.

<sup>37</sup> *Ibid* at para 65.

<sup>38</sup> Deterrence, enterprise risk, and fair recovery have long been a principle underlying vicarious liability. See generally Alan O Sykes, "The Boundaries of Vicarious Liability: An Economic Analysis of the Scope of Employment Rule and Related Legal Doctrines" (1988) 101:3 Harv L Rev 563 at 571; Brodie, *supra* note 23 at 31; Attila Ataner,

In fact, courts have also refused to find vicarious liability in some instances of physical and sexual violence. As the cases detailed below show, findings of a material increase in risk turn on the employee's ability to isolate potential victims as well as the employer's role in creating a power imbalance between the wrongdoer and the victim.

In 2017, the Court of Appeal for Ontario was tasked with determining whether a taxi company could be held vicariously liable for one of its drivers' sexual assault of a young intoxicated passenger. Justice Hoy began her analysis with the remark that "courts are reluctant to impose no-fault liability for abhorrent, intentional acts on the part of an employee."<sup>39</sup> The Court then went on to apply *Bazley* to find that operating a taxi company did not materially increase the risk of assault because the taxi company did not create a power imbalance between the driver and the plaintiff.<sup>40</sup>

Moreover, in a case where the employee of a snow removal company launched racist epithets towards a client and then used his snow blower to pelt her with ice, the Ontario Superior Court held that equipping someone with the tools to injure another does not in and of itself constitute a material increase in risk for which an employer should be held to account.<sup>41</sup> In addition, the Supreme Court held that provincial governments should not be vicariously liable for the sexual assault of foster children committed by their foster parents. Although there is a risk inherent in granting individuals parental authority, vicarious liability would not serve any of the policy considerations explored in *Bazley* because of the low degree of control that the government exercises over foster parents.<sup>42</sup> The Supreme Court also held that abuse perpetrated by a baker at a residential school did not engage the liability of the school because there was nothing inherent in his responsibilities that provided him with more than a mere opportunity to commit a wrongdoing.<sup>43</sup>

On the other hand, plaintiffs have succeeded in claiming vicarious liability in a number of cases of sexual assault—in particular where the nature of the employee's tasks created a sense of psychological intimacy, combined with physical isolation. For example, a provincial government was found responsible when a teenage boy's parole officer sexually assaulted him because the plaintiff was emotionally vulnerable and forced to attend

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"How Strict is Vicarious Liability – Reassessing the Enterprise Risk Theory" (2005) 64:2 UT Fac L Rev 63 at 71; Laski, *supra* note 23 at 125.

<sup>39</sup> *Ivic v Lacovic*, 2017 ONCA 446 at para 11.

<sup>40</sup> *Ibid* at paras 36–39.

<sup>41</sup> *Chieffalo v Ghuman*, 2017 ONSC 1569.

<sup>42</sup> *KLB v British Columbia*, 2003 SCC 51.

<sup>43</sup> *EB v Order of the Oblates of Mary Immaculate in the Province of British Columbia*, 2005 SCC 60.

unsupervised meetings with the parole officer.<sup>44</sup> In a case where a teacher at a correctional boarding school assaulted children who were invited to spend a night at his cabin as a reward for “good behaviour”, the school was found vicariously liable.<sup>45</sup> Finally, it was held that the Roman Catholic Episcopal Corporation could be liable for a sexual assault committed by one of its priests. In that case, the Supreme Court found that the Church’s appointment of a priest in an isolated and highly religious community conferred god-like power on the priest, materially increasing the risk of sexual abuse for young children who regularly spent time with him.<sup>46</sup>

In order to sustain a finding of vicarious liability, the plaintiff must establish that the wrongdoer’s opportunity to commit a tortious act results directly from the nature of the employee’s tasks. In other words, being put into contact with vulnerable people, on its own, is not enough. The jurisprudence also reveals that the factual findings most conducive to a finding of vicarious liability are that the employer’s enterprise manufactured or accentuated a power imbalance and that it allowed the wrongdoer to physically isolate the victim in the regular course of his employment.

The importance of these factors can be traced back to the different results in *Bazley* and *Jacobi*. In *Bazley*, an appropriate execution of the wrongdoer’s tasks allowed for a situation where he was alone in a confined space with a vulnerable child.<sup>47</sup> In *Jacobi*, however, the wrongdoer needed to invite the victims to his home to create such a state of isolation.<sup>48</sup> This reasoning was echoed by the Court of Appeal for Ontario when it imposed vicarious liability on an ultrasound clinic for the acts of a technician that performed unauthorized tests, inappropriately touched, and videotaped a nude patient. The Court found that the combination of the high degree of trust inherent in the relationship between patient and medical service provider and the fact that technicians are regularly required to spend time in private rooms with patients materially increased the risk of wrongdoing.<sup>49</sup>

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<sup>44</sup> *G(BM) v Nova Scotia (Attorney General)*, 2007 NSCA 120.

<sup>45</sup> *Rich v Bromley Estate*, 2013 NLCA 24.

<sup>46</sup> *John Doe v Bennett*, 2004 SCC 17.

<sup>47</sup> *Bazley*, *supra* note 1 at para 43.

<sup>48</sup> *Jacobi*, *supra* note 2 at para 80: Justice Binnie describes the wrongdoer’s need to subvert the public nature of the club as “key to this case”.

<sup>49</sup> *Weingerl v Seo* (2005), 256 DLR (4th) 1, 2005 CarswellOnt 2474 (WL Can) (CA). This logic was also implicit in a case where a dorm supervisor was held vicariously liable for his assault on a student. See generally *Blackwater v Plint*, 2005 SCC 58 [*Blackwater v Plint*]. In addition, vicarious liability was rejected on the basis that the employer did not contribute to physical intimacy or isolation or to an increase vulnerability in: *Jane Doe v MN*, 2018 NLSC 162 at paras 78–103. Vicarious liability was imposed on a school

In cases of intentional wrongdoing which do not involve physical violence, particularly in fraud and theft cases, courts cannot look to physical isolation as an indicator of liability. As a result, courts will look to whether the employee's assigned tasks allow him to cloak his wrongdoing in an appearance of propriety as well as the wrongdoer's ability to abuse a power imbalance. In other words, the more difficult it is for a vulnerable victim to determine whether the employee is exercising his functions normally, the more likely it is that a court will find that the employer materially increased the risk of wrongdoing.

For example, in one case, the Court of Appeal of Alberta rejected vicarious liability for a Worker's Compensation Board where an employee in its accounting department fraudulently purported to collect investments from her friends and family members. Although her position at the Board may have given her credibility, soliciting investments was not a part of her employment and her employer did not materially contribute to the public's perception that she could be a credible investment advisor.<sup>50</sup>

The British Columbia Court of Appeal applied similar reasoning to deny vicarious liability in a case where an investment advisor fraudulently convinced his clients to invest with him 'on the side' only to steal their funds.<sup>51</sup> Since the plaintiff ought to have known that such investments were not part of the employee's responsibilities, the Court held that the employer did not materially increase the risk of such a fraud.<sup>52</sup> In other

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when a teacher sexually assaulted a student because the school allowed the teacher to force students to be in a room alone with him for disciplinary purposes and because of the power imbalance between teachers and students. See generally *John Doe v Avalon East School Board*, 2004 NLTD 239. Courts also rejected vicarious liability cases where a teacher abused children on the grounds that being alone with children was not a part of their jobs and was not permitted. See *SGH v Gorsline*, 2001 ABQB 163 at para 74; *AB v CD*, 2011 BCSC 775. Vicarious liability was rejected in a case where one adult employee assaulted another adult employee because there was no physical intimacy related to their jobs as plumbers. See *Corfield v Shaw*, 2011 BCSC 1529. Vicarious liability was imposed on an employer in a case where a supervisor sexually assaulted an employee because she was led to believe that she could not disclose the assault at work and because their jobs required them to be alone together. See *Pawlett v Dominion Protection Services Ltd*, 2007 ABQB 415 at para 78. Vicarious liability was imposed on a city when a police officer sexually assaulted a driver that he pulled over because his employment contributed to a power imbalance and allowed him to isolate potential victims. See *Evans v Sproule*, 2008 CanLII 58428 at para 93, [2008] OJ No 4518 (QL) (Sup Ct).

