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ARTICLES

VICARIOUS LIABILITY FOR SEXUAL ASSAULT: THE TWO NEW TESTS FOR SCOPE OF EMPLOYMENT IN B. (P.A.) v. CURRY AND T. (G.) v. GRIFFITHS

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Recently, Canadian courts have been divided on the issue of whether or in what conditions vicarious liability may be assigned for an employee's act of sexual assault. In particular, the controversy has focused upon the issue of the proper test for gauging whether a sexual assault may be deemed to have been committed within the scope of employment. The most radical new approach to scope of employment in the context of sexual assault has been that of the B.C. Court of Appeal in the case B. (P.A.) v. Curry and its companion judgment T. (G.) v. Griffiths. In B. (P.A.), the B.C. Court of Appeal rejected the traditional Salmond test for scope of employment as unhelpful in cases involving sexual assault, and proposed in its stead two new tests: one, offered by Huddart J.A., based in an analysis of the conferral of authority; and another, offered by Newbury J.A., based in a flexible analysis of proximity between the tort and employment duties. Both B. (P.A.) and Griffiths have recently been granted leave to appeal to the Supreme Court of Canada. This paper seeks, first, to situate the issue of vicarious liability for sexual assault against the background of the differing justificatory bases for vicarious liability generally. Next, it looks more specifically to the different tests which have been applied in determining the scope of employment issue, focusing on intentional torts including those implicated in the act of sexual assault. Ultimately, it offers a slight variation on the two tests for scope of employment of Huddart and Newbury J.J.A., incorporating elements of each. The paper concludes by pointing out the perceived injustices of assigning vicarious liability for sexual assault, and counters these by affirming as most appropriate in this context the principle of commutative justice on which Madame Justice Huddart's analysis may be regarded as based.

Tout récemment, les tribunaux canadiens ont démontré une divergence d'opinion sur la question de l'applicabilité de la responsabilité de l'employeur aux cas d'agressions sexuelles commises par un employé. La controverse s'est

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particulièrement développée quant au test applicable afin de déterminer si l'agression sexuelle est survenue ou non dans le cadre de l'emploi. La Cour d'appel de la Colombie-Britannique a récemment instauré une approche des plus radicales sur le sujet, dans les décisions B. (P.A.) v. Curry et T. (G.) v. Griffiths. Dans la première décision, la Cour d'appel rejette l'approche traditionnelle de Salmond relative à la qualification du cadre de l'emploi, prétextant son inefficacité quant aux cas d'agressions sexuelles et soumet plutôt deux nouveaux tests: le premier, mis en place par la juge Huddart, analyse le degré d'autorité confiée à l'employé alors que la seconde approche, suggérée par la juge Newbury, propose une analyse flexible de la proximité entre l'acte dommageable et les fonctions attribuées à l'employé dans le cadre de son travail. La Cour suprême a tout récemment accordé un droit d'appel pour chacune de ces deux causes. Dans cet ouvrage, l'auteure tente dans un premier temps de positionner dans le tableau divergent traditionnel le problème de la responsabilité de l'employeur à l'égard des cas d'agressions sexuelles perpétrées par ses employés. Dans un deuxième temps, l'auteure analyse plus précisément les différents tests mis sur pied afin de déterminer la question du cadre de l'emploi, s'attardant aux actes dommageables intentionnels, incluant ceux pertinents aux cas d'agressions sexuelles. En dernier lieu, l'auteure offre une légère variation des deux approches relatives au cadre de l'emploi soumises par les juges Huddart et Newbury, incorporant des éléments propres à chacune des approches. L'auteure conclut en soulignant les injustices créées dans l'application de la responsabilité de l'employeur aux cas d'agressions sexuelles et soumet que l'analyse proposée par madame la juge Huddart dans sa décision, basée sur le principe de justice commutative, s'avère plus appropriée afin de contrer ces injustices.

