

**VICARIOUS LIABILITY AND SEXUAL ABUSE: A COMPARATIVE ANALYSIS OF
DIFFERENT JURISDICTIONS**

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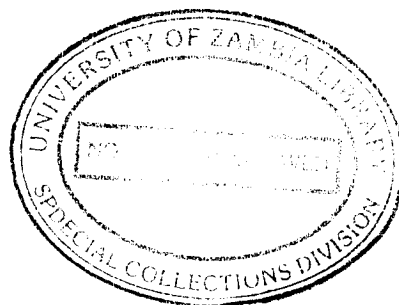
DOROTHY CHISENGALUMBWE

A dissertation submitted to the University of Zambia Law Faculty in partial fulfillment of the requirements for the Award of the Bachelor of Laws (LLB) Degree.

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DECLARATION

I **DOROTHY CHISENGALUMBWE COMPUTER NUMBER 26128683** hereby declare that the contents of this directed research are entirely based on my own findings and it has not previously been submitted for a degree at the University of Zambia or any other University. All other works referred to in this essay have been duly acknowledged. I bear absolute responsibility for all errors, defects or any omissions herein.



STUDENTS' NAME.....*Dorothy Chisengalumbwe*.....

SIGNATURE.....*[Signature]*.....

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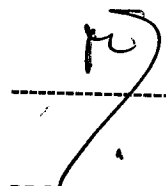
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DEDICATION

This obligatory essay is dedicated to the most loving parents in the whole world, daddy Brian, mommies Kapela and Mavis. Heartfelt thanks to you all! Love you all and God bless. To my best friend and hubby Jeff....

ACKNOWLEDGEMENTS

It has not been an easy road putting together this obligatory essay but because of the mercies and graces the Lord almighty has bestowed on me, I have pulled through. Thank you to my supervisor professor Mvunga, for guiding me, even though at times it was frustrating to keep redoing the chapters. Your guidance has enlightened and equipped me for my future ahead.

Many thanks, to my interviewees who helped me put my work into perspective and guided me, when I needed the guidance. In particular, Mr Mumba Malila and Mrs Susan Wangelani. Thank you again.

Thank you to my family and friends who have urged me on. Law school has been extremely tough! Indeed it is the school of the fittest only the fittest survive. A lot of people have fallen out along the way, but here I am finally completing my LLB....To God be the Glory!!!!!!!!!!!!!!!!!!!!

To my parents, I say thank you for the financial, moral and spiritual support. You have always believed in me and always encouraged me, I guess that's why I have reached this far...I owe my life and entire being to.....

To my siblings Lombe, Chimba, Chinyanta, Pasha, John, Isaac, I hope I have set the right precedent for you all to tag along. A special thanx to you Jeff, for believing in me, loving me and always being there for me when I call on you.

To my friends Khetiwe, Mutale, Violet, Tawona, Maria, Obrien, Nchimunya Kasongo, Nchimunya Ng'andu, Ba Zelu, Kebby, Ba roomy- Lois thank you for being friends! Those not specifically mentioned but who have been there through my UNZA days, Thank You!

ABSTRACT

This obligatory essay discusses how the concept of vicarious liability for sexual abuse has developed in the United States, Canada and England and whether the developments in these jurisdictions are of value to the Zambian legal system. A comparative analysis of different jurisdictions is presented to demonstrate how the Supreme Court of Canada and the House of Lords have approached the issue of vicarious liability for sexual abuse. Further, it discusses how the courts in Zambia have approached the issue of vicarious liability for sexual abuse. This essay, through research found that in jurisdictions abroad, employers have been held vicariously liable for the sexual misconduct of their employees if the sexual misconduct is sufficiently related to the conduct authorized by the employer. According to the findings, the Zambian courts have not made a positive contribution to the law of vicarious liability for sexual misconduct in *Rosaria Mashita Katakwe v AG* because the issue of course of employment which is a critical factor in finding no fault- liability, was not addressed. In general, this essay concludes that the principle of vicarious liability for sexual abuse is valuable to the Zambia legal system in that it may be an effective way of reducing sexual abuse and ensuring victims receive compensation. This essay proposes recommendations regarding what needs to be done in order that the alarming numbers of sexual abuse cases are reduced, compensation is given to victims and effective measures of deterrence are put in place. In particular, institutions should review their internal risk management mechanisms to address the possibility of abuses occurring in their organizations; employee screening is essential and should include criminal record checks; government needs to improve the Victim Support Unit to respond with the needs of society and public information campaigns on sexual violence against women will help enlighten the public.

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CHAPTER ONE

AN INTRODUCTION TO THE CONCEPT OF VICARIOUS LIABILITY AND SEXUAL ABUSE

1.0 Introduction

Initially, jurisdictions such as the United Kingdom, United States and Canada demonstrated a general reluctance to hold employers vicariously liable for employees' sexual torts, but this may be changing. There are many recent cases in these jurisdictions, where victims of sexual abuse have brought civil actions for damages against employers of the offending employee. These raise various significant legal issues, and one of these, so far not much explored in Zambia, is whether and the extent to which there can be vicarious liability for sexual abuse. Victims of sexual abuse frequently wish to sue the employer of the perpetrator rather than the perpetrator personally.¹ A practical reason for this is that the employer is more likely to be able to satisfy any award of damages. Consequently, vicarious liability has been imposed not just for an employee's negligent acts but also for an employee's intentional and criminal acts.²

Three recent leading overseas cases, *Bazley v Curry*,³ *Jacobi v Griffiths*,⁴ and *Lister v Hesley Hall*⁵ have considered vicarious liability in sexual abuse cases. It is clear from these decisions that it is possible to impose vicarious liability for sexual abuse perpetrated by employees. Despite their differences in approach, the conclusion reached by the respective courts as to when vicarious liability for an employee's sexual assault ought to be imposed is the same. What is

¹ Alison Todd. "Vicarious Liability for Sexual Abuse" Available at <http://www.nzlii.org/nz/journals/canterlaw/Rw/2002/2.html>. (Accessed November 3, 2011).

² Todd, "Vicarious Liability for Sexual Abuse." Available at <http://www.nzlii.org/nz/journals/canterlaw/Rw/2002/2.html>. (Accessed November 3, 2011).

³ (1999) 174 DLR (4th) 45

⁴ (1999) 174 DLR (4th) 7

⁵ [2001] WLR 1311

required is a significant connection between the creation of a risk (the employment) and the wrong (the sexual abuse) that arises from the employment and the abuse. As will be seen in the succeeding chapters, the decisions in these jurisdictions show that the cases that attract vicarious liability are those that give rise to a fiduciary relationship between employee and victim.⁶

In Zambia, only one case has considered this issue. In the recent decision of Judge Phillip Musonda of the Zambian High Court, in the case of *Rosaria Mashita Katakwe v The Attorney General and Ors*⁷, a minor girl-student was awarded 45million Zambian Kwacha after she brought her teacher to court for rape. This is the first case of its kind for a minor to win against a person in authority in the nation of Zambia.⁸ Activists in Zambia have called this a landmark decision. Since this case reached the courts, the victim's lawyer has received several calls from other girls and their families seeking help in cases of defilement.⁹ Girls have also approached the victim quietly for advice on their own situations of incest and teacher abuse,¹⁰ illustrating all too clearly how the government needs to address this issue urgently.

1.1 Statement of Problem

Basically, this study presents two problems; firstly, the alarming number of sexual abuse cases in Zambia. A quick perusal of newspapers, magazines and law reports reveals an increase in the number of cases in which perpetrators infringe the rights of citizens by sexually abusing them. The vice is rampant and is manifested in different forms; defilement, rape, sexual assault and

⁶ *Lister v Hesley Hall* [2001] WLR 1311

⁷ 2006/HP/0327

⁸ "The Rampant Rape of School Girls." Available at www.sexualabuse.org. (Accessed November 3, 2011).

⁹ "The Rampant Rape of School Girls.." Available at www.sexualabuse.org. (Accessed November 3, 2011).

¹⁰ "The Rampant Rape of School Girls." Available at www.sexualabuse.org. (Accessed November 3, 2011).

indecent assault. A sexual behavior survey¹¹ undertaken by the Government of Zambia in 2003 revealed that 16.3 percent of female respondents from all age groups had experienced forced sexual encounters, with 17.7 percent of the youngest age sample (15 to 19 years old) reporting “forced sex.” In a 2007 study undertaken by the non-governmental organization Women and Law in Southern Africa Research and Education Trust-Zambia (WLSA-Zambia),¹² schoolgirls indicated there was violence in schools ranging from verbal sexual harassment to rape. Of ten girls from the same school participating in one forum, seven had been sexually molested by the same teacher and none had reported it for fear of being victimized or further harassed. Lack of knowledge and information on where to report was also said to be a major limitation.

Secondly, there are inadequacies in the law in that there is a problem of victims actually recovering compensation in sexual abuse cases. An employee who commits a sexual offence will, most probably, have been dismissed from work and may possibly have been imprisoned for the criminal aspect of that conduct. The chances of recovering damages from such an employee are very low. This low likelihood of recovery makes the case for vicarious liability in a sexual abuse context stronger.¹³ Thus, vicarious liability is a particularly effective way of distributing tort losses in these circumstances and an investigation is necessary to see how laws addressing this issue in other jurisdictions can be incorporated into the Zambian legal system to cure the existing lacuna.

Thus, this study will concern itself with a discussion of how the common law concept of vicarious liability has been extended and modified in recent years in other jurisdictions such as

¹¹ “The Rampant Rape of School Girls.” Available at www.sexualabuse.org. (Accessed November 3, 2011).

¹² “The Rampant Rape of School Girls.” Available at www.sexualabuse.org. (Accessed November 3, 2011).

¹³ Todd, “Vicarious Liability for Sexual Abuse.” Available at <http://www.nzlii.org/nz/journals/canterlaw/Rw/2002/2.html>. (Accessed November 3, 2011).

the United Kingdom, the United States and Canada so as to include sexual abuse and whether such developments are of any value and relevance to Zambia. The above reference to these jurisdictions has been undertaken to show the extent of the problem. It is clear that there is need for government to address this issue urgently and there is need for the judiciary and legislators to respond positively to ensure that women and girls have full recourse to the law if they are sexually abused. In short, this is a clear problem that deserves a detailed analysis to determine the best way forward, thus legitimizing the urgent need for this research.

