



After Waterhouse: vicarious liability and the tort of institutional abuse

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Abstract: *As evidence of the extent of the abuse of children in residential care increases, our understanding of this terrible wrong has altered. These assaults are an institutional syndrome, at the same time that they are individual crimes; certain systems of institutional care are conducive to foster abuse behaviour (acting as 'crucibles' rather than 'honeypots' for rogue paedophiles). A theory of vicarious (institutional) liability is appropriate if we understand a syndrome of institutional abuse in this way, as involving institutional responsibility in addition to individual fault. The recent decision of the Canadian Supreme Court in *Bazley v Curry* found a children's home vicariously liable for sexual assaults of an employee on the basis of responsibility through the creation of risk, an analysis of and apportionment of liability which is appropriate to the special syndrome of institutional abuse, while encouraging deterrence and providing fair and practical compensation to victims. This analysis/liability is supported by an economic analysis of institutional child abuse and decision making in child protection.*

Keywords: vicarious liability; institutional abuse; sexual abuse; Waterhouse Inquiry; residential home abuse; child abuse; child protection

Mark Humphreys hanged himself in a North Wales bedsit. His wife Wendy told the inquest the 30-year-old had been depressed for several years following his experiences at a children's home, where he was raped repeatedly by a senior care worker.

He never got over his horrific experiences. At the age of 16 he was admitted to a psychiatric hospital after a series of suicide attempts. His assailant, Peter Howarth, deputy head of the Bryn Estyn home, was jailed for 10 years for a series of sexual offences and assaults. But his conviction brought no peace for Humphreys. 'They used to haunt me. When I left the home, I couldn't cope with life and I couldn't tell anybody', he said three years before his death at the beginning of 1995.

His suicide is one of 12 deaths among victims identified by an official inquiry into child abuse in North Wales children's homes over the past 20 years. The inquiry report has been suppressed by those who commissioned it, under

pressure from the legal and commercial establishments who erected a barrier of secrecy which even the urbane Secretary of State for Wales, William Hague, has been unable to penetrate.

According to a leaked copy, an inquiry team of three set up by Clwyd county council and headed by John Jillings, a former director of social services for Derbyshire, found that 'abuse of children and young people in Clwyd residential units had been extensive and took place over a substantial number of years. What was described by the North Wales police as the largest investigation of child abuse resulted in 3,755 witness statements being taken. This resulted in four men being convicted. Not less than 24 people were recognised victims of these crimes; offences include buggery, indecent assault, cruelty and actual bodily harm'.

As councillors struggled to come to terms with the baffling and brutal scale of the revelations one of them, Malcolm King, the chairman of Clwyd's social services committee, says, 'children's homes were a gulag archipelago stretching across Britain – wonderful places for paedophiles but, for the children who suffered, places of unending nightmares'.

(The Guardian, 12 June 1996)

Introduction

The way that we conceptualize a problem determines our approach to both prevention and remedy. If we understand the abuse of children in institutional care in terms of the pathological outsider infiltrating an otherwise healthy system, the focus of prevention will follow: keeping the 'outsider' out. If the system, through negligence, allows the pathogen in, liability justly accrues; absent such negligence, justice requires that we hold the system truly innocent. Common-sense ideas of fairness follow this sequence, as do legal theories of liability. An employer will be not be liable under the doctrine of 'vicarious liability' for the 'accidental' (from the employer's point of view, accidental in terms of both predictability and control) wrongs of its employees, but that employer *will* be vicariously liable for an employee's wrongdoing where there is a sufficient connection between wrongdoing and employment – and where the 'accident' is reconceptualized as a generally predictable risk, it is both fair and just that liability should follow.

In the most general sense (politically, bureaucratically and in the media), the 'taken-for-granted' understanding of institutional abuse has shifted as awareness of its incidence has increased: the 'accident' now appears more regular. Yet the focus, in terms of both prevention and remedy, remains on the predatory infiltrator – and how to keep him out – a characterization from the now passing understanding of institutional abuse as the bolt from the blue: the accident, the disaster, the uncontrollable event. Recent developments in the legal doctrine of vicarious liability suggest a new understanding of how and why institutional abuse happens; a theory of prevention, or deterrence, together with a remedy for survivors that is both practical and just.