I. INTRODUCTION: VICARIOUS LIABILITY FOR SEXUAL ASSAULT

The past decade in Canadian tort law has been marked by an unprecedented increase in battery actions based in allegations of incest and sexual assault.1 While such actions, brought either in lieu

1 Civil actions for sexual assault are most commonly brought under the tort heading of battery, though this has been supplemented of late with breach of fiduciary duty. The coexistence of claims in battery and breach of fiduciary duty was explicitly recognized with regard to incest cases by the Supreme Court in M.(K.) v. M.(H.) [1992] 3 S.C.R. 6. Actions against parties other than the perpetrator have been brought in negligence, breach of fiduciary duty, and/or, what will be the subject of this paper, vicarious liability.

Bruce Feldthusen, in "The Canadian Experiment With the Civil Action for Sexual Battery" in N. Mullany, ed., Torts in the Nineties, (Sydney: LBC
of or in addition to criminal proceedings, may on the one hand be prohibitively costly, they offer claimants some potential for a more direct form of justice than criminal proceedings alone. That is, in a civil action, the sexual battery claimant has an increased chance of participation in and control over proceedings. And further, he or she has a chance to receive some amount of compensation, in the form of a monetary award (potentially greater than any criminal victim compensation), and/or a measure of public accountability on the part of the assailant and other responsible parties.2

The increase in actions for sexual battery has led to the development of a body of case law which has had a significant impact on some fundamental areas of Canadian tort law. Landmark cases such as Norberg v. Wynrib, M.(K.) v. M.(H.), and others have been a source of change and controversy on issues of consent, breach of fiduciary duty, the assigning of punitive damages, the rules of discovery and the law of evidence.5

Many of the recent developments in this body of law have focused upon extension of liability beyond the particular assailant to third parties. This pressing of the limits of legal responsibility

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2 As Feldthusen (supra note 1) suggests, damages in a civil suit, assuming a solvent defendant, will likely exceed a successful criminal injury compensation claim (for which maximum awards vary widely between provinces). Success in the latter does not preclude seeking the former. Still, the 'ungenerous conventional' damage award in a civil sexual battery action was, until recently, about $50,000, with a de facto cap of $100,000 plus $50,000 aggravated damages. This is less than the Canadian common law inflation-adjusted cap for basic personal injury claims (299). Yet there is some indication of an upward trend in sexual battery damages (see Feldthusen at 299 footnote 124 on the B.C.C.A. case DAA v. DKB). A thorough review of damage awards in civil sexual assault cases is found in SY v. FGC [1996] B.C.J. No 1596 (QL), and see Feldthusen at 298–301.


5 Feldthusen, supra note 1 at 275.
attaching to incidents of sexual assault is of particular practical concern where the perpetrator is insolvent or dead. Thus both more traditional actions in negligence and more innovative actions for breach of fiduciary duty have been brought against non-perpetrating parties claimed to have breached a duty to protect the plaintiff. Generally, these are such parties as have had supervisory control over the perpetrator, or have had a professionally-based duty to protect the claimant; in cases of sexual assault of minors, the relevant third party may be a non-perpetrating parent or other guardian.  

What had until recently seemed a much more tenuous means of extending liability to third parties in civil actions for sexual assault is the common law doctrine of vicarious liability, or respondeat superior ("let the superior answer"). This is the long-established doctrine by which a "master" (or employer) is liable for torts committed by his or her "servant" (or employee), provided the wrong in question was committed in the course or scope of employment. Vicarious liability is not a form of strict (or no-fault)

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6 The parent-child relationship was unequivocally accepted as a fiduciary relationship in M(K) v. M(H), supra note 1.