<sup>50</sup> *Solis v Alberta (Worker's Compensation Board)*, 2015 ABCA 227 at paras 17–20.

<sup>51</sup> *Hiscott v Canaccord Capital Corp*, 2013 BCCA 23.

<sup>52</sup> *Ibid* at paras 26–34.

words, the employer never made it look like the investment in question was a normal way of conducting business.<sup>53</sup>

On the other hand, in cases where the enterprise is set up in such a way that an employee's fraud appears to be a regular exercise of his functions, the employer is often held to have materially increased the risk of wrongdoing.<sup>54</sup> For example, in a case where investment counsellors intentionally misled a client, the Court of Queen's Bench of Alberta held that the counsellors' employer materially increased the risk of such fraud because it did nothing to stop the wrongdoers from "surround(ing) themselves with the trappings of" of their employer.<sup>55</sup> The fact that the enterprise's structure made the fraudulent investment scheme indistinguishable from good faith advice was a key element of the finding of vicarious liability.<sup>56</sup>

The scope of employment rule in Canadian common law reflects a judicial choice to use vicarious liability as a way of sanctioning enterprises for the risk they introduce into society. In assessing the risk created by a defendant enterprise, courts will evaluate the extent to which a proper exercise of employee functions increases the opportunity for wrongdoing. In cases of physical or sexual violence, vicarious liability will generally be established where an employee's job allows him to benefit from a power imbalance and physically isolate the victim. In cases where the tortious conduct is not physical in nature, courts often find the requisite increase in risk where the employee's regular functions are such that it would be difficult for a potential victim to realise whether or not he is abusing of his authority.

In any event, under the *Bazley* framework, when courts evaluate whether or not an employee was acting within the scope of his employment, they must analyze the conduct of the employer itself. While a finding of vicarious liability is not a finding of fault, it is often tantamount to a finding that the employer ought to have done more to control the risks it introduces into society.

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<sup>53</sup> For similar reasoning, see generally *Hendrickson v Reserverlogix Corp*, 2012 ABQB 766; *Bank Leu Ag v Gaming Lottery Corp*, 2003 CanLII 28360 at para 82, 231 DLR (4th) 251 (Ont CA).

<sup>54</sup> For such reasoning, see *Straus Estate v Decaire*, 2011 ONSC 1157 at para 46, aff'd 2012 ONCA 918 at paras 74–81; *Shetty v Gill, et al*, 2004 BCSC 451; *Frost v Bassett*, 2006 BCSC 243 at para 22; *Kowbel v National Bank of Canada*, 2014 ABQB 311; *Hill v Queensbury Strategies Inc*, 2014 CarswellOnt 18959 (WL Can), 7 ETR (4th) 1 (Sup Ct).

<sup>55</sup> *S MacLise Enterprises Inc v Union Securities Ltd*, 2008 ABQB 214 at para 85, aff'd 2009 ABCA 424.

<sup>56</sup> *Ibid* at paras 83–90.

In sum, the *Bazley* and *Jacobi* cases have brought the policy considerations which have always been at the heart of vicarious liability to the forefront. The Supreme Court's approach, however, has definitively turned the focus away from a strict focus on the individual intent of a wrongdoer and towards the role played by the employer in exacerbating the risk of wrongdoing. As such, scope of employment analysis after *Bazley* and *Jacobi* no longer asks only whether the employee embarked on a "frolic of his own" but rather the extent to which the employer enabled this frolic.

By engaging more openly with the policy considerations at the heart of the Salmond test, the jurisprudence following *Bazley* and *Jacobi* broadens the scope of vicarious liability by imposing an obligation on employers to assess and subsequently limit the risks they introduce into society. It also marks the end of a jurisprudential ambivalence towards vicarious liability for heinous intentional and criminal acts.<sup>57</sup> The case law also recognizes that, in analyzing this risk, context is key. In light of abuse, courts will closely examine the institutional framework and how it contributed to the wrongdoing. So, while the caselaw has become more principled and receptive to vicarious liability for intentional abuses of power, it also calls for a measured case by case analysis; in other words, the floodgates have not been opened and the keys to a finding of vicarious liability are the facts of each case.

### 3. Quebec Civil Law

As one would expect from a civil law jurisdiction, the formal source of vicarious liability in Quebec is the province's *Civil Code*. Article 1463, which is slotted in under the heading "Act, Omission or Fault of Another," establishes that "the principal is bound to make reparation for injury caused by the fault of his subordinates in the performance of their duties; nevertheless, he retains his remedies against them."<sup>58</sup> This provision is a reformulation of the previous *Civil Code*'s rule that "masters and employers are responsible for the damage caused by their servants and workmen in the performance of the work for which they were employed."<sup>59</sup>

Although the *Code* clearly provides for an employer's obligation to repair the injuries that its employees cause in the performance of their duties, it does not provide guidance with respect to how the scope of these duties should be defined. So, while the general principle of vicarious liability in Quebec law is easily stated, its contours are difficult to define.

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<sup>57</sup> Gray, *supra* note 7 at 85.

<sup>58</sup> Art 1463 CCQ.

<sup>59</sup> Art 1053 CCLC.

The current state of the law on vicarious liability can be traced to two early 1920s judgments by the Supreme Court of Canada. In *Curley v Latreille* and *The Governor and Company of Gentlemen Adventurers of England v Vaillancourt*, the Court attempted to delineate whether an employees' intentional wrongdoing fell within the bounds of the "work for which they were employed."<sup>60</sup> In both cases, the majority relied heavily on the text of the *Civil Code of Lower Canada* but offered very little structure or guidance for lower courts. Nonetheless, these cases remain heavily cited and are considered to be the foundation upon which Quebec courts rest their scope of employment analysis.<sup>61</sup>

Before engaging with these cases, however, it is important to understand how Quebec civil law characterizes faults of intention. The jurisprudence distinguishes between faults which are voluntary and faults which are intentional. In both instances, the wrongdoing goes beyond a simple mistake, however, the subjective intent of the wrongdoer is different. A fault is voluntary where the act itself was intended to happen, but the consequences of the act were not. On the other hand, a fault will be intentional where both the act and its consequences were intended.<sup>62</sup> As such, the intentional fault connotes a stronger sense of blameworthiness. Nonetheless, as will be shown below, in the context of vicarious liability, both the voluntary and intentional fault fall difficultly within the "scope of employment" jurisprudence in Quebec insofar as the employee was doing something they knew they ought not to be doing.