The syndrome of institutional abuse: perception and prevention

The last decade has seen a grim succession of scandals involving the sexual abuse of children by their 'caretakers' in residential institutions – schools, delinquent facilities, orphanages, care homes. For the public, the repetition has changed the meaning of this kind of abuse, from shocking aberration to (in its own way far more shocking) something like a phenomenon – or, more accurately, syndrome: a 'concurrence, especially of symptoms: a characteristic pattern or group of symptoms: a pattern or group of actions, feelings, observed happenings, etc., characteristic of a particular problem or condition' (*Chambers Dictionary*).

Recognition of an institutional abuse *syndrome*, rather than discrete and unconnected – if similar – crimes, is apparent in recent government initiatives dealing with institutional abuse. In Canada, 'syndrome-ization' is evidenced by the Justice Minister's Reference to the Law Commission on Institutional Child Abuse (1997); by treating cases of institutional abuse together, the Reference implies an 'institutional abuse' syndrome (encompassing the residential schools for aboriginal children, juvenile correctional facilities, 'special' schools and care facilities) in Canada and abroad, as opposed to a discrete series of crimes. In the UK, successive revelations of sexual abuse in residential facilities (Frank Beck's 'pindown' regime in Staffordshire; sexual abuse scandals in Islington, North Wales, Cheshire and Merseyside, to give some high-profile examples) resulted in the Utting Report on residential care (released in 1997) and the Waterhouse Inquiry into allegations of abuse in children's homes in North Wales (the report of the Waterhouse Inquiry, 'Lost in Care', was released in February, 2000). Allegations around the Waterhouse Inquiry are potentially explosive and deeply disturbing, involving abuse stretching over decades and the collusion of members of the police and social services. Whatever the outcome of these particular allegations, the Inquiry and accompanying government initiatives signal recognition of a phenomenon of 'institutional abuse' distinct from 'ordinary' child rapes, or sexual assaults: generally foreseeable organizational or 'man-made' disasters (see Turner and Pidgeon, 1997) as opposed to the unpredictable acts of pathological individuals.

What difference, if any, does this re-conceptualization make? It has been suggested that professional culture (comprising the norms, assumptions and beliefs of the institution) may blind participants in that culture to risks and dangers which do not accord with the culture's 'taken-for-granted' world-view: 'a way of seeing that [is] simultaneously a way of not seeing' (Vaughn, 1996: 272–6; see Dingwall, 1986). If the world has been misunderstood, however, at some point events will diverge from their intended course, and the incompatibility will become evident 'as an accident, as a disaster, or as some other form of unexpected and unintended outcome' (Turner and Pidgeon, 1997: 117). The inability to prevent the bad event – the element and degree of risk – comes from the gap between the 'real' and understood world. Until and unless there is a 'paradigm shift' or restructuring of the world-view, that risk will stand.

The 'taken-for-granted' understanding of institutional abuse (in terms of a self-understanding 'professional culture' and the 'what happened' story given

by political and bureaucratic authorities in the aftermath of scandal) follows what I call a 'honeypot' conceptualization, in which a pre-existing type or personality (bully, predator, paedophile) is drawn to child care institutions like the proverbial bee to the honey pot. The focus of reform then becomes procedural, that is screening out the 'bees' (and this has, so far, been the major response to the UK care home scandals, including the Utting Report): the problem is caused by random human error (pre-existing deviants infiltrating the system) and the solution (prevention) will depend on improved screening and training and professionalization to filter out these deviants. The emphasis on *professionalism* seems based on nothing more substantive than the rather wistful – and mistaken – middle-class presumption that professionals do not sexually abuse children. On the contrary, a number of high-profile (exposed) paedophiles have boasted impressive professional credentials; over-emphasis on professionalism is not only inaccurate but dangerous, as reliance on professionalization may actually mask dangerous situations. The focus on *screening* presupposes the honey-pot characterization: the abuser as predatory – and pre-inclined – infiltrator.