7 Lord Reid writes in Stavely Iron & Chemical Co. v. Jones Ltd. [1956] App. Cas. 627 (H.L.) at 643: "an employer, though guilty of no fault himself, is liable for the damage done by the fault or negligence of his servant acting in the course of his employment." Vicarious liability doctrine has at times been linked with the negligence-based notion of breaching a duty to take care in selecting or supervising the wrongdoer (L. D. Rainaldi, Remedies in Tort, (Toronto: Carswell) vol. 4, (1986) at 36). Yet modern writers generally assert that vicarious liability is most properly regarded as a form of strict liability, not dependent upon any real or presumed fault of the master (see P. Hogg, Liability of the Crown, 2nd ed., (Toronto: Carswell, 1989) 86; J. G. Fleming, The Law of Torts, 8th ed. (Sydney:
liability as that concept is generally understood, as it requires that tortious fault be established on the part of the employee. Nonetheless, it is often regarded as such, since the employer's liability is determined in absence of his or her direct fault and without reference to the issue of reasonable care. In particular, vicarious liability must be distinguished from direct employer negligence, typically a matter of faulty practices in hiring, training, or supervising employees. The question raised under the heading of vicarious liability, rather, is whether an employer who is not (or not necessarily) found to be negligent or otherwise at fault with regard to an employee's act of sexual assault may yet be vicariously liable for that assault. Such a finding may potentially be made even in contexts where physical intimacy with clients or others is expressly prohibited and guarded against.

In brief, the doctrine of vicarious liability requires the meeting of three criteria: 1) that there be a tort, 2) that the tortfeasor qualify as the defendant's employee, and 3) that the tort be committed in the course or scope of employment. Of these, the key concern in claims of vicarious liability for sexual assault is not the determination of the underlying act as a tort, nor the sometimes contested issue of identification of an employer-employee relationship. Rather, the main concern—and that at issue in the

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As will be discussed below, the main policy justification for this form of strict liability, and that which has been invoked in certain recent Canadian cases which have found employer liability for an employee's sexual assaults, is "the notion that the master should bear the risks that are generated by the conduct of the master's business" (P. Hogg, *ibid.* 86-7. See also, Atiyah *ibid.* at ch.2 and Fleming *ibid.* at ch.2.


9 This issue has traditionally been set as whether the tortfeasor is an employee, and as such, one for whose torts the employer may be vicariously liable, or an independent contractor, in which case there is generally no vicarious liability (J.G. Fleming, *supra* note 7 at 416). This has generally been determined with reference to the 'control test', whereby "an individual will be considered to have been hired as an employee, for the purposes of the doctrine of vicarious liability, when the employer not only tells that person what to do, but how to do it as well" (*ibid.*).

Yet the criteria for determining those relationships which may give rise to vicarious liability have been called into question in a number of jurisdictions, particularly in the context of hospital liability. Weinrib in *The Idea of Private Law*
cases to be examined in this paper—is whether a close enough
connection may be established between the employee’s tortious
sexual assault and the employee’s legitimate role such that the
assault may be deemed to fall within the scope of employment. It
has been suggested that no consistent underlying principle
determines scope of employment—that the test varies according to
the facts in each case, as the employer’s liability must be assessed in
light of the particular tortious act’s relationship to the particular
employment role. According to Fleming, this means that
“precedents are helpful only when they present a suggestive
uniformity on parallel facts.”10 Further, it has been suggested that
scope of employment findings may reflect policy concerns rather
than any formal principle: attempts at a “judicial compromise
between the ‘social necessity’ of making a master answerable for
injury occasioned by servants entrusted with the power of acting in
his business and the conviction that it would be unjust, and indeed
undesirable, to make him responsible for every act the servant
chooses to do.”11 As Huddart J.A. of the B.C. Court of Appeal has
stated: “The concern is to protect victims of the negligence or
misconduct of employees without imposing absolute liability for all
employee wrongdoing on innocent employers.12

Such a lack of uniform principle, as well as an additional lack of
consensus on policy concerns, is reflected in recent Canadian trial

(Cambridge, Mass.: Harvard University Press, 1995) notes that “in the
Commonwealth at least, in recognition of the fact that a person can be an integral
part of the employee’s enterprise without being under the employer’s control (a
doctor working in a hospital, for instance), the courts have moved to a test that asks
whether the supposed employee is, in effect, a cog in the defendant’s organizational
machinery” (186). See the comments of Lord Denning in Stevenson Jordan and

As employment status was not at issue regarding the perpetrators of the sexual
assaults in B. (P.A.) or in Griffiths, this issue will not be dealt with here. But it will
likely arise in other cases regarding vicarious liability for sexual assault—such as
cases involving doctors and other medical workers who are not part of a hospital’s
salaried staff, or foster or group home parents who are not technically considered
employees of the Crown (see in particular the discussion of the latter issue in C.A. v.