In *Curley*, a chauffeur stole his employer's car and went on a joy ride. On this joy ride, he struck and killed a pedestrian. Justice Mignault, writing for the majority, introduced a narrow view of vicarious liability. Mignault held that courts must determine whether the employee's voluntary wrongdoing is merely a result of an opportunity presented by his employment or whether it is an abusive exercise of the very tasks for which he was employed.<sup>63</sup> Mignault ultimately rejected vicarious liability because, in his view, joy riding cannot be considered to be a method of conducting the job of a chauffeur.

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<sup>60</sup> *Curley*, *supra* note 7; *The Governor and Company of Gentlemen Adventurers of England v Vaillancourt*, [1923] SCR 414, [1923] CanLII 50 [*Vaillancourt*].

<sup>61</sup> *Havre des Femmes inc. c Dubé*, [1998] RRA 67 1998, CanLII 13167 (Que CA) [*Le Havre*]; Masse, *supra* note 21 at 606.

<sup>62</sup> *Royale du Canada, Cie d'assurances c Québec (Curateur Public)*, 2000 CanLII 10597 at paras 17–20, EYB 2000-18860 (Que CA); *Axa Assurances c Assurances générales des caisses Desjardins inc.*, 2006 QCCA 674 at paras 17–35 [*Axa*]; See also *Goulet v Cie d'assurances vie Transamerica du Canada*, 2002 SCC 21 at para 33; *Québec (Attorney General) v Syndicat national des employés de l'hôpital St-Ferdinand*, [1996] SCR 211 at para 117, 202 NR 321.

<sup>63</sup> *Curley*, *supra* note 7 at 157.

While it is clear that *Curley* stands for the principle that a distinction must be drawn between the abusive exercise of functions and mere opportunism, it does not offer a principled or clear way in which to draw this distinction. Implicit in the Court's reasoning, however, is that there must be a sufficient connection between the tasks for which the employee is employed and the employee's wrongdoing. What constitutes a requisite connection, however, is not meaningfully addressed.

A year later, in *Vaillancourt*, the Supreme Court attempted to clarify the scope of employment test in a case of intentional wrongdoing. In that case, Wilson, the supervisor of a Hudson's Bay company outpost in northern Quebec, was intoxicated and acting erratically while on duty. Vaillancourt, one of Wilson's subordinates, questioned his conduct and suggested that he put some clothes on. Perceiving this as a slight on his authority, Wilson reached for his rifle and shot Vaillancourt in the leg.

Justice Mignault, again writing for the majority, held the Hudson's Bay Company vicariously liable for the injuries caused by Wilson's aggression. Applying the framework he proposed in *Curley*, Mignault held that Wilson was simply attempting to maintain order and reaffirm his authority.<sup>64</sup> In other words, he was doing the very thing he was hired to do, albeit in an abusive manner. Finally, Mignault added that had Wilson shot Vaillancourt in an attempt to settle a personal vendetta rather than establish the hierarchy set in place by the company, he likely would not have found vicarious liability.<sup>65</sup>

Much like in *Curley*, any attempt at discerning guidance from *Vaillancourt* rests on what is implicit in Mignault's reasoning. The proposition that Wilson's motivations for shooting Vaillancourt were decisive in determining whether or not he was acting within the scope of his employment at the time of the assault implies that this analysis contains a subjective element. More specifically, Mignault's hypothetical suggests that employers may only be liable for the intentional or voluntary torts of their employees where the wrongdoing in question was committed in furtherance of some interest of the employer.

In the wake of *Curley* and *Vaillancourt*, Quebec's courts developed a scope of employment test which relies entirely upon the determination of whether the employee's wrongdoing sought to benefit his employer in some way.<sup>66</sup> In fact, for much of the twentieth century, courts nearly

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<sup>64</sup> *Vaillancourt*, *supra* note 60 at 430.

<sup>65</sup> *Ibid.*

<sup>66</sup> See generally *Bourret c Lacoste*, [1956] Que SC 445, [1956] CS 445; *Zambon Co c Schrijverchhof*, [1961] SCR 291, 27 DLR (2d) 336; *Aubin c Industries E Roy Ltée*, [1968] BR 77, 1967 CarswellQue 322 (Que QB); *Poisson-Fortin c Dutil*, [1969] CS 466, 1968

unanimously determined whether employees' intentional wrongdoings occurred within the scope of their employment by applying this test.

This jurisprudential development culminated with the Court of Appeal's judgment in *Le Havre*. In this case, Denis, an employee at a shelter for vulnerable women, convinced a patient suffering from alcoholism to live with her. The employee preyed on the plaintiff, facilitated her alcoholism and convinced her to make her substantial payments. In determining whether this conduct fell within the scope of Denis' employment, Justice Lebel explained that:

Les arrêts, rendus par la Cour suprême du Canada, d'abord dans *Curley v. Latreille* ... ont adopté un principe judiciaire d'application de l'article 1054 C.c.B.-C., qui exige que le préposé ait commis une faute dans l'exécution des tâches pour lesquelles il avait été engagé, par son incompétence ou par une manœuvre exécutée dans l'exécution normale de ses fonctions. Elle peut même résulter d'un abus de fonctions, à condition que l'acte du préposé demeure dans le cadre établi par l'exercice de ses fonctions et que la faute ait été commise, au moins partiellement, pour le bénéfice du commettant.<sup>67</sup>

Relying solely on the condition that wrongful acts must benefit the employer in order to attract vicarious liability, the Court held that Denis was acting purely in her own interest and rejected the claim for vicarious liability.

Despite the Supreme Court's policy-laden judgment in *Bazley*, which was rendered only a year after *Le Havre*, Quebec's civilian courts have generally been reluctant to implant Justice McLachlin's common law reasoning. The notion that a voluntary or criminal act could ever be in the interest of an employer, however, leaves a seemingly narrow place for vicarious liability in these situations in Quebec. As a result, courts have consistently held that, in determining the scope of employment, what constitutes an employer's interest must be interpreted broadly.<sup>68</sup>

The generous interpretation of what constitutes a benefit to the employer allows courts to be responsive to a number of different types of wrongdoing. The cost of this malleability, however, is uncertainty, and,

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CarswellQue 150 (WL Can) (Que Sup Ct); *Goodwin c Commission Scolaire Lorenvil*, [1991] RRA 673, 1991 CarswellQue 76 (WL Can) (Que Sup Ct); Masse, *supra* note 21.

<sup>67</sup> *Dubé c Denis*, [1998] RJQ 346, 1998 CarswellQue 4 at para 30 (WL Can) (Que CA) [citations omitted].

<sup>68</sup> *Ibid* at para 19; *D'souza c DPM Securities Inc*, 2005 CanLII 29882 at para 114 (Que Sup Ct); *Autorité des marchés financiers c Wishnousky*, 2014 QCCS 3578 at para 269 [Wishnousky]; *Compagnie du chemin de fer du littoral nord du Québec et du Labrador inc c Sodexho Québec ltée*, 2010 QCCA 2408 at para 163.

in some instances, an inability to delineate liability on a principled basis. A brief study of the jurisprudence following *Le Havre* reveals that courts' determination of whether or not a wrongdoing occurred within the scope of employment often relies heavily on the subjective motives of the wrongdoer rather than any objective risk factors linked to the employer's enterprise.