The institution's self-knowledge, or self-conceptualization, is more crucial even than the child protection worker's professional self-image, for the professional character of 'residential care worker' is both perpetrator and preventer, or saver. We can see how framing the abuser as outsider, somehow 'slipping through the cracks', fooling the gatekeepers with diabolical duplicity, is a very workable model, from the institutional perspective. We will also see how it leads to a very specific – and limited – kind of legal liability, in which the duped institution may appear as outraged innocent, alongside the violated child. We can also see the clear limits this conceptualization places on the knowable and how it creates its own professional rule: abusers are deviants, or outsiders; insiders, qualified professionals, are not abusers, and 'signs' become difficult to read. But what if, as I have suggested, certain institutional norms are conducive to abuse? What if the institution is more *crucible* than honey pot?

Accounts of institutional abuse (Besner, 1999) suggest that certain institutional systems generate, or create, abusers. The idea of a 'culture of abuse' is generally accepted where the abusers are themselves youngsters, but in this context the 'culture' has referred to a norm of child behaviour which is learned from deviant adults and then internalized: abusive behaviour is introduced into the child culture of the institution by predatory 'outsider' adults, who bring it in, virus-like. There are, undoubtedly, stereotypical 'bees' drawn to residential 'honey pots' (bringing in sadistic/predatory norms); but it also appears likely that certain institutional conditions (aside from the learning or internalization process described above) tend to produce abusive behaviour in hitherto 'normal' adults.

This point is significant because it brings the focus around to an analysis of the characteristic features of an abusive institutional culture (and, of course, not all institutions are abusive). Certainly, a crucial feature of this culture is secrecy and apartness: the closed world. Secrecy is extraordinarily powerful in sexual abuse, as it acts on both perpetrator and victim. The perpetrator may believe, on an inner or subjective level, that so long as the behaviour is not

known or spoken about, it did not actually happen; it seems certain that some child abusers are able to convince themselves that they haven't actually done anything so long as no-one else knows about it (and this is surely a key reason for suicides among abusers who are found out; quite apart from the shame of others knowing, the abuser is forced to admit to himself what he has done – it becomes real to him, at which point inner guilt, shame and personal re-definition may be intolerable). Abuse victims may also be able to convince themselves that the abuse did not somehow 'really' happen to them, so long as it is not made real by acknowledgement; this is certainly a major reason why suicide is a significant danger after disclosure (like 'gremlins whooshing out of their subconscious' according to one solicitor working with survivors; *The Guardian*, 12 June 1996). In this way, closed or secret institutional communities may (and, evidence suggests, do) work to encourage deviant behaviour by adults – mostly men – because, in such an environment, things can happen without 'really' happening. Understanding this dynamic is crucial to effective prevention: the successful prevention strategy will emphasize both screening and openness, or active resistance to development of the secret world.

Understanding institutional abuse as a series of disconnected crimes committed by cunning deviants conning their way into childcare institutions works against such a complete strategy; nor, as we will consider in the next section, is it the most useful conceptualization in terms of remedy and redress. Conceptualizing institutional sexual abuse as a phenomenon, with particular characteristics and characters, is essential to prevention; it is also possible to treat a phenomenon as a particular kind of legal wrong. This matters because the way we conceptualize, or categorize, a tort may have the effect of determining liability and remedy.

Redress, remedy and responsibility: vicarious liability

The law is not the inevitable – or the only – remedy for abuse suffered by children in institutional care. However, I want to suggest that the law, through the common law doctrine of vicarious liability, is particularly workable in the context of institutional abuse: to provide meaningful compensation, to deter future abuse, and to shift the loss, fairly and justly, from the truly innocent victim to the organization responsible for creating the risk that, in the victim's case, was realized as abuse, damage and loss. Vicarious liability does not replace individual liability, nor does it absolve that individual in any way. In cases of institutional abuse, there really *is* a culprit and he really is to blame. There is also, however, an institutional creation of *risk* through which liability should properly be assigned.

The sexual abuse of a child in a residential institution is a crime: a sexual assault. The criminal sanction for sexual assault is intended to punish the perpetrator, deter future crimes, and provide the victim with the satisfaction – the redress – of justice. Some victims may feel, however, that the redress provided by the criminal law is not enough and, indeed, civil actions against perpetrators are becoming more common (Feldthusen, 1998). In the case of

institutional abuse, a civil action against the perpetrator alone may still not be enough, from the victim's point of view. A victim may feel that punishing the perpetrator only ignores the culpability of 'the authorities' responsible for putting him in a position to be abused and then keeping him there, returning him forcibly after escape or ignoring, even ridiculing, his efforts to get help. Of course, the institution will probably have 'deeper pockets' than the perpetrator, making legal success more meaningful to possibly destitute victims, to whom a money settlement would mean a great deal. From the deterrence point of view, the focus on the perpetrator in both criminal and civil actions does little to encourage institutions to develop strategies for prevention. Moreover, exclusive focus on the perpetrator reinforces the 'honeypot' analysis described in the previous section; non-economically motivated deterrence measures will concentrate on screening efforts, which are not, in themselves, enough.