1.2 Objectives of the Study

The general objective of this study is to bring to light the inadequacies of the law in Zambia by investigating how the law on vicarious liability in the context of sexual abuse has developed in the United Kingdom, the United States and Canada. In so doing, this study will investigate whether such developments can be imported and applied in the Zambian legal system in order that the problem of victims recovering compensation in sexual abuse cases is dealt with. Furthermore, the study will investigate whether such developments in the law will act as a deterrence of sexual abuse by perpetrators.

1.2.1 Specific Objectives

The objectives of this essay are to;

- a) Explain the nature of vicarious liability and the policy behind this principle.
- b) Discuss the justification of vicarious liability in the context of sexual abuse
- c) Discuss how and why, the United Kingdom, the United States of America and Canada have modified the concept of vicarious liability and developed it in the context of sexual abuse.

- d) Bring to light the alarming situation of sexual abuse cases in Zambia.
- e) Bring to light the inadequacies of the law in Zambia and to discuss whether the development of vicarious liability in the context of sexual abuse in other jurisdictions maybe borrowed and applied in Zambia in order that sexual abuse victims are compensated and perpetrators are deterred from such behaviour.
- f) To draw conclusions as to the efficacy of the principle of vicarious liability in addressing the issue of sexual abuse in Zambia and recommend accordingly.

1.3 Rationale and Justification

This research is justified on the basis that there is an increasing problem of sexual abuse and lack of compensation to victims in Zambia. It is also significant in that it aims to come up with practical and legal solutions to the problem of victims receiving compensation. It is also necessary to investigate whether or not the application of vicarious liability in the context of sexual abuse will act as a deterrence to would be offenders.

1.4 Research Questions

1. What justifications are advanced for extending vicarious liability to sexual abuse cases?
2. How has the concept of vicarious liability been extended and modified to apply to sexual abuse in other jurisdictions such as United Kingdom, United States and Canada?
3. What is the current situation of sexual abuse in Zambia?
4. Will the imposition of vicarious liability be a means of victims receiving compensation in Zambia?
5. Will the imposition of vicarious liability serve as a means of deterring perpetrators?

6. Has the decision in *Rosaria Mashita Katakwe v AG* contributed to the law on vicarious liability in light of the alarming rates of sexual abuse cases in Zambia?
7. Of what value are the developments of vicarious liability in other jurisdictions to Zambia; will they serve their intended purpose of reducing the number of sexual abuse cases; deterrence of abusers and compensation to victims?

1.5 Methodology

The major method of data collection to be deployed will be desk research. Where necessary, this will be supplemented by interviews with various personnel in sectors tasked with sexual abuse and violence matters. The data for this research was sourced from books, the internet, journal articles, paper presentations, student obligatory essays and reports by mandated bodies.

1.6 The Nature of Vicarious Liability

Vicarious liability is a common law doctrine that imposes liability upon one party for torts committed by another party.¹⁴ It is a form of strict, secondary liability that arises under the common law doctrine of agency – *respondeat superior* – the responsibility of the superior for the acts of their subordinate, or, in a broader sense, the responsibility of any third party that had the "right, ability or duty to control" the activities of a violator.¹⁵ In one of the leading treatise on vicarious liability, Atiyah¹⁶ has defined vicarious liability as a:

¹⁴ Todd, "Vicarious Liability for Sexual Abuse." Available at <http://www.nzlii.org/nz/journals/canterlawRw/2002/2.html>. (Accessed November 3, 2011).

¹⁵ John Salmond, "Salmond on Torts," 1st ed, 1907, p. 83-84. Available at <http://www.nzlii.org/nz/journals/CanterLawRw/2002/2.html> (Accessed on October 26th 2011)

¹⁶ Todd, "Vicarious Liability for Sexual Abuse." Available at <http://www.nzlii.org/nz/journals/canterlawRw/2002/2.html>. (Accessed November 3, 2011).

Liability imposed by the law upon one person as a result of a tortious act or omission by another,
some relationship between the actual tortfeasor and the defendant whom it is sought to make liable,
and some connection between the tortious act or omission and that relationship.

Employers are vicariously liable, under the *respondeat superior* doctrine, for negligent acts or omissions by their employees in the course of employment (sometimes referred to as 'scope of employment').¹⁷ For an act to be considered within the course of employment it must either be authorized or be so connected with an authorized act that it can be considered a mode, though an improper mode, of performing it.¹⁸

An employer's vicarious liability must be distinguished from any direct or primary liability of the employer. An employer is primarily liable for his or her own torts, including any failure to take all proper care in its employment procedures.¹⁹ Further, an employer who authorizes an employee to commit a tort commits a tort in its own right and may be held independently liable.²⁰ An employer who acquiesces in tortious misconduct by an employee may also be independently liable in negligence.²¹ This is in contrast to imposing vicarious liability on the employer for the acts of his or her employees. Thus, it can be seen that vicarious liability is a doctrine of strict liability, where the employer is liable despite there being no finding of fault or negligence on the employer's part. The employer's vicarious liability is based on his or her servant's tort being imputed to him or her, whereas an employer's primary liability is linked to

¹⁷ John Salmond, "Salmond on Torts," 1st ed, 1907, p.83-84. Available at <http://www.nzlii.org/nz/journals/CanterLawRw/2002/2.html> (Accessed on October 26th 2011)

¹⁸ Todd, "Vicarious Liability for Sexual Abuse." Available at <http://www.nzlii.org/nz/journals/canterlawRw/2002/2.html>. (Accessed November 3, 2011).

¹⁹ B. Feldthusen, "Vicarious Liability for Sexual Torts" Available at <http://www.nzlii.org/nz/journals/canterlawRw/2002/2.html>. (Accessed November 3, 2011).

²⁰ R Tobin, 'Vicarious Liability: Recent Developments' New Zealand Business Law Quarterly, Available at <http://www.nzlii.org/nz/journals/canterlawRw/2002/2.html>. (Accessed November 3, 2011)

²¹ Todd, "Vicarious Liability for Sexual Abuse." Available at <http://www.nzlii.org/nz/journals/canterlawRw/2002/2.html>. (Accessed November 3, 2011).

breach of his or her personal duty.²² The focus of this essay is on the vicarious liability of an employer, independently of any potential primary liability.

1.7 Sexual abuse

Sexual abuse, also referred to as molestation, is the forcing of undesired sexual behaviour by one person upon another.²³ When that force is immediate, of short duration, or infrequent, it is called sexual assault.²⁴ The offender is referred to as a sexual abuser or often pejoratively molester.²⁵ The term also covers *any* behaviour by *any* adult towards a child to stimulate either the adult or child sexually. When the victim is younger than the age of consent, it is referred to as child sexual abuse.²⁶

1.8 Types of sexual abuse

There are many types of sexual abuse, including:

- Non-consensual, forced physical sexual behaviour (rape and sexual assault).
- Unwanted touching, either of a child or an adult.
- Sexual kissing, fondling, exposure of genitalia.
- Exposing a child to pornography.
- Saying sexually suggestive statements towards a child (child molestation).
- Also applies to non-consensual verbal sexual demands towards an adult.
- The use of a position of trust to compel otherwise unwanted sexual activity without physical force (or can lead to attempted rape or sexual assault).
- Incest

²² Todd, "Vicarious Liability for Sexual Abuse ." Available at <http://www.nzlii.org/nz/journals/canterlaw/Rw/2002/2.html>. (Accessed November 3, 2011).

²³ Barbra, Bogorad, "Sexual Abuse: Surviving the Pain" Available at <http://www.apa.org/practice/childprotection.html>. (Accessed October 5, 2011).

²⁴ Sue Blume, "Secret Survivors" Available at <http://www.apa.org/practice/childprotection.html>. (Accessed October 5, 2011).

²⁵ "Peer commentaries on Green (2002) and Schmidt (2002)". *Archives of Sexual Behavior* Available at http://wikipedia.org/wiki/sexual_abuse (Accessed November 3, 2011).

²⁶ Available at http://en.wikipedia.org/wiki/child_sexual_abuse (Accessed November 3, 2011).

1.8.1 Positions of power

Sexual misconduct can occur where one person uses a position of authority to compel another person to engage in an otherwise unwanted sexual activity.²⁷ For example, sexual harassment in the workplace might involve an employee being coerced into a sexual situation out of fear of being dismissed. Sexual harassment in education might involve a student submitting to the sexual advances of a person in authority in fear of being punished, for example by being given a failing grade. Several sexual abuse scandals have also involved abuse of religious authority as will be seen in the succeeding chapters.

1.8.2 Child sexual abuse

Child sexual abuse is a form of child abuse in which a child is abused for the sexual gratification of an adult or older adolescent.²⁸ It is generally defined as contacts between a child and an adult or other person significantly older or in a position of power or control over the child, where the child is being used for sexual stimulation of the adult.²⁹ In addition to direct sexual contact, child sexual abuse also occurs when an adult indecently exposes their genitalia to a child, asks or pressures a child to engage in sexual activities, displays pornography to a child, or uses a child to produce child pornography.³⁰ Most sexual abuse offenders are acquainted with their victims; approximately 30% are relatives of the child, most often fathers, uncles or cousins; around 60%

²⁷ Barbra Bogorad "Sexual Abuse: Surviving the Pain" Available at <http://www.apa.org/practice/childprotection.html>. (Accessed October 5, 2011).

²⁸ Finn Hartman "Child Sexual Abuse". Available at <http://www.nlm.nih.gov/medlineplus/childsexualabuse.html>. (Accessed October 5, 2011).

²⁹ Barbra Bogorad "Sexual Abuse: Surviving the Pain" Available at <http://www.apa.org/practice/childprotection.html>. (Accessed October 5, 2011).

³⁰ Finn Hartman "Child Sexual Abuse". Available at <http://www.nlm.nih.gov/medlineplus/childsexualabuse.html>. (Accessed October 5, 2011).

are other acquaintances such as friends of the family, babysitters, or neighbours; strangers are the offenders in approximately 10% of child sexual abuse cases.³¹

1.8.3 Sexual abuse of people with developmental disabilities

People with developmental disabilities are often victims of sexual abuse. According to research³², people with disabilities are at a greater risk of victimization of sexual assault or sexual abuse because of lack of understanding. The rate of sexual abuse happening to people with disabilities is shocking, yet most of these cases go unnoticed.