For example, in one case, the Superior Court of Quebec found that a security guard who intentionally lit the building he was supervising on fire was acting within the scope of his employment. The Court found that the security guard intended to later put out the fire and demonstrate his mastery of the situation.<sup>69</sup> Since the guard's attempt to appear heroic by putting out the fire, if successful, would have had correlative reputational gains for the employer, he was adjudged to have been seeking some benefit for his employer.<sup>70</sup> In this case, the employee's personal desire to shine, or as the Court put it, "de briller et d'impressionner dans l'exécution de ses fonctions," was crucial in establishing vicarious liability.

In this same vein, the Superior Court found vicarious liability for a youth centre that employed a social worker that sent herself fake death threats in an attempt to frame a child's parents by making them appear violent.<sup>71</sup> The Court reasoned that since the employee's goal was to have the parents' custody revoked and that she honestly believed that the child's parents were abusive, she must have been trying to protect the child. Because the mandate of a youth centre is to protect children, this fault was adjudged to have furthered the objectives of the youth centre.<sup>72</sup>

Finally, the Superior Court also imposed vicarious liability in a case where an employee at a garage violently attacked a customer after a verbal altercation regarding the employer's recreational vehicle repair policies. The Court held, without detailing why, that although the employee had personal reasons for assaulting the customer, he was also acting to further his employer's goals.<sup>73</sup>

These cases demonstrate that because the scope of employment test laid out in *Le Havre* relies on a single criterion, courts may occasionally stretch the meaning of that criterion quite thin. While employees may honestly, yet mistakenly, believe that their intentional or voluntary

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<sup>69</sup> See generally *Axa Assurances inc c Groupe de sécurité Garda inc*, 2008 QCCS 6087.

<sup>70</sup> *Ibid* at para 111.

<sup>71</sup> *A(J) c F(S)*, 2007 QCCS 4286, aff'd 2009 QCCA 2352 [*A(J) c F(S)*].

<sup>72</sup> *Ibid* at paras 36–45.

<sup>73</sup> *Veilleux c Dumont*, 2005 CanLII 27866, [2005] RRA 1220 (Que Sup Ct) [*Veilleux c Dumont*].

wrongdoing benefits their employer in some way, this benefit does not actually always accrue. Nonetheless, the jurisprudence relies on assigning liability to the employer on the basis of the employee's own private motives. Under this jurisprudential trend, the conduct of the employer and the employer's contribution to the risk of wrongdoing are entirely left out of the equation in determining whether or not vicarious liability lies.

In some instances, courts' focus on the intent of wrongdoers may lead to a broadening of the scope of employment; however, in cases of theft or fraud, this approach has significantly narrowed the scope of employment. In fact, courts have often refused to find any benefit to the employer in cases where employees abuse their functions in order to embezzle funds or steal property—even where it appears that their employment significantly increased the risk of such intentional wrongdoing.

For example, vicarious liability was rejected in a case where an overnight watchman invited a friend to the lot he was supervising to come and raid the trucks he was supposed to be protecting. The Superior Court held that the security guard's employer did not reap any benefits from the theft and therefore that the employee was not acting within the scope of his employment.<sup>74</sup> This same reasoning was applied in the case of a courier who stole a package he should have delivered, a banker who redirected clients' funds into his own pockets, and car salesmen that pocketed fraudulent fees from clients.<sup>75</sup>

Short of finding negligence in hiring or supervision, it is difficult to imagine a scenario in which a Quebec court could hold an employer liable in the event of theft unless the employer had a correlative economic gain from the theft.<sup>76</sup> In fact, where employees defraud clients, courts have held that the fraud must also have benefited the employer for there to be vicarious liability. For example, when an employee's fraud leads to an increase in the employer's revenue, there may be vicarious liability.<sup>77</sup>

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<sup>74</sup> *Zurich Canada inc c Services Transport André Marcoux ltée*, 2016 QCCS 2566 at paras 117–33 [*Zurich Canada*].

<sup>75</sup> *Murphy v United Parcel Service China*, 2016 QCCQ 5550 [*Murphy*]; *Patenaude c Caisse Populaire Desjardins de Ville-Émard*, 2011 QCCS 6086; *Laporte c 3463192 Canada inc.*, 2011 QCCQ 9354 [*Laporte*]; *Normand c Arbour Volkswagen*, 2007 QCCQ 3005. See also *Sattar c Butt*, 2016 QCCS 3775.

<sup>76</sup> This was pointed out as a flaw of over-reliance on the benefit of the employer test by Justice McLachlin in *Bazley*, *supra* note 1 at paras 18–20. See also *Allan c Boutin*, [2002] RJQ 1875, EYB 2002-32904 (Que CA) [*Allan c Boutin*].

<sup>77</sup> *Autorité des marchés financiers c Langelier Legault*, 2014 QCCS 6159 at para 125 [*Langelier Legault*]; *Allan c Boutin*, *supra* note 76.

Although such cases may lead to vicarious liability, there remains a significant blind spot in Quebec's law with respect to cases where employees use their functions to commit purely self-serving theft. In many of these cases, even under the most generous of interpretations, it will be difficult to find that the employee's act sought to further the employer's interests in any way. As will be explained further, courts have also faced this impasse when evaluating vicarious liability in the context of sexual violence.<sup>78</sup>

In sum, the general trend in Quebec's jurisprudence has been to define the scope of employment for intentional or voluntary wrongdoings based on the singular criterion of whether or not the wrongdoing relates to an interest of the employer. In evaluating this criterion, courts may turn to an evaluation of the subjective intentions of the employee and attempt to reconcile this intention with some broad conception of an employer's interest. Although Quebec's scope of employment test is relatively easy to state, its usefulness is questionable since it does not consider the employer's ability to mitigate risks and its flexible nature has made its application seem, at times, arbitrary.

#### 4. Is Quebec Accepting *Bazley*?

Since the judgment in *Bazley*, a counter narrative has developed in Quebec's scope of employment jurisprudence in cases of intentional or voluntary wrongdoing. Despite the widespread acceptance of the test as laid out in *Le Havre*, Quebec courts have occasionally embraced the *Bazley* approach to overcome some of the difficulties inherent in attempting to find a benefit to the employer when an employee deliberately commits a fault.

It comes as no surprise that *Bazley*'s strongest foothold in Quebec law is in cases of sexual violence. The benefit to the employer approach simply does not account for the realities of modern society with respect to liability for sexual assault. Simply put, no employer will benefit from having an employee commit a sexual assault. As one author notes, decisions rejecting vicarious liability in cases of sexual assault, "ne seraient plus socialement acceptables aujourd'hui, compte tenu de la prise de conscience que des tels événements se produisent, que les victimes ne mentent pas et qu'il y a des conséquences graves à long terme pour les victimes."<sup>79</sup>

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<sup>78</sup> See generally *Goodwin c Commission Scolaire Lorenlval*, [1991] RRA 673, JE 91-1322 (Que Sup Ct); *SM c GG*, 2017 QCCS 2716; *Gosselin c Fournier*, [1985] CS 481, JE 85-459 (Que Sup Ct). In addition, the Court ruled that a priest's sexual assault was not part of his employment, but this issue was secondary since the case was decided on the basis of prescription in *FB c Therrien (Succession de)*, 2012 QCCS 175 at para 73, aff'd in part, 2014 QCCA 854 (upheld on prescription only).

<sup>79</sup> Langevin, *supra* note 23 at 45.