To show a direct institutional liability, the victim will need to be able to show negligence or breach of fiduciary duty, which may be conceptually inappropriate and, in the case of negligence, difficult to prove. Vicarious liability is an alternative theory of third-party liability which provides the most coherent principle on which to found institutional liability for the sexual abuse of children, taking into account the special characteristics of the crime and the special deterrence issues involved. These special characteristics make it appropriate to think about institutional abuse as a 'special', or distinct, tort: a kind of sexual assault with fiduciary-like elements and a crucial element of control derived from the child's special social position.

An employer will be held vicariously liable for torts committed by an employee where the tort is committed in the course of employment. The modern legal doctrine must be applied so as to balance the fairness principle underlying vicarious liability (that '[where] somebody must be a loser by this deceit, it is more reason that he that employs and puts a trust and confidence in the deceiver should be a loser, than the stranger . . .', *Hern v. Nichols* (1701), 1 Salk. 289, 91 E.R. 256 and see *Lickbarrow v. Mason* (1787), 2 Term. Rep. 63 at 70 [1775–1802] All E.R. 1 at 3: 'whenever one of two innocent persons must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it') with the fairness principle underlying tort law itself, that loss should be shifted from where it falls if a causal connection can be shown to exist between the harm and the party liable. In the words of Lord Keith, 'The broad statements of fairness justifying vicarious liability must be confined within the limits that justice truly requires' (*Armagas Ltd. v. Mundogas SA* [1986] 2 All E.R. 385 (H.L.) at 392).

The two-part inquiry of the Salmond test has been the traditional mechanism by which these competing fairness principles have been brought into balance. The Salmond test infers a causal connection between employer and employee (giving effect to the 'third-party' fairness principle) through the theoretical device of 'modes' of authorized behaviour:

An employee's wrongful conduct is said to fall within the course and scope of his or her employment where it consists of either (1) acts authorised by the employer

or (2) unauthorised acts that are so connected with acts that the employer has authorised that they may rightly be regarded as modes – although improper modes – of doing what has been authorised. (*Salmond and Heuston on the Law of Torts*, 1981: 437)

The Salmond test has obvious conceptual limitations in the context of intentional torts, which do not fit easily into the framework of ‘improper modes’ of performing ‘authorized’ tasks.

The conceptual incongruity of intentional torts within the Salmond framework is perhaps most jarring in the context of sexual assaults. We can see how a fraudulent conveyance could be an ‘unauthorized mode’ of drawing a mortgage (see *Lloyd v. Grace, Smith & Co.* [1912] A.C. 716 (H.L.)) and how the customs officer’s theft might be an ‘unauthorized mode’ of handling the precious goods he was entrusted with (*The Queen v. Levy Brother Co.* [1961] S.C.R. 189); but how can sexual assault be an unauthorized mode of performing an ‘authorized act’? Sexual assault would seem the quintessential independent act, the ‘frolic of his own’ which would bar vicarious liability (see *Barrett v. ‘Arcadia’ (The)* (1977), 2 C.C.L.T. 142 (B.C.S.C.); *Q. v. Minto Management Ltd* (1985), 49 O.R. (2d) 531 (H.C.)). This disjunction may be accentuated where the sexual assault involves an adult engaged to take care of, counsel or teach a child (see *Boykin v. District of Columbia* 484 A. 2d 560 (D.C. App. 1984); *Doe v. Village of St. Joseph, Inc.* 415 SE 2d 56 (Ga. App. 1992); *Jeffrey Scott E. v. Central Baptist Church* 243 Cal. Reporter 128 (Ct. App. 1988); *S.(T.) v. North Yorkshire County Council* [1999] IRLR 98). Assault in this context is not merely unauthorized but appears to be the antithesis of what the employee has been engaged to do (see *MacDonald v. Mombourquette* (1996), 152 N.S.R. (2d) 109 (C.A.)).