1.9 Conclusion

This chapter has set the scene for this obligatory essay by introducing the area of research, delineating the area of research by stating the problem to be researched. It has also explored the definitions and the nature of the terms vicarious liability and sexual abuse. It is clear that there is a problem of sexual abuse in Zambia and also a problem of victims recovering compensation for sexual abuse. This essay will, in the succeeding chapters, explore how other jurisdictions have approached the issue of vicarious liability for sexual abuse. In so doing, this paper will investigate whether such developments can be imported and applied in the Zambian legal system in order that the problem of victims recovering compensation in sexual abuse cases is dealt with. Furthermore, the study will investigate whether such developments in the law will act as a deterrence of sexual abuse by perpetrators.

³¹ Finn Hartman, "Child Sexual Abuse". Available at <http://www.ptsd.va.gov/public/pages/child-sexual-abuse.asp>. (Accessed October 5, 2011).

³² Finn Hartman, "Child Sexual Abuse". Available at <http://www.ptsd.va.gov/public/pages/child-sexual-abuse.asp>. (Accessed October 5, 2011).

CHAPTER TWO

POLICY CONSIDERATIONS AND COURSE OF EMPLOYMENT

2.0 Introduction

This chapter shall firstly ascertain the policy considerations behind vicarious liability. Particular attention will be given to the justifications of vicarious liability when applied in a sexual abuse context. Secondly, this chapter shall examine the law as to when an employer maybe held vicariously liable. It will further illustrate how the law on vicarious liability has developed to include not only negligent acts but also intentional or criminal acts.

2.1 Policy behind Vicarious Liability

Can vicarious liability be justified? This aspect of the essay addresses the issue of why there should be a rule of vicarious liability. Vicarious liability is one of the most firmly established legal principles throughout the common law world. This may seem peculiar considering the doctrine is at odds with the fundamental principles of tort law, viz¹:

- (a) that a person should only be liable for loss or damages caused by his or her own acts or omissions, and
- (b) that a person should only be liable where he or she has been at fault.

¹ Dennis Keenan, Smith and Keenan's English law, 14th ed. (London: Pearson Education Limited, 2004), 483.

A number of theories have been put forward to explain the deviation from the prevalent fault-based theory of liability. One accepted view as to its possible justifications, is that the doctrine serves public policy. Fleming² has given an overview:

Most important... is the belief that a person who employs others to advance his own economic interest should in fairness be placed under a corresponding liability for losses incurred in the course of the enterprise; that the master is a more promising source of recompense than his servant who is apt to be a man of straw without insurance...; and that the rule promotes wide distribution of tort losses, the employer being a most suitable channel for passing them on through liability insurance and higher prices... deterrent pressures are most effectively brought to bear on larger units like employers who are in a strategic position to reduce accidents by efficient organization and supervision of their staff.

Four justifications can be identified in Fleming's words above; fairness, the deep pocket principle, distributive justice and deterrence. These ideas will be examined in below.

2.1.1 Fairness

It has been argued that one of the primary considerations behind vicarious liability is to provide a just and practical remedy to people who suffer as a consequence of wrongs perpetrated by an employee.³ In other words, a person who creates a risk should bear the loss when the risk ripens into harm. It has also been argued that vicarious liability is a just concept because the employer profits from the employee's work and should therefore bear losses caused by the employee's torts.⁴ It is clear to say that, an employer chooses his employee and if he chooses a careless employee he ought to compensate the victims of the careless employee's torts.⁵ This public

² John Fleming, *The Law of Torts*, 9th ed. (London: Sweet & Maxwell, 1998), 410.

³ *Bazley v Curry* (1999) 174 DLR (4th) 45

⁴ Keenan, Smith and Keenan's *English law*, 483.

⁵ Keenan, Smith and Keenan's *English law*, 483.

policy consideration has been found in early judgments as well as those in the present day. In the old case of *Duncan v Finlater*⁶ Lord Brougham made the well-known statement that:

The reason that I am liable is this, that by employing him I set the whole thing in motion; and what he does, being done for my benefit and under my direction, I am responsible for the consequences of doing it.

2.1.2 The 'Deepest Pocket' Principle

The "deepest pocket" principle justifies vicarious liability because the employers generally have larger assets, and greater means with which to offset any losses than the employee who caused the damage.⁷ It has been suggested that one of the most important social goals served by vicarious liability is victim compensation. Professor Glanville Williams⁸ has commented:

However distasteful the theory maybe, vicarious liability owes its explanation to the search for a solvent defendant.

Put simply, an innocent tort victim should be able to pursue damages from a solvent defendant, and as many employees have insufficient resources to defend or honour a tort judgment, vicarious liability improves the chances of the victim recovering compensation from a solvent employer. Thus, it is safe to say that, it is more likely that the wrong will in fact be put right.

2.1.3 Distribution of Tort Losses

Apart from compensation described above, vicarious liability serves a loss-spreading function because employers are potentially better able to distribute tort losses to a wider community.⁹

⁶ [1839] Eng R 1005

⁷ Jenny Steele, *Tort Law: Text, Cases & Materials* (Oxford: Oxford University Press, 2007), 567.

⁸ Paula Giliker and Silas Beckwith, *Tort* (London: Sweet and Maxwell, 2000), 181.

⁹ Robert Flannigan, "Enterprise Control: The Servant- Independent Contractor Distinction" *University of Toronto Law Journal* 37 (1987) Available at http://en.wikipedia.org/wiki/vicarious_liability. (Accessed November 4 2011).

Firstly, according to Todd¹⁰, loss distribution comes about because the employer can pass on the cost of his or her tortious vicarious liability, through the price of the goods or services, to the community which consumes the product or service.¹¹ This means that ultimately the expense will be borne by the consumer of the product, who should pay the costs which the hazards of the business have incurred. Secondly, vicarious liability ensures that losses are spread efficiently via the network of compulsory employer insurance. The employer is the best insurer against liability and any extra cost to the employer can be passed on to the public in the form of higher prices.¹² In practice the employer does not really suffer loss because an employer can insure against such losses and the loss is then distributed to a large section of the community.¹³ Thus, it can be concluded that, if the costs of torts committed by employees in the course of employment are allocated to the employer, then the employer can take them into account in pricing and output decisions.

2.1.4 Deterrence of Future Harm

Todd¹⁴ has further argued that fixing the employer with responsibility for the employee's wrongful act, even where the employer is not negligent, may have a deterrent effect. She says holding the employer vicariously liable for employees' torts will encourage the employer to put in place efficient administration, and supervision to reduce accidents and intentional wrongs. In other words, the fear of vicarious liability gives employers great incentive to take every

¹⁰ Todd, "Vicarious Liability for Sexual Abuse." Available at <http://www.nzlii.org/nz/journals/canterlaw/Rw/2002/2.html>. (Accessed November 3, 2011).

¹¹ Todd, "Vicarious Liability for Sexual Abuse." Available at <http://www.nzlii.org/nz/journals/canterlaw/Rw/2002/2.html>. (Accessed November 3, 2011).

¹² Keenan, Smith and Keenan's English law, 483.

¹³ Keenan, Smith and Keenan's English law, 483.

¹⁴ Todd "vicarious liability for Sexual Abuse." Available at <http://www.nzlii.org/nz/journals/canterlaw/Rw/2002/2.html>. (Accessed November 3, 2011).

precaution to see that the enterprise is conducted safely.¹⁵ Therefore, an employer who then implements a cost-effective deterrence strategy would potentially avoid facing a future large judgment in tort.¹⁶ However, in cases of negligence, it can be argued that it is difficult to see how a person can be deterred from making a mistake. Moreover, Todd¹⁷ has further argued that a defendant is less likely to be deterred when he or she is insured. Critiques of vicarious liability have also argued that vicarious liability diminishes the deterrent effect of tort law; “why should I take care if any harm I cause will be paid for by my employer?”¹⁸ An employer has an option of an indemnity or contribution from the employee, although this right is rarely enforced. Seemingly, this weakens the impact of deterrence in relation to the employee. However, the employee may be deterred by the possibility of dismissal from employment and/or a criminal charge.

2.2 Justification in the Context of Sexual Abuse Cases

As seen above, arguments justifying vicarious liability are sound. Thus, they may have special significance in sexual abuse cases. Firstly and more importantly is that, as is common in general tort law, policy reasons should allow those injured to have means of compensation. This should therefore include victims of sexual abuse injured as a result of an employee’s sexual tort. Employers generally have larger assets than employees, thus victims stand a better chance of receiving compensation. Secondly, there is a possibility that an employee who commits a sexual

¹⁵ Todd, “Vicarious Liability for Sexual Abuse.” Available at <http://www.nzlii.org/nz/journals/canterlawRw/2002/2.html>. (Accessed November 3, 2011).

¹⁶ B Feldthusen, “Vicarious Liability for Sexual Torts” in NJ Mullany & AM Linden (ed) *Torts Tomorrow: A tribute to John Fleming* (1998) 225. Available at <http://www.nzlii.org/nz/journals/CanterLawRw/2002/2.html> (Accessed on October 26th 2011).

¹⁷ Todd, “Vicarious Liability for Sexual Abuse.” Available at <http://www.nzlii.org/nz/journals/canterlawRw/2002/2.html>. (Accessed November 3, 2011).

¹⁸ Giliker and Beckwith, *Tort*, 173.

tort may have been dismissed from work and may possibly be imprisoned for the criminal aspect of that conduct. The chances of recovering judgment from such an employee are very low. This low likelihood of recovery makes the case for vicarious liability in a sexual abuse stronger.¹⁹ Further, it is under the instruction of an employer by which a tort is committed; the employer can be seen to gain from the duties of their employees, and thus must bear the consequences of any wrongdoings committed by them.²⁰ Lastly, it has been justified as a way to reduce the taking of risks by employers, and to ensure adequate precautions are taken to prevent the risk of sexual abuse. Therefore, it can be argued that there are reasonably convincing justifications for the imposition of vicarious liability in sexual abuse cases. It is now imperative to look at when vicarious liability will be imposed.

2.3 The existence of an employer/employee relationship

Before vicarious liability is imposed on a defendant there are two conditions which must be met. First, there must be a specific employer- employee relationship. This is distinguished from an employer's relationship with a self employed independent contractor: employers are not usually liable for the torts of independent contractors. This has caused severe difficulties for the courts and continues to do so. It can sometimes be difficult to define the status of an employment relationship. This may happen to casual workers for example. One accepted distinction is that those working under "a contract of service" are employees and those working under "contract for services" are independent contractors.²¹ It has been argued that this distinction is of no help in

¹⁹ Feldthusen, "Vicarious Liability for Sexual Torts." in NJ Mullany & AM Linden (ed) *Torts Tomorrow: A tribute to John Fleming* (1998) 225. Available at <http://www.nzlii.org/nz/journals/CanterLawRw/2002/2.html> (Accessed on October 26th 2011).