In *Bazley*, Justice McLachlin wrote that:

[i]f, in the final analysis, the choice is between which of two faultless parties should bear the loss—the party that created the risk that materialized 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 better opportunity to control it.<sup>80</sup>

Given modern society's sensitivity towards the devastating effects of sexual assault, this reasoning is increasingly attractive to judges. Since *Le Havre* does not allow for such reasoning, judges have occasionally ignored its strict formulation of the scope of employment test.

In *Borduas c Catudal*, the Superior Court was tasked with determining whether or not to hold a school board vicariously liable for the sexual assault of one its students by her math teacher. The Court underwent a painstaking analysis of the facts, detailing that the school was in a rural area and had relatively small class sizes. As a result, it was common for teachers to act as guidance counsellors and therapists for vulnerable students. In short, the school's operation accentuated the power imbalance between students and teachers and increased the likelihood of physical and psychological intimacy. Applying *Bazley*, the Court held that the school materially increased the risk of sexual violence between teachers and students and found vicarious liability.<sup>81</sup> The Court of Appeal, however, overturned this finding without commenting on the law of vicarious liability. Rather, the Court held that the victim's claim was prescribed.<sup>82</sup> Interestingly, Justice Mailhot, in dissent, explicitly approved of the trial judge's comparative approach.<sup>83</sup>

While *Catudal* did not, by itself, change the law in Quebec, it provides Courts with a leg to stand on in invoking *Bazley*. In *Axa*, the Superior Court was seized with the question of whether Garda, a security company, was vicariously liable for the fire that its night watchman intentionally ignited. The Court exhaustively traced the origins of the enterprise risk theory adopted in *Bazley* and canvassed the theoretical underpinnings of vicarious liability.<sup>84</sup> Justice Masse then reasoned that there was no principled reason to believe that the policy rationales underlying vicarious liability are different in Quebec than in the rest of Canada and held that

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<sup>80</sup> *Bazley*, *supra* note 1 at para 54.

<sup>81</sup> *Borduas c Catudal*, [2004] RJQ 1565, 2004 CanLII 18292 at paras 155–60 (Que Sup Ct) [*Catudal*].

<sup>82</sup> *Catudal c Borduas*, 2006 QCCA 1090.

<sup>83</sup> *Ibid* at para 135.

<sup>84</sup> *Axa*, *supra* note 62.

*Bazley* could be a source of liability in Quebec.<sup>85</sup> Ultimately, however, the Court added that even under the traditional test from *Le Havre*, the security guard should be considered to have been within the scope of his employment.

Despite Justice Masse's ambitious proposition that Quebec courts should consider the criteria established in *Bazley*, her push for reform went relatively unnoticed. It was only six years after *Axa* that the common law jurisprudence would resurface to play an important role in a Quebec case.

In the 2014 case of *Tremblay*, a class action launched on behalf of victims of sexual abuse at a boarding school operated by the Redemptorist Congregation, Justice Bouchard of the Quebec Superior Court held that since *Bazley*, "a new approach to vicarious liability has developed."<sup>86</sup> He then went on to explain that many of the victims lived at the school full-time, including weekends, that the students confided in the priests who abused them and that physical and emotional intimacy were inherent in the priest-student relationship.<sup>87</sup> Finally, he concluded that the priests' assigned tasks significantly increased the risk of reprehensible conduct and held the congregation vicariously liable.<sup>88</sup>

While only a handful of cases have explicitly applied the Supreme Court's "common law reasoning", certain other decisions have implied that the benefit to the employer is not the single determining factor in defining the scope of employment.<sup>89</sup> In particular, cases addressing abusive policework have decided the issue without mentioning either the "benefit to the employer" criterion or the risk creation approach.

For example, as early as 2001, the Court of Appeal, with very little justification, found that a police officer who intentionally made false claims about and stalked a citizen, leading to his unlawful arrest, was acting within the scope of his employment.<sup>90</sup> Similarly, in *Gauthier v Beaumont*, a 1998 case, the Supreme Court imposed vicarious liability on a municipality when police officers beat and tortured a suspect. On this point, the Court wrote that:

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<sup>85</sup> *Ibid* at para 110.

<sup>86</sup> *Tremblay c Lavoie*, 2014 QCCS 3185 at para 146.

<sup>87</sup> *Ibid* at paras 148–64.

<sup>88</sup> *Ibid* at para 163.

<sup>89</sup> The Court of Quebec also applied *Bazley*, *supra* note 1 citing *Axa*, *supra* note 62 as the case which introduced it into Quebec law, in a case involving a fraud committed by a mortgage broker. See *Tarakanov v Mortgage Intelligence Inc*, 2015 QCCQ 11713.

<sup>90</sup> *Quane c Québec*, 2001 CanLII 40120, EYB 2001-27399 (Que CA).

If, as the respondent municipality suggests, the employer's liability was only engaged where it is shown that a delict was committed by its employees in the public interest, in the fight against crime or for the protection of the municipality's citizens, but was not engaged where the alleged acts are excessive, para. 7 of art. 1054 C.C.L.C. would be totally meaningless. The employer would have no incentive to exercise control over the conduct of its police officer employees. It is very fortunate that the respondent did not knowingly endorse the brutal acts committed by its employees, but this does not relieve it from liability under para. 7 of art. 1054 C.C.L.C.<sup>91</sup>

The Court's brief comment on vicarious liability suggests that a proper analysis of the scope of employment should go beyond finding distinct benefits to the employer and consider how the imposition of vicarious liability helps deter future wrongdoing.

Of note in these cases, is that the *Code* itself purports to introduce a specification for the rules on vicarious liability for the faults of certain State actors. Article 1464 of the Quebec *Civil Code* states that “[a] subordinate of the State or of a legal person established in the public interest does not cease to act in the performance of his duties by the mere fact that he performs an act that is illegal, beyond his authority or unauthorized, or by the fact that he is acting as a peace officer.”<sup>92</sup> This article does not do away with the condition that the employee must be acting in the performance of his duties, rather it specifies that the criminal nature of an act does not bar vicarious liability for the acts of the State's employees, a principle which has been accepted by the jurisprudence for private sector employees as well.<sup>93</sup>

This article was incorporated in the *Code* to correct a line of cases which held that municipalities could not be responsible for the faults of police officers acting as peace officers. One author writes that it essentially ensures that the general principles of vicarious liability apply to public law employers as they do to private employers.<sup>94</sup> So, in cases where public officials commit faults, voluntary or not, the body of jurisprudence developed in the private sector applies unchanged.<sup>95</sup> Despite 1464 of the *Civil Code*, there is no principled reason to believe that cases involving

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<sup>91</sup> *Gauthier v Beaumont*, [1998] 2 SCR 3 at para 93, 162 DLR (4th) 1 [*Gauthier v Beaumont*].

<sup>92</sup> Art 1464 CCQ.

<sup>93</sup> *Langelier Legault*, *supra* note 77 at para 125; *Allan c Boutin*, *supra* note 76 at para 137; *Vaillancourt*, *supra* note 60.

<sup>94</sup> Vincent Karim, *Les Obligations (vol 1)*, 4th ed (Montreal: Wilson & Lafleur, 2015) at para 3077.