The conceptual incompatibility of the Salmond test in intentional tort situations, particularly sexual assaults, suggests the following conclusions:

- 1 Vicarious liability is not coherent in this context and should not be found.
- 2 A different test for vicarious liability should be applied
- 3 The Salmond test needs to be explained, in the context of intentional torts, through consistent guiding criteria

Applicability of vicarious liability

The Salmond test is a test: it is not, in itself, a principle but a formula for giving effect to abstract principles. The test’s unworkability in certain factual situations, where this precludes the fair consideration of the relevant principles, indicates that other, alternative tests and/or criteria are required. Does employee sexual assault draw into play the fairness principle articulated in *Hearn and Lickbarrow*? Yes, it does: the employer will be in a better position to control the employee and prevent assault situations than the third-party victim, and of the two it is more just that the employer bear the cost which is incurred by the victim when he or she is assaulted (in so far as this is possible, through damages). The Salmond test as given, however, does not give effect to that principle in the context of sexual abuse (although it has been applied to characterize sexual assaults committed by a housemaster as an ‘unauthorized mode of parenting’; see *B.(P.A.) v. Curry* (1995), 9 B.C.L.R. (3d) 217).

Alternative test for vicarious liability

Any alternative theory must, of course, give effect to this fairness principle while including as a criteria for liability that something in the conditions of employment – ‘something more’ than mere opportunity – existed to bring vicarious liability within the fairness framework of tort: the ‘limits that justice truly requires’.

An alternative test and /or theory of vicarious liability based on the creation of risk was proposed by Atiyah (1967: 263):

Instead of asking what acts the servant was engaged in performing when he committed the tort, and whether the tort was merely an improper mode of performing an authorised act, it would be preferable if the courts were to ask, e.g., is the servant’s tort sufficiently similar to the acts he has been authorised to perform?; is there a substantial risk the employer’s object cannot be achieved without torts of this kind being committed by his servants? In general the risk of a negligent act is clearly much greater than the risk of wilful wrongdoing by a servant. A stationmaster, for example, is much more likely to arrest a passenger by mistake than he is to do so deliberately knowing that he has no right to make the arrest. On the other hand, certain types of wilful acts, and in particular frauds and thefts, are only too common, and the fact that liability is generally imposed for torts of this kind shows that the courts are not unmindful of considerations of policy.

How does this test, linking vicarious liability to the creation of risk, work out in the context of sexual assault? What conditions of employment might make sexual assault more likely to occur?

This question was addressed by the Supreme Court of California in the case of *Mary M. v. The City of Los Angeles* (814 P. 2d 1341 (Cal. 1991)), concerning the vicarious liability of the City of Los Angeles for a sexual assault committed by a police officer. The assault occurred when an on-duty police officer, patrolling alone in his marked police car, wearing his police uniform with badge and gun, stopped Mary M., who had been drinking, for erratic driving. Mary M. began to cry and plead with the police officer not to take her to jail, whereupon the officer ordered Mary M. into his car, and drove to her home where he raped her, explaining that he expected ‘payment’ for not taking her to jail. The California Supreme Court overturned a decision of the California Court of Appeal that the officer was *not* acting within the scope of his employment when he raped Mary M. The Supreme Court relied on a doctrine of ‘deliberate allocation of a risk’ founded on the principle that it would be ‘unjust for an enterprise to disclaim responsibility for injuries occurring in the course of its characteristic activities’ (at 1349).

The court outlined three policy rationales underlying the doctrine: (1) to prevent recurrence of the tortious conduct [deterrence]; (2) to give greater assurance of compensation for the victim; and (3) to ensure that the victim’s losses will be equitably borne by those who benefit from the enterprise that gave rise to the injury. The risk in this case – the risk of assault, including sexual assault – was directly connected to the kind of authority conferred on police officers by society:

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

The relationship between the employment-related conferral of authority/power of control and the risk of sexual assault meets the fairness principle underlying tort law – that there be a meaningful causal connection between wrong and liability. We can also see how a risk-based analysis meets the fairness principle underlying vicarious liability – that the innocent third party, in no position to prevent the wrong or otherwise influence the wrongdoer, should not bear the loss. Related to this point is the employer's prevention opportunity, which is not shared by the third party – this makes vicarious liability both fair and good policy in terms of *deterrence*. Assigning responsibility to an employer through a theory of vicarious liability based on the creation of risk encourages the employer to follow risk management strategies to minimize the likelihood of such assaults occurring. These kinds of initiatives are much less likely where there is no ascription of responsibility/liability and (consequently) no economic incentive.