10 Fleming, supra note 7 at 377.
11 See Bugge v. Brown (1919), 26 C.L.R. 110 at 117-18 per Isaacs J.
12 In B. (P.A.), infra note 14 at 18, citing M (F.W.) v. Mombourquette, infra note
13 at 116-17.
and appeal court decisions on vicarious liability for sexual assault. On the one hand, scope of employment has traditionally been assessed in Canada with the Salmond test, which imposes vicarious liability only where the tortious act may be classified as a “mode” of performing an authorised act. Under this test, an employer is generally not to be held responsible for employee torts which involve a radical departure from authorised employment-related conduct. As such, vicarious liability seems unlikely to attach to an employee’s act of sexual assault. Rather, sexual assault would seem more likely to be deemed a completely independent act—a “frolic” of the employee’s own, or a radical departure from employment duties and objectives in pursuit of personal gratification. This approach to employee acts of sexual assault was recently taken by the Nova Scotia Court of Appeal in McDonald v. Mombourquette, with the result that a Catholic diocese was found not to be vicariously liable for sexual assaults committed by one of its priests.

But strong opposition to this form of analysis has been raised: first in a set of trial court decisions in B.C. and Nova Scotia in which the Salmond test was held to support findings of vicarious liability for sexual assault, and then, most radically, in two recent cases in which the B.C. Court of Appeal stated its rejection of the Salmond Test for the purposes of determining vicarious liability for sexual assault. These cases were B.(P.A.) v. Curry, in which the B.C. Court of Appeal affirmed a trial court finding of vicarious liability, and T.(G.) v. Griffiths, a simultaneously-released decision in which the same panel of five judges overturned a finding of vicarious liability. In B.(P.A.)—where the reasoning for the tests applied there and in Griffiths was set out—the five judges unanimously declared that the Salmond test’s required categorizing of tortious acts as wrongful modes of performing authorised acts was inappropriate in cases of sexual assault. Instead, the Court put forward two new tests for scope of employment, suggesting these to be more sensitive to the particular context and circumstances of

such cases: on the one hand, a test offered by Huddart J.A. which focused on conferred authority; and on the other, a more broadly-based proximity test proposed by Newbury J.A. Notably, apart from the main concern in these judgments to establish a test for scope of employment in cases of sexual assault which would be responsive both to case precedents and policy implications, some concern was also raised (though ultimately deemed irrelevant to the issue of liability) about the effects of expanded employer liability on government and private non-profit organizations providing services to children and other vulnerable groups.

As yet, the matter of the proper test with which to determine vicarious liability for sexual assault now setting the B.C. and Nova Scotia Courts of Appeal into apparent conflict has not been addressed by the Supreme Court of Canada. But this is about to change: recently, leave to appeal was granted to the two B.C. Court of Appeal cases, B.(P.A.) and Griffiths. Thus the Supreme Court will soon be in a position to provide much needed guidance as to whether or under what conditions an employee's act of sexual assault may give rise to employer liability.

This paper seeks to assess the new tests for scope of employment put forward in B.(P.A.) and Griffiths in light of some of the main competing arguments concerning the justifications for vicarious liability doctrine generally, and in light of the particular concerns that arise in attaching such liability in cases of sexual assault. Two key questions are thus raised. First, under what justification can vicarious liability (ever) be imposed on employers for employee acts of sexual assault? Is the justificatory model to be adopted one of corrective justice, under a rights analysis involving an expanded notion of composite or corporate fault; or one of distributive justice, under an analysis of economic efficiency and maximization of overall public welfare? Or is the relevant justificatory model that of commutative justice, requiring that the beneficiaries of an enterprise or institution compensate those who have been subject to systemic enterprise-related injuries? Alternatively, as is sometimes suggested in the judicial discourse, is the appropriate model some, perhaps uneasy, combination of these?