<sup>95</sup> *A(J) c F(S)*, *supra* note 71.

police officers should be treated differently than those involving any other type of employee.<sup>96</sup>

While the jurisprudence in Quebec contains examples of cases which can serve as the groundwork for the implantation of a *Bazley*-like approach in the province, such an approach is far from being admitted as the law in the province. The *Axa* case, clearly the most ambitious attempt by a Quebec judge at having *Bazley* recognized as the law in Quebec, has hardly gained any traction. In fact, courts which have subsequently cited *Axa* have generally dismissed its comparative approach and highlighted Justice Masse's comment that even the traditional *Le Havre* test would ground liability. As such, the case's apparent implementation of *Bazley* has largely been characterized as nothing more than interesting commentary.<sup>97</sup>

Although it is possible to identify a trend questioning the traditional Quebec civil law "benefit of the employer test" and pushing towards a more policy-oriented view of vicarious liability, this trend is not yet the predominant one. As will be detailed in the following section, until an appellate court decisively rules on the matter, a certain amount of incoherence will remain in the province's jurisprudence.

### **A) The Future of Quebec's Law of Vicarious Liability**

In Canada's common law provinces, the Supreme Court's judgment in *Bazley* introduced a novel approach to defining the scope of employment in cases of vicarious liability for intentional wrongdoing. Although the Court's enterprise risk theory generated controversy early, its legacy is unmistakable.<sup>98</sup> There is no doubt that common law courts will hold that the contours of a wrongdoer's scope of employment are defined by the extent to which the employer's enterprise increases the risk of intentional wrongdoing.

More specifically, in the common law, an employee who deliberately commits a tort, even if this tort is criminal, will be held to have been acting within the scope of his employment where "there is a significant connection between the conduct authorized by the employer or controlling agent and the wrong."<sup>99</sup> In analysing this connection, common law courts

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<sup>96</sup> *Kosoian v Société de transport de Montréal*, 2019 SCC 59 at para 40; *Guité c Québec*, 2006 QCCA 354 at para 27 [*Guité c Québec*].

<sup>97</sup> The Court cites *Axa*, *supra* note 62 for the proposition that the benefit of the employer test is to be interpreted liberally in *Wishnousky*, *supra* note 68 at para 269. See also *Murphy*, *supra* note 75; *Zurich Canada*, *supra* note 74; *Laporte*, *supra* note 75.

<sup>98</sup> The Court was split in its first application of the *Bazley* test. See generally: *Jacobi*, *supra* note 2.

<sup>99</sup> *Blackwater v Plint*, *supra* note 49 at para 65.

will analyze the following factors: “(a) the opportunity afforded by the employer’s enterprise for the employee to abuse his power; (b) the extent to which the wrongful act furthered the employer’s interests; (c) the extent to which the employment situation created intimacy or other conditions conducive to the wrongful act; (d) the extent of power conferred on the employee in relation to the victim; and (e) the vulnerability of potential victims.”<sup>100</sup> In Quebec’s civil law, however, it has traditionally been held, as it was in *Le Havre*, that an employee will only be acting within the scope of his employment where his action furthered or sought to further the interests of his employer.

As such, the significance of *Bazley* in Quebec’s civil law is unclear. While *Bazley* did not change the fact that an overwhelming majority of Quebec cases echo this traditional test, a contrary jurisprudential trend questioning this approach may be emerging. So, although *Le Havre* remains—for all intents and purposes—reflective of the state of the law, it appears that its teachings are currently in question. As a result, the law of vicarious liability in Quebec has reached somewhat of a crossroads. In order to chart an effective way forward, courts should look to the policy objectives justifying vicarious liability and attempt to reconcile them with the legal test they employ.

The policy rationales most often cited as justifying vicarious liability—in Quebec as well as in the rest of Canada—are a combination of risk creation, deterrence, loss spreading and compensation.<sup>101</sup> While the *Bazley* framework invites courts to openly consider how the imposition of vicarious liability serves these purposes, the traditional civilian test, as laid out in *Le Havre*, makes no mention of them.<sup>102</sup>

The result of *Le Havre*’s scant policy discussion has been a test that is easy to state but relatively difficult to apply and understand. Justice Lebel’s framework provides judges with the rhetorical tools and general framework around which to justify an imposition of liability but fails to explain what the purpose of this liability is. This creates a degree of difficulty considering that vicarious liability, a rare form of strict liability in a regime of extra-contractual obligations centered on the concept of fault, is by definition exceptional. In many cases, courts must choose between allowing the burden of a grievous wrongdoing to fall on an

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<sup>100</sup> *Ibid* at para 20.

<sup>101</sup> See generally Langevin, *supra* note 23; *Gauthier v Beaumont*, *supra* note 91 at para 85; *Axa*, *supra* note 62 at para 110; Baudouin, Deslauriers & Moore, *supra* note 20 at para 814; Pinsonneault, *supra* note 20 at 80; Masse, *supra* note 21 at 600.

<sup>102</sup> It has been remarked that Quebec’s courts are consistently silent on the policy rationales driving vicarious liability. See Baudouin, Deslauriers & Moore, *supra* note 20 at para 819.

innocent victim or shifting it onto an employer who has done nothing wrong. Under Quebec's traditional legal test, the sole decisive factor in this equation is whether the court can attribute some benefit to the employer from the employee's act.

The major conceptual difference between this test and the risk creation approach under *Bazley* is that under *Bazley*, courts evaluate how the actions of the employer contribute to the possibility of wrongdoing whereas under *Le Havre*, the analysis turns on whether the wrongdoer herself felt she was helping her employer.<sup>103</sup> This is particularly problematic because once vicarious liability is established, the wrongdoer should no longer be part of the equation; for example, vicarious liability has been established even where the wrongdoer could not be identified.<sup>104</sup> It therefore seems illogical that the subjective intent of a wrongdoer could play a significant role in determining an employer's liability.

The idea that the impugned act must have been to the benefit of the employer in order to fall within the employee's scope of employment has led to a series of curious decisions in which liability was ground on factual findings that the employer had no control over. For example, employers have been held liable for violent assaults perpetrated by an employee where the employee was attempting to maintain order in the workplace or, in the case of an off duty police officer, attempting to give out a traffic ticket.<sup>105</sup> Despite the fact that the employer has not gained anything from these assaults, since they were clearly excessive and manifestly unreasonable, liability attaches because the wrongdoers' intentions were to help their employers.<sup>106</sup>

Although the subjective nature of the benefit to the employer test may seem unusual, it is a necessary implication of Quebec's traditional legal test. In *Le Havre*, Justice Lebel confirms that the fact that an employer has expressly prohibited certain conduct or that the conduct is criminal

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<sup>103</sup> One author comments that *Bazley* invites us to determine whether the employer/institution is a "crucible of abuse" and to find liability accordingly. See generally Margaret Hall, "After Waterhouse: Vicarious Liability and the Tort of Institutional Abuse" (2000) 22:2 J Soc Welfare & Fam L 159 at 171.

<sup>104</sup> *BES v MacDougall*, 2018 BCSC 2138.

<sup>105</sup> *Vaillancourt*, *supra* note 60; *Veilleux c Dumont*, *supra* note 73; *Guité c Québec*, *supra* note 96.

<sup>106</sup> These cases are merely examples. Courts have adopted this reasoning in a number of cases. A benefit to the employer was found when a security guard committed arson because he thought he could make himself, and therefore his employer, seem competent by putting it out in: *Axa*, *supra* note 62. A benefit to the employer was found when a youth center employee attempted to frame parents she considered to be abusive of a crime so that they would lose custody in: *A(I) c F(S)*, *supra* note 71.

or intentional is not a bar to vicarious liability.<sup>107</sup> With this in mind, an objective standard for the benefit of the employer test would be much too restrictive to be practicable in many cases. It is difficult to imagine a case in which an employer draws an actual benefit from an employee's criminal act, especially in the case of physical or sexual violence. As such, the scope of employment must occasionally be defined by wrongdoers' warped senses of reality rather than any discernable facts.