A more fully explained test for intentional tort situations

In a recent decision (June 17, 1999, *Bazley v. Curry*) the Supreme Court of Canada articulated a set of guiding principles for applying the Salmond test in intentional tort situations, with particular considerations outlined for cases involving child abuse. The absence of criteria had made application of the test in intentional tort situations unacceptably dependent on semantics rather than any true or measured quality of connection, it being possible in many situations to characterize a wrongful act as either an 'independent act' or 'unauthorized mode' (and this is the basis on which McLachlin J., giving reasons for a unanimous court, disapproved the decision of the English Court of Appeal in *S.(T.) v. Yorkshire County Council*).

Where there are no helpful (unlike *S.(T.)*) precedents on very similar facts, the *Bazley* principles would require courts to openly inquire as to whether vicarious liability *should* be imposed in light of the broader policy rationales and purposes of vicarious liability, rather than engaging in word games about 'modes' and 'acts'. To *justify* vicarious liability, the court must then ask whether the wrongful act was sufficiently related to conduct authorized by the employer, a relationship established where there is a significant connection between the creation or enhancement of a risk and the wrong that in fact occurred, regardless of whether that risk is related to the employer's desires. These (non-exclusive) factors are to be considered when determining a connection on the basis of creation of risk:

- the opportunity that the enterprise afforded the employee to abuse his or her power;

- the extent to which the wrongful act may have furthered the employer's aims;
- the extent to which the wrongful act was related to friction, confrontation or intimacy inherent in the employer's enterprise;
- the extent of power conferred on the employee in relation to the victim;
- the vulnerability of potential victims to the wrongful exercise of the employee's power.

In child abuse situations, '[b]ecause of the peculiar exercises of power and trust that pervade [such] cases . . . special attention should be paid to the existence of a power or dependency relationship, which on its own often creates a considerable risk of wrongdoing' (*Bazley v. Curry*, at para. 46).

Tying vicarious liability to this risk-based connection provides an adequate and just remedy for the injured party and deters future harms; without the connection between wrong and creation of risk, the employer could obviously not decrease risk and, therefore, would not be able to deter the recurrence of similar wrongs (see the companion decision of the SCC in *Jacobi v. Griffiths*, June 17, 1999). The risk-based connection is fair to employers in that a characteristic risk, a risk connected to conditions of employment, will be *generally* foreseeable (so, in *Bazley v. Curry*, while the employer may not have been able to foresee Mr Curry's acts, it should have been able to foresee that employees in the position of Curry might abuse children in their care). Applying risk-based criteria to establish a connection between wrong and employment so as to comprise 'course of employment' furthers public policy considerations of deterrence and compensation, and balances the fairness considerations underlying the doctrine with the 'limits that justice demands', as described by Lord Keith in *Armstrong*.

A risk-based test for vicarious liability in institutional abuse situations does not in itself necessarily imply a 'crucible' world-view in place of the 'honey pot', however – the necessary precursor, I have argued, to an effective deterrence approach. The creation of risk may be understood primarily in terms of inappropriate screening (see Feldthusen's analogy to the bakery attracting rats; Feldthusen, 1998: 228). But a conceptual foundation for this paradigm shift is inherent in Bazley's analysis locating the creation of risk in the relationship between child and employee created by the employment. The connection is made more explicitly by Madam Justice Huddart in the decision of the British Columbia Court of Appeal (*B.(P.A.) v. Curry* (1997), 30 B.C.L.R. (3d) 1):