²⁰ Basil Markesinis and Johnston Angus and Simon Deakin, *Markesinis and Deakin's Tort Law* (Oxford: At the University Press, 2007), 683.

²¹ Giliker and Beckwith, *Tort*, 173.

telling which is which. In the past, the degree of control exercised by the employer over the way in which work is done was the primary indicator used by the courts.²² Little credit is given now to early ideas that vicarious liability rested on the fact that the employee's acts were impliedly authorized, or that the employee should have been controlled by the employer as many employees perform skilled tasks which the employer is incapable of understanding.²³ Thus, to say for example, that a health authority chief executive controls the work of the consultant is stretching the meaning of the word. In today's advanced technological age, so many employees are now skilled; the employer may be able to tell the employee what to do but not how to do it. Therefore, instead of relying on a single test the courts now consider a wide range of factors in each particular case.

2.4 Course of Employment (the connection of torts to employment)

Once it is established that the sufficient relationship of employer and employee exists, it is necessary that any tort be committed in the course of employment.²⁴ As with distinguishing an employer and employee relationship, there is no one test which adequately establishes which acts employers are vicariously liable for. Such determinations rest upon precedent, and the facts of each individual case. An employer is not vicariously responsible for all tortious acts of its employees. The employer is liable only for those acts which fall within the employee's course of employment.²⁵ However, the point at which an employee steps outside his or her employment may be difficult to determine.

²² John Cooke, *Law of Tort*, 6th ed (London: Pearson Education Limited, 2003), 362.

²³ Cooke, *Law of Tort*, 362.

²⁴ Markesinis, Johnston, Deakin, Markesinis and Deakin's *Tort Law*, 683.

²⁵ S. Todd, *The Law of Torts in New Zealand*, 3rd ed, 2001, p.18,19. Available at <http://www.nzlii.org/nz/journals/CanterLawRw/2002/2.html> (Accessed on October 26th 2011)

In deciding whether an employee's tort has been committed in the course of his or her employment, usually the 'Salmond' test is applied.²⁶ This preferred test of the courts was formulated by John William Salmond, some 100 years ago, Salmond maintained that a wrongful act done by a servant is deemed to be in the course of employment if it is either; (1) a wrongful act authorized by the master, or (2) a *wrongful and unauthorized mode of doing some act* authorized by the master. Furthermore, a master is liable even for acts which he or she has not authorized, provided they are so connected with acts which he or she has authorized, that they may rightly be regarded as modes - although improper modes - of doing them. In other words, if the unauthorized and wrongful act of the servant is not so connected with the authorized act as to be a mode of doing it, but is an independent act, the master is not responsible: for in such a case the servant is not acting in the course of his or her employment, but has gone outside it.²⁷

A distinction can be drawn between acts which are prohibited, and acts which take employees out of the course of their employment. An illustration of the test is provided by two contrasting cases, *Limpus v London General Omnibus Company*²⁸ and *Beard v London General Omnibus Company*²⁹, both involving road collisions. In the former, a driver pulled in front of another rival omnibus, in order to obstruct it. Despite express prohibitions from the employer, they were found liable; this was merely an unauthorized mode of the employee carrying out his duties (driving), not an entirely new activity.³⁰ By contrast, in the latter case, London General Omnibus Company

²⁶ John Salmond, "Salmond on Torts," 1st ed, 1907, p.83-84. Available at <http://www.nzlii.org/nz/journals/CanterLawRw/2002/2.html> (Accessed on October 26th 2011)

²⁷ Todd, "Vicarious Liability for Sexual Abuse." Available at <http://www.nzlii.org/nz/journals/canterlawRw/2002/2.html>. (Accessed November 3, 2011).

²⁸ 158 ER 993

²⁹ [1900] 2QB 530

³⁰ 158 ER 993, 999

were not liable where a conductor (employed to collect fares on board the bus) negligently chose to drive the vehicle instead; this was completely outside of his duties.³¹

The surrounding circumstances of wrongdoings are often important in deciding whether an act is in the course of employment or not. For example, where a professional rugby player was expressly prohibited in contract from assaulting another player, it was held that as it had been contemplated by the drafters, such an act was in the course of his employment.³² Where in *Century Insurance Co v Northern Ireland Road Transport Board*³³ an employee set alight a petrol station, by throwing a match carelessly away while refueling a petrol tanker, this was adjudged to have been in the course of his employment.

It is relatively straightforward to apply the Salmond test to situations of negligent conduct by employees. However, a situation involving intentional torts by employees does not fit neatly into the framework of 'improper modes' of performing authorized tasks. This is because the employee may be seen as more intent on satisfying the employee's own interests than those of the employer. The question therefore is whether or how Salmond's test can apply in the case of an employee's willful wrongdoing, which is the concern of this essay.

2.5 Intentional torts of employees

Historically, most actions alleging vicarious liability for intentional torts failed, primarily on the grounds that no employer employs an individual to be dishonest, or to commit crimes.³⁴ It is apparent from the case law that courts are much more reluctant to impose vicarious liability

³¹ [1900] 2QB 530

³² *Gravil v Carroll* [2008] EWCA Civ 689

³³ [1942] AC 509

³⁴ Markesinis, Johnston, Deakin, Markesinis and Deakin's Tort Law, 687.

where an employee has committed a deliberate tort rather than where the employee has merely been negligent.³⁵ But it is perfectly clear that employers can be held vicariously liable for intentional acts. For example, in some cases the use of force may naturally be expected of certain employees. Stewards at dance halls³⁶ and persons authorized to repossess their master's property³⁷ who assault third parties have been held to be acting within the course of their employment, regardless of the motives of the employee or whether or not the force was in excess of what was authorized.³⁸ In this category, the employee's conduct can be seen as reasonably incidental to his or her allotted duties.³⁹ When that is so, vicarious liability may be imposed.

In the leading decision in *Lloyd v Grace, Smith & Co*,⁴⁰ the House of Lords established that an employer could be liable for a servant's fraud and other dishonest conduct even if the employee acted for his own benefit. In this case solicitors were liable for the dishonesty of their managing clerk, who had induced one of their clients to transfer property to him and then disposed of it for his own advantage. This principle was applied in *Morris v CW Martin & Sons Ltd*,⁴¹ it establishes vicarious liability of thefts by an employee, where there is a non-delegable duty to keep the claimant's possessions safe. However, the scope of such liability was limited to torts committed in the course of employment, under the second limb of Salmond's course of employment test. This precluded recovery for torts committed while an employee was not involved in the furtherance of his employer's business. The importance vested in Salmond's test

³⁵ Todd, "The Law of Torts." Available at <http://www.nzlii.org/nz/journals/canterlaw/Rw/2002/2.html>. (Accessed November 3, 2011).

³⁶ *Daniels v Whetstone Entertainments Ltd* [1962] 2 Lloyd's Rep 1

³⁷ *Dyer v Munday* [1895] 1QB 742

³⁸ *Petterson v Royal Oak Hotel Ltd* [1948] NZLR 136

³⁹ Todd, "Vicarious Liability for Sexual Abuse." Available at <http://www.nzlii.org/nz/journals/canterlaw/Rw/2002/2.html>. (Accessed November 3, 2011).

⁴⁰ [1912] UKHL 1

⁴¹ [1966] 1 QB 716

was not reconsidered until *Lister v Hesley Hall Ltd*,⁴² a case involving vicarious liability for sexual abuse. In following the ratio of the Supreme Court of Canada in the case of *Bazley v Curry*⁴³, the House of Lords established a newer test for finding liability in cases of intentional torts; where a tort committed by an employee is closely connected to their duties, their employer may be found liable. This case will be discussed further in the next chapter. The various decisions above show that the concept of vicarious liability for intentional wrongdoing is well established. Further, they provide a background to the recent sexual abuse cases, which will be discussed in detail in the next chapter.

2.6 Conclusion

This chapter has considered the general policy rationale of vicarious liability and in particular has considered the justification of vicarious liability in a sexual abuse context. It has been shown that generally, the doctrine has sound justifications even in sexual abuse cases. Further, it has been shown that for an employer to be liable for the tort of an employee, the tort must have been committed in the course of employment. Vicariously liability has been imposed not just for an employee's negligent acts but also his criminal acts. The Supreme Court of Canada and the House of Lords have recently imposed vicarious liability for sexual abuse as will be seen in the next chapter.

⁴² [2001] WLR 1311

⁴³ (1999) 174 DLR

CHAPTER THREE

A FRAMEWORK FOR ASSESSING VICARIOUS LIABILITY FOR SEXUAL ABUSE: The guidelines set out in the recent Supreme Court of Canada and the House of Lords decisions.

3.0 Introduction

This chapter will discuss how jurisdictions such as the United States of America, Canada and England have imposed vicarious liability for sexual assaults. The leading decisions in this area are those of the Supreme Court of Canada in *Bazley v Curry*¹, *Jacobi v Griffiths*² and the House of Lords in *Lister v Hesley Hall*³. However, as will be seen in this chapter, before these decisions, courts were reluctant in a number of cases to impose vicarious liability for sexual assaults. The recent review of the whole question will be examined.

3.1 United States of America

The United States of America, like other jurisdictions initially demonstrated a general reluctance to hold employers vicariously liable for employees' sexual torts. But as will be seen shortly this is changing. Claims against education authorities are common. A few cases will be reviewed. In *Boykin v District of Columbia*,⁴ the employer was not liable where a young blind, deaf and mute student was sexually assaulted by the coordinator of her educational programme, even where the employee was authorized to take the student by the hand in guiding her. It was argued on behalf of the student that because physical touching between teacher and pupil was an essential activity, the subsequent abuse was an unauthorized mode of performing an authorized activity. This argument was rejected. The Court of Appeal stated:

¹ (1999) 174 DLR (4th) 45

² (1999) 174 DLR (4th) 7

³ [2001] WLR 1311

⁴ 484 A 2d 560 (1984)

We do not believe that a sexual assault may be deemed a direct outgrowth of a school official's authorization to take a student by the hand or arm in guiding her past obstacles in the building.

It was thus held that the employee's actions were done solely for his independent, malicious, mischievous and selfish purposes.