For example, one author proposes a hypothetical in which an employee kills an employer's competitor in order to eliminate competition and improve business. In this hypothetical, the employee's belief is unmistakably that he is serving the interests of his employer. Following a strict study of subjective intent of the employee as the key criterion in defining the scope of employment, as Quebec courts often have, a finding of vicarious liability becomes possible, although improbable.<sup>108</sup>

Surely, in practice, courts would be loath to make such a finding, however, it is the logical extreme of Quebec courts' predominant approach. In fact, this hypothetical is logically similar to a case in which the Court of Appeal held that a social worker was acting in the scope of her employment when she sent herself death threats, in an attempt to frame a child's parents, therefore causing them to lose parental authority. Since this social worker felt that such an outcome would benefit the child and that her employer's objective is to serve the child's interests, the Court held that because the employee's motives and the employer's goals aligned, the social worker's wrongdoing triggered vicarious liability.<sup>109</sup> This approach is clearly insufficient, as one author puts it, it is "a crude enterprise risk theory" that imposes liability on the employer for having introduced a risk into society without actually evaluating the degree to which the employer contributed to this risk.<sup>110</sup> Such cases demonstrate scenarios in which Quebec's scope of employment test is unduly broad in that it imposes vicarious liability for unpredictable and extreme acts without any regard to whether the employer could have prevented them.

The benefit of the employer test, as it has been applied in Quebec, does not provide courts with a lens through which to evaluate the conduct of the employer, and therefore does not allow for a delineation of liability on the basis of fairness and deterrence as *Bazley* does. Vicarious liability under the rule in *Bazley* is not a mere "deep pockets" rule.<sup>111</sup> While the fact that employers are typically more solvent than wrongdoing employees

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<sup>107</sup> *Le Havre*, *supra* note 61 at 18.

<sup>108</sup> Gray, *supra* note 7 at 26–27.

<sup>109</sup> *A(J) c F(S)*, *supra* note 71.

<sup>110</sup> Gray, *supra* note 7 at 25.

<sup>111</sup> *Jacobi*, *supra* note 2 at para 24.

looms large, the imposition of liability must bear a connection to the employer's risk creation. This introduces an element of fairness into the analysis because courts are forced to consider whether there is something more that the employer could have done to meaningfully reduce the risk of the wrongdoing that materialized.

The *Axa* case provides an interesting point of entry through which to analyze how the concept of fairness is augmented through the incorporation of the *Bazley* analysis. In that case, the Court seemingly applies both *Bazley* and *Le Havre* to a situation in which a security guard lights the building he was guarding on fire. Applying *Bazley*, the Court found that the owner of the building was vulnerable because it entrusted the building's safety and integrity to the employer's security company. Then, the Court went on to explain that the security guard's ability to be alone for an extended period of time materially increased the risk of arson.<sup>112</sup> In the alternative, applying *Le Havre*, the Court held that the employer benefitted from the arson because if the employee successfully put out the fire, as he intended, the company would have looked proactive.

While one may question the reasonability of the conclusion under either test, it is evident that the *Bazley* approach provides the defendant with a more satisfactory answer as to why it has been held liable. Justice Masse's application of the risk creation theory traces vicarious liability to the employer's decision to grant the security guard free reign over the empty building. While the employer may not necessarily have acted unreasonably, it can understand how its conduct contributed to the injury. Under this analysis, the Court articulates that although the security company isn't a wrongdoer *per se*, it played a significant part in the occurrence of the wrongdoing. This reasoning grants legitimacy to the holding that it is fairer for the security company than the purely innocent victim to bear the financial costs of the fire.

The *Le Havre* analysis, on the other hand, fails to explain—even implicitly—the role that the employer played in the arson or why the employer should bear the cost of that arson. In addition, it is unclear why the employee's motivations for committing a wrongful act should impact an employer's liability. There is no principled reason why it would have been less fair for the security guard's employer to be liable if his motivation for lighting the building on fire was pyromania. In either scenario, the defendant's conduct, blameworthiness and ability to prevent the fire would have been exactly the same.

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<sup>112</sup> *Axa*, *supra* note 62 at para 109.

In addition to adding a degree of fairness to the delineation of liability, the *Bazley* approach also increases the odds that vicarious liability will be capable of deterring wrongful conduct.<sup>113</sup> The policy rationale of deterrence is ubiquitous in general theories of tort and vicarious liability is no exception.<sup>114</sup> As such, the deterrent function of liability should be considered when crafting rules of vicarious liability.

Because under *Bazley* the employer's contribution to enhancing the risk that enabled the wrongdoer's deliberate tort is determinative of liability, enterprises' internal policies aimed at avoiding liability should be aimed directly at negating employees' opportunities to commit any wrongdoing. For example, we would expect cautious counsel for a camp or school to suggest policies ensuring that children and adults are rarely alone in compromising situations. In addition, internal policies may be based on judgments under the *Bazley* framework because these point to concrete risk factors that contribute to wrongdoing and, therefore to liability. The identification of these risk factors may serve as tangible examples of the type of conduct employers should avoid.

Under *Le Havre*, however, from a strictly legal point of view, counsel could ostensibly provide sound advice by only going as far as advising against setting up a situation in which an employee's abuse could be seen, even in some distant way, to benefit the employer. Because of the nature of the "benefit of the employer test," in order to avoid legal responsibility for sexual assault or theft committed by its employees, employers may need only to avoid being personally at fault. This standard is significantly less exacting than the material increase in risk standard. In an ideal world, enterprises would take precautions against abuse regardless of the regime of vicarious liability in place. There is little downside, however, to a test that admonishes businesses for not taking these steps.

As it stands now, the single criterion that an act must have served or attempted to serve the benefit of an employer to be within the scope of employment leaves an extremely narrow space for intentional torts like assault. This difficulty stands in stark contrast with the broad interpretation that Quebec courts have given to the scope of employment where employees take extreme measures to serve what they mistakenly perceive as their employee's interests. It is rather absurd that the dominant doctrine of vicarious liability in Quebec would hold an employer liable for the damages caused by a social worker who sends herself death threats but

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<sup>113</sup> See generally Hall, "Liability Without Fault", *supra* note 9.

<sup>114</sup> Sykes, *supra* note 38; Brodie, *supra* note 23; Neyers, *supra* note 21; *London Drugs*, *supra* note 13; Baudouin, Deslauriers & Moore, *supra* note 20.

not for the damages caused were that same social worker to assault a child under her care.

In sum, when compared to the test in *Bazley*, Quebec's traditional approach to defining the scope of employment in cases of intentional wrongdoing does not provide a framework for ensuring fairness and is less likely to ensure behaviour modification. In order to enhance the law of vicarious liability, Quebec's judiciary should look towards *Bazley* and incorporate a risk-based approach to the scope of employment which adequately examines the role granted to an employee, the structure created by an employer and how they have conspired to contribute to the wrongdoing at issue.