Second, with more specific reference to the B.C. Court of Appeal's two tests: assuming some justification for assigning

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vicarious liability in certain cases of sexual assault, what criteria are most properly applied in determining liability in any specific instance? Here, it is suggested that while each of the competing justificatory models for vicarious liability must hold that the scope of employment test requires a closeness of connection between the employee tort and enterprise activity, there is yet some question within each of these models as to what this connection must consist in, or how its sufficiency should be determined. In particular, as has been borne out in the United States and now Canadian cases, approaches differ in their focus upon, on the one hand, proximity of acts (or between employee duties and the tortious act), and on the other, probability of risk. In sexual assault cases, the latter type of analysis may look specifically to the increased likelihood of such assaults occurring due to the establishment of relationships of power within the employment context. Exploration of the differing implications of these two approaches may be aided by a closer look at the concept of enterprise causation (and the accompanying analysis of “increased probability of risk” or “characteristic risk”), invoked in some modern judicial and academic analyses of vicarious liability, including B. (P.A.), as determinative of the scope of employment issue.

With this second question, then, concerning the method and criteria for determining scope of employment in cases of sexual assault, the two tests of the B.C. Court of Appeal may be critically assessed. Ultimately, the focus of controversy between Huddart and Newbury JJ.A. is the significance or weight to be assigned the employer’s conferral of authority to the employee. That is, if the Salmond test’s required classification of the tort as a mode of performing an authorised act is to be rejected, should the key or perhaps the only consideration in determining scope of employment be the nature and extent of any authority conferred upon the employee—the test of Huddart J.A.? If so, how broadly or narrowly is the concept of authority to be understood? Or is the test to be more flexible, admitting not only considerations of authority, but also functional and formal similarities as well as coincidences in time or place between employee duties and the sexual assault—the proximity test of Newbury J.A.? Or, as other members of the B.C. Court of Appeal have suggested, is the proper test in cases of sexual assault a combination of these: flexible in allowing a variety of indications of connection between the
employment role and the tort, while maintaining an emphasis on conferred authority as an important, and perhaps necessary, element?

While this paper cannot claim to resolve all of these complex issues, it will close by setting the B.C. Court of Appeal’s new tests into what is hoped to be sharper relief with the traditional justifications for vicarious liability doctrine. As such, it will suggest that it is not corrective nor distributive but commutative justice that functions as the primary operative justificatory model in _B. (P.A.)_ and in the context of vicarious liability for sexual assault generally. With this, some attention will be given to issues of insurance and insurability, and whether these might be deemed relevant to employer liability. Ultimately, this is a suggestion that the principle of commutative justice, as it is invoked particularly in the conferral of authority test of Huddart J.A., is derived less through an engaging of first principles under vicarious liability theory than through the attempt to set the analysis of liability for sexual assault within a broader analysis of institutional or enterprise-based systems of authority and power, both public and private, and systemic abuses of such authority and power. As such, the commutative justice principle at work in _B. (P.A.)_ may be understood to be informed by feminist concerns to identify the structural determinants of sexual assault and abuse, as well as by a basic notion of civic responsibility for society’s most vulnerable.