Conferring upon an employee parental authority over children, in my view, provides that employee with power that makes more probable a wrong. This is so because the children are placed in a position where the employee will have complete control over every aspect of the child's life and the child will perceive themselves to be powerless in relation to that parental figure. The child will undoubtedly place his or her complete trust in that employee, since the employee will represent a primary source, in some cases the only source, of parental stability and security in the child's life. Furthermore, the child may not be inclined to report the employee's misconduct since the employee is a parental figure. This power given to the

employee can only serve to increase the probability of misconduct, since the employee is given the ultimate control a person can have over a child – parental control. . . . When the [children's home] conferred the authority of a parent on [the housemaster], it put him in the place of the most powerful person a child can know – that of a parent upon whom the child is totally dependent. It encouraged the development of the intense emotions that predictably can be mishandled, particularly in the absence of the incest taboo. With the acceptance of parental authority and its delegation must, in my view, come acceptance of responsibility for the consequences of its abuse by the person upon whom you conferred it. (at 93–100)

Enterprise causation: the economics of liability

The question of institutional liability for the sexual abuse of children in residential schools and other institutional settings invariably leads to the 'economic' question of affordability: the damages may be just, but they are not affordable. In Canada, these debates are playing out against the issue of compensation for abuses suffered in the residential school system for aboriginal children, run by the Catholic and some Protestant churches on behalf of the government of Canada for many years. It has been suggested that compensation has the potential to bankrupt mainstream churches, and may ultimately cost the State billions of dollars.

But the prospect of financial ruin, or 'going out of business', is not an 'economic' argument against vicarious liability. On the contrary, an economic theory of liability for vicarious torts favours institutional vicarious liability where abuse has been shown (keeping in mind that the abuse itself must be proven, and is never presumed or inferred) on grounds of both justice and efficiency.

The economic theory of 'enterprise causation' states that an enterprise should bear all costs – including social costs – and risks of cost that they create. This is the idea of 'cost internalization', that the total costs of the enterprise should be borne by the organization or individual profiting from the enterprise. 'External' costs are those not borne by the enterprise itself (either through cost of production or price) and so are borne by third parties. 'Costs' in this analysis, are not restricted to financial loss; and, indeed, the classic 'externality' is industrial pollution, and I will use this example to illustrate the related ideas of internalization, discount and efficiency. Where the cost of pollution is not borne by the polluting industry, that cost will not be reflected in the price of the industry's product. The product is put on the market at a 'discount' – but a crucial point to bear in mind is that the cost exists and it has been incurred, albeit it is generally perceived to be invisible (except of course by those individuals actually suffering from pollution). However, because of this perceived invisibility, moves to force the industrial polluter to bear the costs of its pollution will be perceived as a 'new' cost – certainly by the industry and, probably, by the public in general; pollution 'cost' is usually diffuse and abstract, while a tax or other payment demand on industry is an overt, or obvious cost.

The efficiency problem with 'externalities' like pollution is that the artificial discount conferred on price causes an inefficiently large amount of the product to be bought and sold. The factory producing widgets, for example, benefits by not having to pay the full cost of production and so being able to offer widgets at an artificially low price, undercutting any competitors who may be under a cost internalization regime of one kind or another. The purchaser benefits by getting 'cheap' widgets. The 'missing' cost is borne by the 'invisible' third parties suffering the ill-effects of pollution; the artificial discount perpetuates and exacerbates the problem by encouraging escalating market inefficiencies. (Ronald Coase, 1960, discussing English nuisance cases, suggested that the common law was an effective mechanism for internalizing social costs.)

Alan Sykes (1988) has incorporated the idea of risk into an (economic) efficiency analysis of vicarious liability for employee assaults. Vicarious liability for intentional employee assaults (not committed to further employer objectives) will be efficient where 'the tort [has been] "caused", at least in large part, by the employment relationship [and] the imposition of liability on the employer [does] not excessively reduce the employee's incentives to avoid wrongful conduct' (p. 588). Syke's analysis outlines a spectrum of 'full' enterprise causation (dissolution of the enterprise and unemployment of the employee would bring the probability of the wrong to zero) to 'partial' enterprise causation (in which the probability of the wrong would be reduced but not eliminated without the employment relationship). The 'crucial variable' is the extent to which the employment relationship increases the probability – or risk – of misconduct.