Similarly, a narrow view was taken in *John R v Oakland Unified School District*⁵ involving a young boy who was sexually assaulted by a school teacher during an off-campus extracurricular activity. The Supreme Court of California also declined to impose vicarious liability. In the opinion of the court this would mean significantly discouraging extracurricular activities and one-on-one exchanges between students and teachers. It further considered that there was not a sufficient degree of authority in school-related sexual assault cases to impose vicarious liability. It is the opinion of this essay that the two narrow decisions above failed to appreciate the policy concern that holding the school authorities liable might deter such behavior and that it gave greater assurance of compensation for the victim. It is also evident that the courts were reluctant to impose vicarious liability for sexual abuse because as was seen in chapter two, no employer employs an individual to be dishonest, or to commit crimes. Furthermore, there were no previous cases imposing vicarious liability for sexual abuse in schools. This accounted for the narrow approach of the judges above.

The same court reached a different result in *Mary M v City of Los Angeles*⁶ where a police officer stopped the victim in her car, ordered her into his car, drove her to her home and sexually assaulted her. The court held that the city was vicariously liable for the police officer's rape. In its opinion, its decision to impose vicarious liability was a deliberate allocation of risk, based on

⁵ 769 P 2d 948 (1989)

⁶ 814 P 2d 1341 (1991).

the notion that it would be unjust for an enterprise to disclaim responsibility for injuries occurring in the course of its characteristic activities. Thus, the court set out the policies underlying why risk was allocated in this way. The American experience has been shown above, after reviewing the landmark decisions in Canada below, it will be clear that vicarious liability should have been imposed in the two cases above that involved the school authorities. Thus, it will be shown below that courts are now willing to impose vicarious liability for sexual abuse, the test used and circumstances in which they do so will be illustrated.

3.2 Canada

Before the Supreme Court of Canada's decision in *Bazley v Curry* and *Jacobi v Griffiths*, earlier claims sought to make employers liable for sexual assaults committed by employees but the lower Canadian courts demonstrated a general reluctance to do so. For example, in *EDG v Hammer*⁷ and *Goodwin v Commission Scolaire Laurenval*⁸ (*The Janitor Cases*) there was no vicarious liability on school boards for sexual assaults committed by janitors. The employment provided no more than the opportunity to commit the acts. In *B (J-P) v Jacob*⁹, a male nurse sexually assaulted a sleeping patient. Again, the employment merely provided the opportunity for the assault to occur and the hospital was not vicariously liable. In *McDonald v Mombourquette*,¹⁰ the Catholic Church was not vicariously liable for sexual assaults committed by a priest against young parishioners. The fact that the priest was placed in a position of trust and authority and was provided the opportunity to do wrong did not make the employer liable, especially in light of the fact that he acted criminally and against his vows. But in *K (W) v*

⁷ [1998] BCJ No.992 (QL) (SC)

⁸ [1992] RRA 673, 8 CCLT (2d) (Que SC).

⁹ (1998) 166 DLR (4th) 125

¹⁰ (1996) 152 NSR (2d) 109 (CA)

*Pornbacher*¹¹ the Catholic Church was vicariously liable for sexual assaults committed by a priest, as he was involved in the care or nurturing of children in the course of his employment. The cases above demonstrate the reluctance of the courts to impose vicarious liability for sexual abuse in Canada. A recent review of the whole question is discussed below in the two landmark Canadian cases.

3.3 Bazley v Curry

3.3.1 Facts

The Children's Foundation was a non-profit organization operating residential care facilities for emotionally troubled children. A child in its care was sexually abused by an employee expressly hired to act as a surrogate parent to the child. The employee's duties involved intimate activities, such as bathing and tucking the child in at bedtime. The issue for the Supreme Court was whether the Foundation was vicariously liable for the tortious conduct of Curry. The court was unanimous in holding that it was indeed vicariously liable.

3.3.2 Holding

McLachlin J, used the 'Salmond' test as a starting point and stated that: an employer is vicariously liable for (1) employee acts authorized by the employer; or (2) unauthorized acts so connected with authorized acts that they may be regarded as modes (albeit improper modes) of doing an authorized act. The Court said that the concern in cases involving vicarious liability for sexual assaults is with the second limb of the test. The problem is how to distinguish between an unauthorized mode of performing an authorized act that attracts liability, and an entirely independent act that does not. The court suggested that the second branch of the Salmond test

¹¹ (1997) 32 BCLR (3d) 360 (SC)

should be approached in two stages. First, prior precedents should be examined to decide if they determine on which side of the line the case falls. Secondly, if the earlier cases do not suggest an answer, the broader policy rationales behind vicarious liability should be reviewed to determine whether liability should be imposed.

Consequently, the Supreme Court found the employer vicariously liable for the employee's unauthorized and intentional wrong on an application of the following three principles;

First, the courts should openly confront the question of whether liability should lie against the employer, rather than obscuring the decision beneath semantic discussions of 'scope of employment' and 'mode of conduct'. In the example of the court, it would be difficult to maintain the fiction that a teacher committing a sexual assault on a student was "ostensibly" authorized to do so by his or her public school board employer. Secondly, the fundamental question is whether the wrongful act is sufficiently related to conduct authorized by the employer to justify the imposition of vicarious liability. In the courts view, it is not enough that the employment merely provided the opportunity for the tort. There must be a significant connection between the creation or enhancement of a risk and the wrong that accrues there from. In other words, the enterprise and the employment must materially enhance the risk of the tort occurring. Thirdly, to determine the sufficiency of the connection, the following factors should be considered:

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

The court in its summary stated that; an employer is vicariously liable for an employee's sexual abuse of a client where the employer's enterprise and empowerment of the employee materially increased the risk of the sexual assault and hence the harm. The test laid down above was applied to the case at hand and McLachlin J found the Foundation vicariously liable for Curry's sexual misconduct. It was held that, the opportunity for intimate private control and the quasi-parental relationship and power required by the terms of employment created the special environment that nurtured and brought to fruition Curry's sexual abuse. The employer's enterprise created and fostered the risk that led to the ultimate harm. The abuse was not a mere accident of time and place, but the product of the special relationship of intimacy and respect the employer fostered, as well as the special opportunities for exploitation of that relationship it furnished.¹² Right on the heels of this decision, the court released its decision in *Jacobi*.

3.4 *Jacobi v Griffiths*

3.4.1 Facts

The Boys' and Girls' Club of Vernon was a non-profit organization providing organized recreational activities for children and youths. An employee supervisor was encouraged to form friendships with the children, two of whom he sexually assaulted on a number of occasions at his house, and once during a bus drive to a club-related sporting event. The Supreme Court held by a majority of 4 to 3 that the employer was not vicariously liable.

¹² *John R v Oakland Unified School District* 769 P 2d 948 (1989)

3.4.2 Holding

Binnie J, giving the majority decision, found the precedents useful in showing the lack of support for vicarious liability in this context. On the particular facts he considered there was not a sufficiently strong connection between the enterprise and the sexual assault to justify imposing vicarious liability. The club merely afforded Griffiths the opportunity to commit the sexual assaults. The enterprise did not confer job-created power on Griffiths and did not encourage intimacy. It offered recreational activities for children, whereby the employee was encouraged to develop a positive rapport with the children, rather than develop an intimate relationship.¹³

McLachlin J, in the minority, considered there was a material connection between the employment and the tort. She thought the club's function of providing guidance and moral direction to youths necessarily caused the club to authorize, and the staff to develop, a mentoring relationship of trust and intimacy between the staff and the children. Having assumed this special mentoring responsibility, the Club ought also to be viewed as having assumed responsibility for the heightened risks it introduced.¹⁴

3.4.3 Analysis

The two cases above show the difficulties in applying the test laid down by the Supreme of Canada in *Bazley*. Further, the fact that the Court split in reaching its decision in *Jacobi*, demonstrates the difficulties in applying the test which was set out in *Bazely*. In spite of this, the decisions provide a useful framework in which to consider cases involving vicarious liability for sexual abuse. The *Bazley* test above is thought to be credible by eminent writers but they argue

¹³ At paragraph 80.

¹⁴ At paragraph 17.

that it may not be entirely straightforward in its application.¹⁵ This is evidenced by the different results reached in *Bazley* and *Jacobi*, and by the split of opinion in *Jacobi*. Binnie J.¹⁶ in the *Jacobi* case justified the imposition of vicarious liability in *Bazley* and described *Bazley* as an “easy” case in which to apply the enterprise risk test because power and intimacy are hallmarks of a parenting relationship and that it was the job-created parent-like relationship that attracted vicarious liability. He distinguished the two cases in that the *Jacobi* case involved a club which like public schools in many circumstances, offers its services in a public setting, in group activities with other persons, including other children and adults. In his opinion, the club could not be said to be vicariously liable, because the sexual abuse became possible only when the employee managed to take advantage of the public nature of the Club’s activities, by isolating the victims from the group in a manner that was entirely adverse to the group’s purpose.¹⁷ Thus, unlike the Children’s Foundation in *Bazley*, he was of the opinion that there was no “job-created authority for the perpetrator to insinuate himself into the intimate lives of these children.”

The underlying conclusion of the author upon review of the two cases is that *Bazley* implies that the cases most likely to attract vicarious liability for sexual assault are those that involve a intimate parental relationship between the employee and the victim.¹⁸ Such cases will usually involve employers who provide the victim with some type of residential care for example in hospitals, boarding schools and home based care homes. Although the majority in *Bazley*, stated that vicarious liability should not be limited to parental authority situations, Todd argues that

¹⁵ Todd “Vicarious Liability for Sexual Abuse.” Available at <http://www.nzlii.org/nz/journals/canterlaw/Rw/2002/2.html>. (Accessed November 3, 2011).

¹⁶ At paragraph 58.

¹⁷ At paragraph 43.

¹⁸ *Bazley v Curry*(1999) 174 DLR (4th) 45

outside this context it will be very difficult to establish the necessary strong connection between the employment and the tort.¹⁹

From the two cases above, it can be seen that the “close connection test” emerged in the court's analysis of the two cases above. Cane proposes that this test seeks to achieve a fair outcome, by balancing the interests of the innocent victim on the one hand and the 'innocent' employer on the other, while taking into account the wider social concerns of vicarious liability.²⁰ The *Bazley* approach above requires the judge to decide in any given case whether the connection between the employer's enterprise and the employee's tort is close enough to justify imposing vicarious liability. It has been shown above that judges will differ on whether the employment led to a material enhancement of the risk of abuse, as evidenced by the contrasting decisions in *Jacobi*.