Here, though, a final question which arises is whether, in cases of employee acts of sexual assault, the objectives both of fairness and of feminist-inspired social change are best served by focusing judicial attention on vicarious liability, with its causation-centred criteria for scope of employment, or on direct employer liability, assessed through a more thorough scrutiny of the duty of care—ideally, a scrutiny which would be sensitive to a variety of employment-related determinants of sexual assault. Therefore, alternative headings under which employer liability may be assessed will be briefly suggested, including negligence, breach of fiduciary duty, and the concept of the non-delegable duty.
In B. (P.A.) v. Curry, a five-person panel on the B.C. Court of Appeal unanimously upheld a trial decision finding the defendant Children's Foundation vicariously liable for sexual assaults committed by a residential care worker (Curry) upon a minor at one of its group homes. Yet in T. (G.) v. Griffiths, a judgment released simultaneously with B. (P.A.), the same panel overturned a trial court decision assigning vicarious liability to the defendant Boys' and Girls' Club of Vernon for sexual assaults committed upon two minors by the Club's Program Director. Notably, in Griffiths, a minority of two (on the reasons of Newbury J.A.) would have assigned vicarious liability for the one assault committed while the employee was on duty.

The plaintiff in B. (P.A.) had been subjected to acts of sexual abuse by the residential care worker, Curry, while living at one of The Children's Foundation's facilities between 1968 and 1971. The Foundation provided care at this facility to children aged six to twelve whose needs could not be met in their own homes or foster homes. In 1980, upon receiving and investigating a separate complaint of sexual abuse at the facility, The Children's Foundation dismissed Curry. The plaintiff brought his claim after Curry was later criminally convicted of gross indecency and buggery, two of the convictions relating to the plaintiff. Curry's sexual misconduct with regard to the plaintiff included acts of oral sex and anal sex, performed in the boy's bedroom during the night shift, in the absence of any other employee. Further, Curry had "bribed and threatened" the boy "to keep [these acts] secret." Of great relevance to the appeal court's finding of vicarious liability in B. (P.A.) was its assessment of the position of trust in which Curry had been placed by the Foundation, and which he was found to have abused. The Court noted that his duties had included

...ensuring the children went to bed on time...ensuring the children bathed or showered themselves...tucking the children in at night...providing an appropriate role

17 Supra note 14.
18 Supra note 15.
19 B. (P.A.) supra note 14 at 7.
model for the children...dealing in an age appropriate way with the children’s questions regarding sexuality... accompanying children on outings and physical activities...[and] providing a safe and secure environment for the children.\textsuperscript{20}

As such, the Court found, Curry had essentially been entrusted with the role and duties of a parent.

The appeal in \textit{B. (P.A.)} was specifically concerned with the Trial Court’s finding of vicarious liability on the part of The Children’s Foundation; indeed, it is important to note that the issue had been brought to trial as a special case, by which the Court was asked to consider “only vicarious liability and not to consider any liability of The Children’s Foundation that is founded directly upon any negligence of The Children’s Foundation.”\textsuperscript{21} While both Huddart and Newbury JJ.A. indicated that analysis of the Foundation’s direct fiduciary or non-delegable duty\textsuperscript{22} may have been appropriate in the circumstances, such alternative heads of liability were not under consideration. In unanimously upholding the Foundation’s vicarious liability, the members of the appeal court took a few differing approaches to the issue of scope of employment. These consisted in two proposed alternatives to the Salmond test (those of Huddart and Newbury JJ.A.); two proposals that these two new tests may themselves be reconciled (Hollinrake and Finch JJ.A.); and one agreement without reasons (Donald J.A.).

In \textit{Griffiths}, two children (a brother and sister) had been sexually assaulted by the defendant Griffiths while he was Program Director of the Boys’ and Girls’ Club that they attended. The boy

\textsuperscript{20} \textit{Ibid.}\textsuperscript{21} \textit{B. (P.A.) supra} note 14 at 34.
\textsuperscript{22} The concept of non-delegable duty is invoked by Newbury J.A. in \textit{B. (P.A.) supra} note 14 at 35. This is a concept drawn from agency law, whereby certain types of duty, based in the exercise of statutory authority or the undertaking of dangerous activities or activities of general importance to the community, cannot be divested by delegating responsibility to another. The concept is often invoked in the analysis not of employer liability for acts of employees but for acts of independent contractors. But the key point here is that the non-delegable duty is a direct duty owed by the employer to those within foreseeable range of harm, a duty which may be breached through the negligent or intentional wrongs of those upon whom the employer has conferred responsibility. See Fleming, \textit{supra} note 7 at 368-69, 373-74; Keeton et al., \textit{supra} note 8 at 197, 511.
had been sexually assaulted on one occasion at Griffiths's home, outside working hours. The girl had been subject to numerous incidents of sexual assault by Griffiths, including an act of sexual intercourse when she was thirteen or fourteen. Of these incidents, only one—an act of sexual touching which occurred during a Club-related bus trip—occurred directly in the context of Club activities.