Rubin Weber (1992) applied an economic theory of vicarious liability to, specifically, *sexual* assaults, concluding that vicarious liability in this context was both *fair* and *just*, in that it was 'just for employers, rather than innocent victims, to bear the cost of employee torts because the employers derive profits from exposing others to the risk-creating activities of their employees' (p. 1520). Moreover, vicarious liability here was also *efficient* (as we have described the term above) in both the private and the public sector:

By bestowing authority upon the employee . . . the employer realises a financial gain. Similarly in the public sector, communities profit from the authority granted employees such as police officers or teachers . . . Because communities derive benefits from the authority afforded teachers and police officers, the communities should bear the burden of liability when that authority is misused. (Rubin Weber, 1992:1536)

It is straightforward enough to transfer Rubin Weber's justice argument to the specific context of institutional child sexual abuse, where high levels of authority and control create significant risk, but it has been argued that the efficiency analysis is not applicable on the basis that the child protection 'market' can neither expand nor contract: the protection of abused and neglected children is a civic obligation, and the conferral of parent-like authority is an essential part of the state's fulfilment of that obligation. (See Madam Justice Huddart, *B.(P.A.) v. Curry*, B.C.C.A. at 89). However, an efficiency analysis

does work here if we 'unpack' exactly what we mean by social benefit and child protection.

Perhaps the obligation of child protection cannot be expanded or contracted to reflect its 'total cost', but there is no reason why a particular *form* of child protection should not expand or contract to follow an efficiency-based analysis. So, for example, if the risk costs of certain forms of residential care would require contraction under an efficiency analysis, it is doubtful whether such arrangements can really be classified as child protection at all. The benefit of such an 'inefficient' system would primarily lie, I suggest, in *appearing* to meet society's 'moral obligations'; primarily a benefit to society overall rather than to particular children (see Hall, 1998). The economist's theory of enterprise causation and 'cost internalization' works here if we conceptualize 'profit' as this *apparent* resolution. In the 'inefficient' care institution, the 'social cost' of sexual assault and abuse is borne by the child users of the system, detached from (and not cutting into) the 'profit' realized by the general society, this being the apparent resolution of social anxiety about child suffering and the 'moral obligation' of child protection.

Conclusion

The sexual abuse of children in institutional care has undergone a partial reconceptualization from 'accident' to syndrome. The paradigm shift has not been complete, however, and the honeypot characterization continues the idea of abuse as – from the institutional perspective – an uncontrollable natural disaster, the paedophile like a hurricane or wild animal attack. Like other *man-made* disasters, however, institutional abuse may only be prevented if the nature of the risk is adequately perceived, which means understanding how some institutions act as crucibles of abuse.

The legal remedy afforded to victims through the doctrine of vicarious liability accords with this re-alignment of blame between wrongdoer (who is not absolved of his act) and employer, whose legal responsibility follows Holt's maxim, that '[where] somebody must be a loser by this deceit, it is more reason that he that employs and puts a trust and confidence in the deceiver should be a loser, than the stranger'. The 'limits that justice truly requires' are met by establishing a risk-based connection between employment and wrongful act. In cases involving the sexual abuse of children, in particular, this determination will weigh the level of control and kind of authority conferred.

Institutional abuse is the paradigm case for finding vicarious liability in cases of sexual abuse/assault because of the level of 'total intervention' and parent-like control that may be involved. Children are expected to defer to authority figures of all kinds (from police officers to, in adult terms, very weak 'authorities' such as teachers or coaches, even shopkeepers and bus drivers) to the extent that they are taught to accept the judgement of such individuals in place of their own – the adult character knows best, obedience is a child's virtue. In general, perhaps, this is not a bad social norm, for children really do need guidance and instruction; but we must also recognize that this socialization

creates significant risks. The special risk created by the child's social position *vis-à-vis* adults must be taken into account as creating a particular quality of authority that is especially conducive to increasing the risk of sexual assault. This cultural norm of deference is a constant background risk that will not by itself found vicarious liability in all situations, but will intensify authority where one party is a child.

Debates about child protection over the last decade and a half have revolved around the question of when intervention is better than no intervention at all – and how the different kinds of intervention measure up: foster care, institutional care, or maintenance of family units through the provision of family services, even where those families are shown to be 'dangerous' places. It will be possible to make responsible decisions about child protection strategies when we have a measure of the real costs involved (including the costs of foster care and family preservation). The social benefit of legal action is that it makes the true costs of each of these strategies visible, and so measurable – no longer hidden in the bodies of silent individuals.

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