Many critics²¹ have argued that vicarious liability should have been imposed in *Jacobi*. It is argued that the narrow approach taken by the majority fails to appreciate how sexual abuse operates from the victims' perspective. In other words, the employment did afford more than a mere coincidental opportunity to commit the tort. It placed Griffiths in a position of power over the children, and it is this sort of employment that materially increases the risk that sexual abuse will occur. Although most of the assaults took place outside work hours and off work premises, one of the assaults took place during a bus drive to a club related sporting event. In the author's opinion, that should have been a reason to impose vicarious liability on the club. After reviewing

¹⁹ Todd “Vicarious Liability for Sexual Abuse.” Available at <http://www.nzlii.org/nz/journals/canterlawRw/2002/2.html>. (Accessed November 3, 2011).

²⁰ Cane, “Vicarious Liability for Sexual Abuse.” *Law Quarterly Review* 21, 116(2000). Available at <http://www.nzlii.org/nz/journals/canterlawRw/2002/2.html>. (Accessed November 3, 2011).

²¹ Feldthusen, “Vicarious Liability for Sexual Torts.” in NJ Mullany & AM Linden (ed) *Torts Tomorrow: A tribute to John Fleming* (1998) 225. Available at <http://www.nzlii.org/nz/journals/CanterLawRw/2002/2.html>(Accessed on October 26th 2011).

both decisions, it is the opinion of this essay that Courts should continue to rarely impose vicarious liability for sexual abuse upon employers for sexual assaults by employees, with one exception - where intimate “parent-like” relationships exist. In summation, the *Bazley* analysis has value for the law of vicarious liability generally; in fact, this decision has been approved by later cases including the landmark case of *Lister v Hesley Hall* as will be shown below.

3.5 England

Before the House of Lords' decision in *Lister v Hesley Hall*²², the English Court of Appeal considered the issue of vicarious liability for sexual assault in *Trotman v North Yorkshire County Council*.²³ A young epileptic and mentally handicapped boy was allegedly abused by the deputy headmaster of the special school which he attended. This occurred during a school trip overseas, where, due to his condition, the boy was required to share a room with the headmaster. It was held unanimously that the employers were not vicariously liable for these actions. The court took a narrow interpretation of the Salmond test, with Butler-Sloss LJ saying:

The headmaster's position of caring for the plaintiff by sharing a bedroom with him gave him the opportunity to carry out the sexual assaults. But availing himself of that opportunity seems to me to be far removed from an unauthorized mode of carrying out a teacher's duties on behalf of his employer. Rather it is a negation of the duty of the council to look after children for whom it was responsible... But in the field of serious sexual misconduct, I find it difficult to visualize circumstances in which an act of the teacher can be an unauthorized mode of carrying out an authorized act, although I would not wish to close the door on the possibility.

3.6 Lister v Hesley Hall

3.6.1 Facts

3.6 Lister v Hesley Hall

3.6.1 Facts

²² [2001] WLR 1311

²³ [1999] LGR 584

3.6 Lister v Hesley Hall

3.6.1 Facts

The House of Lords has also recently considered the question of an employer's vicarious liability for an employee's sexual assault. In this case, the defendants ran a school for children with emotional and behavioural difficulties and a boarding annex to the school. The boarding house was intended to be a home for the boys. Grain was employed as the warden of the boarding house. He lived at the boarding house and was responsible, inter alia, for making sure the boys got up, went to school, to bed, and organized evening activities. Over a period of time, he systematically sexually abused the appellants in the boarding house and was convicted of multiple offences involving sexual abuse. The appellants brought an action against the employers; on the grounds they were vicariously liable for the torts of the warden. The trial judge and the Court of Appeal were bound by the Court of Appeal's decision in *Trotman*, holding that sexual abuse by a teacher could not be regarded as 'an unauthorized mode of carrying out an authorized act' within the Salmond test for vicarious liability. The House of Lords, however, overruled *Trotman* and unanimously imposed vicarious liability.

3.6.2 Holding

Their Lordships confirmed the authority of the Salmond test; that when imposing vicarious liability under the second limb, it was necessary to focus on the connection between the employment tasks and the tortious act. A master is liable even for acts which he has not authorized, provided they are so connected with acts which he has authorized, that they may rightly be regarded as modes, although improper modes of doing them. They applied this test to the case at hand and found that the warden's torts were closely connected with his employment

and inextricably interwoven with the carrying out by the warden of his duties. In their opinion, it was thus fair and just to hold the employers vicariously liable.

3.6.3 Analysis

The House of Lords decision above also demonstrates that it is now possible to impose vicarious liability for sexual abuse. Their Lordships²⁴ imposed vicarious liability on the basis that the employers voluntarily assumed a relationship towards the plaintiff that carried corresponding duties, the performance of which was entrusted to the employee. In their opinion, the motive of the employee and the fact that he is doing something expressly forbidden and is serving only his own ends does not negate the employer's vicarious liability. It is evident that the duties which the employer owed to the plaintiffs included a duty to take all reasonable steps to safeguard the plaintiffs in their physical, moral and educational development whilst at the school. In other words, the employers entrusted the performance of that duty to their employee and that employee failed to perform that duty, rendering the employers vicariously liable for that breach of duty.

It has been suggested by Smith²⁵ that the House of Lords has effectively revised the test of vicarious liability and endorsed a 'close connection test' beyond what Salmond originally intended. He proposes that, this could have been because they did not want it to be read as narrowly as it was in *Trotman*, which focused too much on whether the wrongful acts could be described as unauthorized modes of performing the employee's duty rather than focusing on the closeness of the connection between the employee's act and the duties of his employment. Having said that, the question which the courts have to deal with is where the line will be drawn; *Lister* and *Bazley* on the one hand and *Jacobi* on the other hand. As shown above in *Jacobi*, the

²⁴ Lord Hobhouse at paragraph 55

²⁵ I Smith, "Employment law brief" Available at <http://www.nzlii.org/nz/journals/canterlaw/Rw/2002/2.html>. (Accessed November 3, 2011).

answer may not always be clear and application of the *Bazley* test may not be without problems. However, their Lordships in *Lister* approved of *Bazley*. Despite divergent views and approaches, be it, legal or policy considerations, the same conclusion has been reached by both the Canadian and the English Courts; there must be a significant connection between the creation of a risk (the employment) and the wrong (the sexual abuse) that accrues there from. Even though the House of Lords and the Supreme Court of Canada based their conclusions upon the second branch of the Salmond test, in fact, it has been argued²⁶ that a new test has emerged in both countries to govern vicarious liability for intentional wrongdoing. As shown above, it has been called the 'close connection' test.

3.7 Conclusion

This chapter has discussed how jurisdictions such as the United States of America, Canada and England have imposed vicarious liability for sexual assaults. The three leading decisions, those of the Supreme Court of Canada in *Bazley v Curry*, *Jacobi v Griffiths* and the House of Lords in *Lister v Hesley Hall*, have been discussed and have shown that the Salmond test holds the answer to the question of when vicarious liability is imposed for sexual abuse. What is critical is the closeness of the connection between the employee's duties and his wrong doing. However, as discussed above, there may be problems in application, putting cases on one or other side of the line, but these are unavoidable. In Summary, the cases shown above have value for the law of vicarious liability generally and the law in relation to sexual or other criminal wrongdoing.

²⁶ Todd "Vicarious Liability for Sexual Abuse" Available at <http://www.nzlii.org/nz/journals/canterlaw/Rw/2002/2.html>. (Accessed November 3, 2011).

CHAPTER FOUR

VICARIOUS LIABILITY FOR SEXUAL ABUSE IN ZAMBIA

4.0 Introduction

The preceding chapter has considered how vicarious liability for sexual abuse has been imposed in the United States of America, Canada and England. This chapter shall look at how the Zambian Courts have imposed vicarious liability for sexual abuse in the case of *Rosaria Mashita Katakwe v AG*,¹ (hereinafter referred to as the *Rosaria* case) and is the only case that has considered this issue. It will further discuss whether the development of vicarious liability in the context of sexual abuse in other jurisdictions maybe borrowed and applied in Zambia in order that sexual abuse victims are compensated and perpetrators are deterred from such behavior.

4.1 Vicarious Liability of Educational Authorities for Sexual Abuse: *Rosaria Mashita Katakwe v AG*

4.1.1 Relevance to the Study

Issues of concern and of particular relevance to this study was the reasoning and criteria used by the learned trial judge in *Rosaria* in finding the Attorney General vicariously liable for the acts of Mr Hakasenke (hereinafter referred to as the teacher). Therefore, a consideration of this case will follow to explore its weaknesses in comparison to the cases in other jurisdictions and suggest possible modifications.

4.1.3 Background and Facts

In February 2006, a thirteen year old schoolgirl, Rosaria, was defiled by her teacher when she went to his house to collect past papers upon his request. He told her not to report the incident as

¹ 2006 HP/0327

she would be thrown out of school and he would lose his job. Rosaria did not report the rape until several weeks later after she was treated for a sexually transmitted infection that she had contracted as a result of the defilement. Her aunt subsequently instituted a civil suit against the teacher, the school, the Zambian Ministry of Education and the Attorney General as legal advisor to the government. In the civil suit, Rosaria claimed damages from Mr. Hakasenke for personal *injury and emotional distress*. *She also requested that the school and the Ministry of Education be held accountable for their negligence and that the Ministry of Education set guidelines to prevent incidents of teacher rape in the future.*

4.1.4 Holding

The presiding Judge, Philip Musonda delivered a judgment in the High Court of Zambia in which the victim was awarded K45 million as compensation. In his ruling Judge Musonda, found that the teacher had defiled Rosaria and further found that the headmaster acted negligently because he knew that Mr Hakasenke was a sexual pervert and did not do anything about it. He said it was the responsibility of the government to care for all school going children through its agents (teachers and school authorities), when schools are in session. He also found the Attorney General vicariously liable for the acts of the teacher.