Although there may be a reluctance to the wholesale implantation of a "common law" test into Quebec's civil law, the adoption of a *Bazley*-like approach would not be as drastic a change as it may seem.<sup>115</sup> First, as explained above, some courts in Quebec have explicitly endorsed *Bazley*, and others have implied that the civil law should adopt a policy-oriented view of the scope of employment. As such, change may already be—albeit incrementally—underway. Secondly, a conceptual similarity between the approaches in *Le Havre* and *Bazley* may allow courts to smoothly bridge the gap between the two.

The Supreme Court's risk creation test does not abandon the notion of benefit to the employer altogether. In fact, it is listed as a factor which may contribute to a finding that the employer's enterprise materially increased the risk of its employee's wrongdoing.<sup>116</sup> Therefore, the adoption of *Bazley* in Quebec would not do away with the province's jurisprudence on the issue altogether. Rather, it would allow courts to build on it through a more nuanced approach to the problem of vicarious liability.

In addition, the material increase in risk test from *Bazley* bears certain similarities to the benefit of the employer test from *Le Havre*. This conceptual connection between both approaches stems from the fact that even under the enterprise risk approach, courts are tasked with evaluating how the employer benefitted from the situation that led to the wrongdoing. Instead of asking if the employer benefitted from the wrongdoing itself, however, Canadian common law courts must ask if the employer benefitted from a situation which allowed for the wrongdoing to occur.

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<sup>115</sup> One author hypothesizes that Justice LeBel's judgment in *Le Havre* was motivated by a desire to protect the traditional civil law rules rather than analyse how relevant they are in modern society: Langevin, *supra* note 23 at 49.

<sup>116</sup> *Bazley*, *supra* note 1 at para 41.

Although the concept of benefit to the employer is not determinative in *Bazley*, it underpins the risk creation model. Doctrinal writers from both Canadian legal traditions have accepted that vicarious liability is fair because it is the employer that benefits the most from the existence of the enterprise.<sup>117</sup> In its simplest form, the argument is that since the employer reaps the rewards of the business, it should also bear its social costs.

Both Canadian scope of employment tests aim to address this very notion, they only differ on where the benefit to the employer must be found. Under *Bazley*, the employer is liable where it benefits from the introduction of a material risk. Under *Le Havre*, the employer is liable where it benefits from the wrongful act or where the employee feels the employer will benefit from this act, regardless of how inconsequential the relationship between the enterprise and the creation of that risk may be. While the practical difference between these two tests is notable, the basic conceptual premise on which they lie is similar. As a result, an adoption of *Bazley* in Quebec would be a modest theoretical advance with significant concrete benefits.

Moreover, there is precedent for Quebec courts to draw on in looking to the common law for guidance. History has shown that the adoption of common law reasoning into Quebec civil law is not just possible, but also, in certain instances, beneficial. For example, the law of civil procedure in Quebec is defined by its mixity. More specifically, the institution of discovery was directly transplanted from the common law and is now an integral part of procedure in Quebec. The same can be said of the injunction as well as its related procedures.<sup>118</sup> In addition, Quebec's law of evidence is deeply rooted in the common law. For example, the concept of hearsay did not make its way into Quebec law from the French tradition. Rather, it was borrowed from the Anglo-Canadian tradition.<sup>119</sup>

Even in common law Canada, courts have looked to the civil law for guidance when the issue in dispute is similar in principle between traditions. For example, on the computation of damages, the Supreme Court of Canada relied on article 1608 of the Quebec *Civil Code* to fashion a common law rule mirroring the civilian solution.<sup>120</sup>

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<sup>117</sup> Laski, *supra* note 23 at 108; Pinsonneault, *supra* note 20 at 79; Neyers, *supra* note 21 at 17; Baudouin, Deslauriers & Moore, *supra* note 20 at para 827; Gilliker, *supra* note 20 at 237; Langevin, *supra* note 23 at 41.

<sup>118</sup> Rosalie Jukier, "Procedural law as a Microcosm of Mixity" (2016) 62:3 Loy L Rev 691 at 697.

<sup>119</sup> Daniel Jutras, "Cartographie de la mixité: La Common Law et la Complétude du Droit Civil au Québec" (2009) 88:2 Can Bar Rev 249 at 264.

<sup>120</sup> See generally the majority reasons of Justice Cory in *Cooper v Miller*, [1994] 1 SCR 359, 113 DLR (4th) 1.

While the civil law and the common law jurisprudence on vicarious liability has largely developed in parallel, with only rare examples of comparative analysis, there is no reason why this must continue. As explained above, the principles underlying vicarious liability across Canadian law are similar and, therefore, there is no theoretical impediment to the adoption of the common law's approach in Quebec.

Aside from being admitted by Canadian courts, a comparative approach can be a useful tool in ensuring that the law is responsive to societal developments. Rather than remain civilian for the sake of being civilian, Quebec judges should provide a more just result for litigants by looking to the rest of Canada's caselaw. Such an approach would ensure that Quebec law does not become sclerotic. As Daniel Jutras writes, criticizing scholars who fear mixity, "sur les terrains de mixité parcourus ici, comme d'ailleurs sur le terrain libre du droit comparé, cette attitude risque de produire une fermeture qui appauvrira le droit civil québécois et le privera de sa singularité."<sup>121</sup>

In sum, as it stands, a heavy volume of Quebec cases supports defining the scope of employment based either on how the impugned act furthers the employer's objectives or on how the employee thinks they will. Nonetheless, a series of contrarian cases applying an enterprise risk approach has introduced a counter-narrative into the law of obligations. As such, there remains doubt as to the applicable legal test. In my view, the best way for Quebec courts to settle this doubt is by returning to the basic policy principles underlying vicarious liability and applying a legal test which meaningfully considers these principles. Adopting the Supreme Court's test from *Bazley* is therefore the best way forward.

## Conclusion

In conclusion, the law of vicarious liability for intentional and criminal wrongdoing in Quebec aims to address the same policy concerns as the vicarious liability regime in place elsewhere in Canada. Despite the seemingly similar foundation upon which these different legal regimes are built, they have developed different approaches towards defining the scope of a wrongdoer's employment, and therefore towards delineating an employer's liability. The approach employed in the common law provinces as a result of the judgment in *Bazley* openly engages with policy considerations and is an effective tool for ensuring deterrence and the fair allocation of liability. Quebec's approach, which reflects a jurisprudential trend which started in 1920 in *Curley* and culminated with the 1998

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<sup>121</sup> Jutras, *supra* note 119 at 271.

judgment in *Le Havre*, however, is notable for its conspicuous absence of overt policy discussion.

As a result of the test typically employed in Quebec, courts have had difficulty responding to certain forms of intentional wrongdoing in a meaningful and principled manner. Therefore, the policy concerns of deterrence and fairness—which underscore vicarious liability—are underserved by Quebec’s law. In addition, the difficulties in applying a strict “benefit of the employer” test in cases of intentional torts have resulted in confusing and unpredictable constructions of what constitutes a benefit as well as certain liability blind spots.

In response to the limitations of the traditional civilian approach, a minor trend has emerged in which Quebec courts implement *Bazley* altogether. Although this trend has been met with some resistance, it reflects the fact that in some instances, especially with regard to sexual violence, the *Le Havre* test has outlived its usefulness. In order to palliate the challenges faced by the imposition of vicarious liability in Quebec, courts should not hesitate to look to the Supreme Court’s common law jurisprudence for guidance. Until further notice from an appellate court, however, the scope of employment test in Quebec will remain the object of great uncertainty—with respect to both what it is and how it is applied.