4.1.5 Case Review

This case will be distinguished from the three main cases discussed in the previous chapter. It must be noted from the onset that for the purposes of this essay, this case review will only address the issue of vicarious liability that was raised in this case. It must be noted, however, that there was an issue of negligence which was raised which is beyond the scope of this essay. On

the issue of vicarious liability, it was established by the judge that Mr Hakasenke was a servant of the government, a teacher at Woodlands A Basic School, in the Ministry of Education and this was based on the four indicia laid down by Lord Thankerton in *Short V J & W Henderson Limited*². The judge rightly found that Mr Hakasenke was an employee of the government; however, he did not consider whether the teacher was acting in the course of employment. It was held that, the teacher created an opportunity by deliberately forgetting the exam papers on diverse dates, so that he could sexually assault the pupil and thus the government was vicariously liable for the sexual misconduct of the teacher. This was a serious misdirection of law. In order to impose vicarious liability, it is a well established principle of law that the tort must have been committed in the course of employment. Therefore, the learned trial judge misdirected himself in only using the indicators in a contract of service to find the government vicariously liable for the acts of Mr Hakasenke. Authorities³ have stated that the mere fact that one is an employee is not a sufficient basis to hold the employer vicariously liable for negligence or wrongful acts.

It is the opinion of the author, that the issue of the course of employment was not adequately addressed or established in this case. As has been seen in the previous chapter, the recent trend of jurisdictions abroad is to establish vicarious liability for sexual abuse upon the determination of certain criteria. It has been shown above that the Salmond test holds the answer to the question of when vicarious liability is imposed for sexual abuse. What is critical is the closeness of the connection between the employee's duties and his wrong doing. The decisions of the Supreme of Canada and the House of Lords discussed above have value and are applicable to the case at hand. The judge in *Rosaria* should have considered the criteria laid down in the three cases

² [1946] TLR 427 at 429

³ R.A.Percy, Charlesworth and Percy on Negligence, 10th ed.(London: Sweet and Maxwell, 1990),134.

above in order to make his decision. If he had considered these cases from other jurisdictions, he would not have arrived at such a decision.

Binnie J.'s endorsement of Newbury J.A.'s comments at the B.C. Court of Appeal in *Bazley v Curry* is more illustrative for the purposes of assessing the authority accorded to teachers in a typical school setting⁴:

Where, for example, a teacher uses his or her authority to develop a relationship with a pupil in his or her class and then abuses that relationship by approaching the child at a park during the summer holidays, it may be said that by employing the teacher and giving him or her some authority (albeit not parental authority) over the child, the teacher's employer "made the wrong more probable". But it is likely vicarious liability would not be imposed on the employer given the absence of a close connection between the teachers' duties and his or her wrongful acts. To put the matter another way, the fact that the teacher took advantage of his opportunity at the school to develop a relationship with the child is not enough: something more is required – a close connection between the teacher's duties and his or her wrongful acts – to render the school board liable without proof of negligence or other fault on its part."⁵

The same is applicable to the *Rosaria* case; the teacher developed a relationship with Rosaria whilst at school and then abused that relationship by inviting her to get past papers from his home after hours of school where he raped her. It can be argued that the school facilitated this relationship by virtue of the authority bestowed on the teacher. As shown above, this on its own was not sufficient to impose vicarious liability on the school. There must have been established a close connection between the teacher's duties of teaching and the rape. The employment must have materially enhanced the risk of the impugned act before an employer will be held vicariously liable. The fundamental question is whether the wrongful act is sufficiently related to conduct authorized by the employer to justify the imposition of vicarious liability. Authorities show that it is not enough that the employment merely provided the opportunity for the tort.⁶ In

⁴ *Bazley v Curry* (1999) 174 DLR 4

⁵ At paragraph 83

⁶ *Bazley v Curry* (1999) 174 DLR 4

other words, there must be something more. The teacher's job did provide an opportunity for the subsequent rape, but on its own, was not sufficient. It is the author's opinion that there was no close connection between the teacher's duties of teaching in class and the rape which took place outside working or school hours. The sexual abuse only became possible when the teacher enticed Rosaria to go to his home after hours which was entirely adverse to his duties as a teacher of the school or the school activities. The teacher had allegedly had carnal knowledge of the pupil at his house. This cannot in anyway be considered an act in the course of employment nor an improper mode of doing his work for the court to hold the employer liable. This unfortunate incident took place outside the school premises after working hours and it is unrealistic to expect the school authorities to supervise the teachers and pupils in their spare time.

Similarly, in *Jacobi*⁷, the club was not held liable as was shown in chapter three. In Binnie J.'s view, the Club could not be said to be vicariously liable, because the sexual abuse became possible only when the employee managed to subvert the public nature of the Club's activities, by isolating the victims from the group in a manner that was entirely antithetical to the group's purpose. In particular, the employee enticed the children to his home to cultivate a one-on one relationship which was entirely outside Club activities.⁸ Binnie J. concluded that: "where, as here, the chain of events constitutes independent initiatives on the part of the employee for his personal gratification, the ultimate misconduct is too remote from the employer's enterprise to justify no fault liability"⁹. Thus, it was concluded from the three leading cases abroad that while "parent-like" relationships will usually attract vicarious liability (e.g. the teacher sharing a room

⁷ (1999) 174 DLR (4TH)

⁸ At paragraph 80

⁹ *Bazley v Curry* (1999) 174 DLR 4 Paragraph 80

with a disabled student requiring supervision), it will be much more difficult to establish vicarious liability in non-intimate situations like in the *Rosaria* case, were the teacher had no intimate duties to perform such as bathing, tucking into bed as was the case in the *Bazley*. However, Binnie J took pains to state that a parent-like relationship is not a precondition to a finding of vicarious liability in child abuse cases; he concluded that this shows “how high the courts have set the bar before imposing no-fault liability.”¹⁰

That said, there should not be a blanket imposition of vicarious liability for sexual abuse as was the case in *Rosaria*. To ensure consistency and predictability of the law, the courts should scrutinize the relationship between the employee and the victim as structured by the employer that allows the abuse to occur.¹¹ It has been shown above that by entrusting the employee to be in close physical proximity to the victim and by fostering a power imbalance between the two (whereby the employee is empowered in respect of his or her duties towards the victim), the risk of sexual abuse is heightened. The test laid down in the three leading decisions discussed above, thus help to explain when and why an employer might be held vicariously liable for conduct which is adverse to the goals of the employer.¹² It has been seen above that judges face difficulties in deciding on which side of the line a case falls, but in general the three cases lay down important criteria which the Zambian Court system may emulate to better the legal system. Thus, the judge in *Rosaria* should have considered how courts abroad have imposed vicarious liability for sexual abuse in order to determine on which side of the line the case falls.

¹⁰ At Paragraph 64

¹¹ N Des Rosiers, “From Precedent to Prevention - Vicarious Liability for Sexual Abuse.”

¹² P Cane, “Vicarious Liability for Sexual Abuse.”

The case was hailed both locally and internationally as a landmark case. However, the Attorney General appealed, but because of intense pressure from civil society, the appeal was withdrawn. In an interview¹³ with the Attorney General, he was of the opinion that *Rosaria* was bad law and that the appeal was meant to set the record straight on the issue of whether or not government should be held vicariously liable in such circumstances and not to affirm the teacher's actions. He reiterated that government should not be held liable for acts done outside office hours or in an employee's spare time. In other words, such a decision implies that employers would be held liable for the extraneous acts of teachers. It is the author's opinion that this branch of law should be allowed to develop in the Zambian legal system but not in the manner laid down in the *Rosaria* case. In summary, the law of vicarious liability for sexual abuse as laid down in *Bazley*, *Jacobi* and *Lister* has value for the Zambian legal system.

4.2 Compensation for Sexual Abuse in Zambia

It was mentioned in the problem statement in chapter one that sexual violence against women has been increasing at an alarming rate. YWCA¹⁴, a Zambian nongovernmental organization revealed that it records eight cases of rape of young girls every week at its centre in the capital, Lusaka. The organization's shelter in Lusaka also recorded 10 cases of rape of adult women every week. Child sexual abuse¹⁵ is a public health and a human rights problem that can no longer be ignored. It has been observed that there is no safe space for adolescent girls. Defilement takes place in homes, schools, churches and in the communities. The risks and consequences of HIV/ AIDS infection, unwanted pregnancies, physical and psychological

¹³ Interview with Mr Mumba Malila, Attorney General, Ministry of Justice, January 25, 2012

¹⁴ Tisunge Ana Athu Akhazi Coalition (TAAAC), "Promoting Rights of the Girl Child" Available at www.TAAACZambia.htm. (Accessed April 2, 2012)

¹⁵ Tisunge Ana Athu Akhazi Coalition (TAAAC), "Promoting Rights of the Girl Child" Available at www.TAAACZambia.htm. (Accessed April 2, 2012)

trauma should draw attention to this silent emergency. Thus, the extension of vicarious liability for sexual abuse in Zambia is valuable to the legal system because of the increased number of sexual abuse cases. If vicarious liability is established and imposed against an employer, and in most cases an employer has a deeper pocket, the chances of victims of sexual abuse receiving compensation are much higher. Further, employees may be deterred from such behavior. Therefore, this principle of vicarious liability should be extended in the Zambian context and imposed on employers for the wrongdoings of their employees. As was shown in chapter three, this principle of vicarious liability for sexual abuse is of value to other jurisdictions discussed above and may also be of value to the Zambian legal system. It was shown that from a public policy point of view, that vicarious liability is designed to ensure that parties undertaking risky enterprises take all reasonable measures to reduce the risk. The employer who has introduced the risk of the wrong is charged with its management and minimization. Losses will be suffered in our modern world, and we should be aware of the losses we cause, and should try to reduce the risks of such losses, or compensate for such losses when appropriate.¹⁶

As Chief Justice McLachlin stated in *Bennett*¹⁷:

Vicarious liability is based on the rationale that the person who puts a risky enterprise into the community may fairly be held responsible when those risks emerge and cause loss or injury to members of the public. Effective compensation is a goal. Deterrence is also a consideration. The hope is that holding the employer or principal liable will encourage such persons to take steps to reduce the risk of harm in the future.

Thus, there must be an incentive for those who control institutions or enterprises in Zambia that engage in intimate touching, treatment of patients or activities concerning vulnerable individuals

¹⁶Terrence Carter, "Supreme Court of Canada Brings Clarity to Vicarious Liability of Churches in Canada" Available www.carters.ca (Accessed April 2, 2012)

¹⁷ [2004] S.C.J. No 17.

especially girls to minimize the risk of harm. Finding the employer vicariously liable encourages such employers to take such steps and hence, reduce the risk of further harm.

It has been noted above that sexual abuse in whatever form may occur anywhere at home, in institutions such as churches, hospitals, schools and charities. Thus, because of the economic problems Zambia is currently faced with, institutions will not want to be liable for the sexual misconduct of their employees. Extending the principle of vicarious liability for sexual abuse to Zambia may have an effect of deterrence. Employers may take supervision of their employees seriously and put in place efficient internal mechanisms to reduce the risk of sexual abuse occurring. Overall, if many institutions do so, there may be a general reduction of sexual abuse cases in the country. In an event that sexual abuse does occur, by extending this principle of vicarious liability to sexual abuse cases, victims will be able to receive compensation from a solvent defendant. It must be also noted that this reduction cannot operate in isolation but in tandem with rigorous law enforcement mechanism, an active judiciary and a strong willed government.

4.3 Conclusion

This chapter has revisited the *Rosaria* case and has explored its weaknesses and has suggested possible modifications. This chapter concludes that all relevant factors need to be taken into account before vicarious liability is imposed and that the criteria laid down in the three leading decisions abroad are of value and the Zambian courts may wish to emulate these jurisdictions abroad to ensure consistency, predictability and positive development of the law. Further extending this principle will ensure effective deterrence on employees and compensation for innocent victims of abuse.

CHAPTER FIVE

CONCLUSION AND RECOMMENDATIONS

5.0 Introduction

The objective, in the preceding chapters, has been to illustrate how the principle of vicarious liability has been extended to include sexual abuse in the United States, Canada and England. This work has outlined the approaches the courts in these jurisdictions abroad have used in arriving at their respective decisions. This work has also attempted to demonstrate how the Zambian courts have approached the issue of vicarious liability for sexual abuse. This chapter shall therefore draw conclusions from the preceding chapters as to the value of vicarious liability for sexual abuse in Zambia, in light of the widespread phenomena of sexual violence against girls and women. This chapter shall also make recommendations on what needs to be done in order that this scourge is reduced, compensation is given to victims and effective measures of deterrence are put in place.

5.1 Conclusion Drawn

From the preceding chapters, it can be concluded that the issue of vicarious liability of employers for the wrongful acts of employees has long been a difficult issue. Nowhere is the difficulty more clear than in sexual assault cases where employers can never be said to have intended the wrongful conduct. Nevertheless, it has been shown in the preceding chapters that when an employee uses their position in some fashion to commit a sexual assault, employers have been held liable. Further, it has been seen that liability can follow if the sexual misconduct is sufficiently related to conduct authorized by the employer falling within the scope of employment. It has been shown in chapter three that a recent string of decisions by the Supreme Court of Canada and the House of Lords have brought clarity to the issue of when the doctrine of

vicarious liability will be imposed on various institutions such as a church, and a non-profit or charitable organization, for losses arising from the sexual misconduct of their employees or agents. Further, it has been argued in the preceding chapters that the fact that the Supreme Court of Canada arrived at two different decisions in the *Bazley* and *Jacobi* cases demonstrates the difficulties of applying the test which was set out in *Bazley*. Despite this, it is particularly encouraging to see Canada and England take the lead in developing the law by finding liability against employers for the sexual misconduct of their employees. The courts in these jurisdictions have demonstrated that in a sexual assault circumstance, the test for an employer's vicarious liability focuses on whether the employer's business and the power given to the employee materially increase the risk of sexual assault.

It can be concluded further that vicarious liability will be much more likely in potentially intimate situations involving young children, students with disabilities requiring personal assistance and special activities, such as overnight schools, where a parent- like relationship¹ subsists. However, it has been shown that this is not a precondition to a finding of vicarious liability. Further, the courts have set a high bar before imposing no fault liability. That said, it can be concluded that the Zambian courts have not made a positive contribution to the development of the law of vicarious liability for sexual misconduct. The High Court had an opportunity in 2008 in the *Rosaria* case to do so but did not satisfy the criteria laid down at common law to find no fault liability, namely; the issue of course of employment which is a critical factor was not addressed. Thus, it did not arrive at a fair and consistent decision.

¹¹ Paragraph 64 (*Bazley v Curry* 1999 174 DLR)

It can be concluded that, in general, the principle of vicarious liability for sexual abuse is of value to the Zambian legal system as alluded to in the previous chapter in that, if the test described in the three leading decisions abroad is met, vicarious liability will be imposed on any organization or institution and this in the writer's opinion is viewed as a sensible means of reducing risk as well as an appropriate mechanism by which to ensure victims receive compensation.

5.2 Recommendations

From the foregoing, it is safe to conclude that much remains to be done in Zambia. If vicarious liability is imposed in appropriate circumstances, victims of sexual abuse will be able to receive compensation and further, in light of the increase of sexual abuse cases, deterrence measures may reduce the occurrence of abuse. This essay shall hereunder explore what measures should be put in place to ensure the effective reduction of the number of sexual abuse cases and to ensure compensation for sexual abuse victims.

5.2.1 Internal Risk Management

It is recommended that all schools, hospitals, churches, charities, non-profit organizations and various institutions in Zambia should review their internal risk management mechanisms to address the possibility of abuses occurring in their organizations.² They must address the risks that are inherent in their operations, especially those that deal with children and disabled persons especially girls. They must take all reasonable steps to reduce risks of sexual abuse against such vulnerable persons. Further, child abuse and sexual abuse policies should be put in place in these institutions to ensure that no sexual violence occurs. If this is not done, these

² Available at www.charitylaw.ca (Accessed April 2, 2012).

institutions should expect the possibility that they will be held vicariously liable for the wrongful and intentional conduct of their employees who abuse positions of power. As is clear from the recent decisions of the Supreme Court of Canada holding non-profit organizations vicariously liable for the wrongful and intentional conduct of their employees is viewed as a sensible means of reducing risk as well as an appropriate mechanism by which to ensure victims receive compensation.

5.2.2 Employee Screening

It is recommended that proper screening of individuals wishing to work with children especially girls must include criminal record checks as well as obtaining and checking references when such persons apply for work. In this way, institutions such as schools, hospitals, churches, charities, profit and non-profit organizations can make steps towards limiting the risk of abuse taking place, while at the same time limiting their liabilities.

5.2.3 Governmental, Legislative and Judicial Response

In addition to the internal measures that should be considered by institutions described above, the government, legislature and the judiciary have a critical role to play in addressing the issue of sexual abuse. Imposition of vicarious liability maybe one way of serving as a means of deterrence and compensation to victims, however, on the other hand, the state, nongovernmental organizations and the church have a great role to play in preventing sexual violence. Thus, this essay recommends that urgent measures need to be taken in the field of law enforcement, education, rehabilitation and integration of victims. Proper legislation needs to be established and enforced. More initiatives are also needed to reduce the number of sexual abuse cases as shown below;

5.2.3.1 Law Enforcement

Upon investigation, the author observed that the police's Victim Support Unit (VSU), which is often the first contact for victims of sexual abuse, faces several challenges including resource constraints and office space thus affecting its ability to respond and follow up cases effectively. It was found that law enforcement personnel are, in general, ill-equipped to handle complaints from women and girls who have been victims of rape and other forms of sexual violence. The victims interviewed complained of the discriminatory attitudes of many members of the police and the judiciary which have led to a lack of trust and thus to the subsequent under-reporting of rape and other forms of violence against women. Therefore, the state has a critical role to play in improving the VSU by adequately training its personnel to deal with sexual violence matters. Thus, there should be persons trained in psychology, law and any other field that can effectively deal with sexual violence. There should be awareness campaigns inviting those abused to freely go to the VSU when abused. Further, officers discriminating victims should face disciplinary action. Moreover, VSU should work with civil society and carry out campaigns to sensitize women and girls on their rights and how they can complain about sexual violence.

5.2.3.2 Education and Public Awareness

There is a need for strengthening of public information campaigns on sexual violence against girls and women. The state and other concerned stakeholders need to work consistently with the mass media by looking at programs to increase reporting of sexual violence, and increasing public awareness and sensitivity on this issue. More research and information gathering is required on sexual abuse. This will go a long way in providing adequate information on which meaningful intervention efforts can be based. There is a need for training of personnel in various

institutions working with victims of sexual abuse in difficult circumstances on how to handle cases. All relevant social sectors which include hospitals, charities, nongovernmental organizations and churches should also be trained about the existence, scope and harmful physical and psychological impact of sexual abuse.

5.2.3.3 Law Reform

It is recommended that in the interest of justice the Supreme Court of Zambia should set the record straight by clarifying the precedent set in the *Rosaria* case and it should specifically address the issue of when or how vicarious liability for sexual abuse should be imposed. Thus, there is need for judicial activism to set the law as it should be. Further, it is recommended that there should be legal reform based on an analysis of substantive and procedural laws in formal and traditional legal systems that impede and or facilitate girls' access to justice and perpetuate or condone sexual violence against girls. Many cultures in Zambia encourage sexual violence against women, thus reforming the traditional thinking of Zambians is key. Concerted efforts by the state will go a long way in reviewing legislation. It is further recommended that the legal community which consists of lawyers, judges, law students and prosecutors should be enlightened on international, regional and national legal standards applicable to the rights of women sexually abused.

5.2.3.4 Preventive Measures in Schools

It has been seen in the foregoing chapters that schools are a place where sexual abuse is rampant. It is therefore recommended that initiatives such as guidance and counseling, awareness talks and participation in activities involving awareness of sexual violence which will help sensitize pupils on the scourge should be put in place. It is also recommended that all teachers should stop

conducting tuitions with pupils in their homes because this has resulted in increased sexual abuse among girls. The government is thus called upon to issue a directive to this effect and ensure its implementation and compliance. Further, it is recommended that simply requiring that two teachers be present at extra-curricular events and encouraging school administrators to enter classrooms randomly may serve as effective deterrents.

This paper ultimately recommends that in order to overcome the issue of sexual abuse greater coordination is required amongst and between non-governmental organizations, government agencies, the judiciary and parliament. The most fundamental change will have to come from government, which needs to develop political will and serve as the catalysts for change by taking the commitments made more seriously. However the most important thing is to prevent cases of sexual abuse to occur in the first place for prevention is better than cure. Government and civil society organizations should come up with more strategies to prevent the crime.

5.3 Conclusion:

The final chapter has provided an overview of the entire study drawing a conclusion while at the same time effectively making recommendations. It has been shown that vicarious liability can be imposed for sexual abuse as illustrated in the three leading cases abroad. Extending this principle to Zambia will be valuable in light of the increased number of sexual abuse cases in that victims may receive compensation from a solvent defendant and there maybe deterrence of would be perpetrators if internal mechanisms are put in place by employers. The ultimate conclusion of this essay is that the state has a critical role to play in reducing the number of sexual abuse cases in Zambia.

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