At trial, it was emphasized that Griffiths had seemed "almost god-like" to the girl at the time. He had been a mentor to these and other children whose participation in Club activities often reflected a lack of parental guidance or support at home. The Trial Judge found Griffiths liable for assault and battery, and found the Club vicariously liable, holding that although the assaults had not occurred in the employment setting, they were nonetheless "a direct result of Griffiths misusing his position at the Club and his relationship with the children at the Club to seek out and cultivate victims from among the membership."23

Yet the B.C. Court of Appeal reversed the finding of vicarious liability against the Club, though the minority dissented regarding the one act of sexual touching which occurred on the Club-related bus trip. In the majority decision, Huddart J.A. held that while the defendant's employment role had allowed him to develop a relationship of trust with the plaintiffs, this "opportunity" to gain the children's trust provided by his employment was insufficient to establish vicarious liability. Crucially, in the opinion of Huddart J.A., the defendant's job-related authority was not of a sort that increased the probability of risk of such assaults significantly beyond the background risks in the community at large.

Both the tests of Huddart and Newbury J.J.A. in these cases accept the general principle that vicarious liability requires a sufficient "connection" between the employment role and the tortious act—a connection surpassing "mere opportunity"—but propose alternative grounds on which the sufficiency of such a connection might be established. Huddart J.A.'s conferral of authority test draws particularly on fiduciary theory, and in doing so offers an interpretation of the doctrine of vicarious liability which attends to the dynamics of power and vulnerability bound up in the employee's act of sexual assault, and the extent to which these power relations may be deemed to flow from the employment or

23 Cited in Griffiths (B.C.C.A.), supra note 15 at 206.
institutional context. Newbury J.A., on the other hand, while acknowledging in a more circumscribed way the relevance of authority or power dynamics to the analysis of vicarious liability, proposes a test under which attention is directed across a broader spectrum of potential connections—temporal, spatial, formal—between employment duties and the tortious act.

In order to better understand and evaluate these two tests, it will be useful first to examine more closely the doctrine of vicarious liability as such, with reference to its historical and modern justifications. Then we may examine more particularly the competing tests concerning scope of employment which have been deemed determinative of such liability, assessing the tests of Huddart and Newbury JJ.A. among these.

III. VICARIOUS LIABILITY: HISTORICAL AND MODERN JUSTIFICATIONS

1. Origins of Vicarious Liability Doctrine

Academic treatments of vicarious liability have differed regarding the doctrine’s precise origins, just as they continue to differ regarding its essential rationale. Oliver Wendell Holmes traced the historical origins of the doctrine to Roman law—specifically, the practice of assigning liability to masters for the torts of slaves.24 Holmes also noted an expansion of this principle in the assigning of liability to the *pater familias* or head of the household for the acts of either slaves or family members.25

It has been suggested by some legal historians that while the doctrine originally imposed a strict form of liability upon a master for his servant’s torts, this rule was considerably narrowed in the

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24 O.W. Holmes, *The Common Law* (Boston: Little, Brown, 1881) at 4-38. Of some note, though, is Thomas Baty’s fervent reply to Holmes’ theory: “Had the present-day liability of masters for servants (as O.W. Holmes thinks) been a clear survival of the liability of masters for slaves, it is inconceivable that it should have suffered such eclipse before blazing forth again in A.D. 1700”: (T. Baty, *Vicarious Liability* (Oxford: Clarendon, 1916) at 152).

25 O.W. Holmes, “Agency” (1891) 4 Harv. L. Rev. 345, at 351-3. The liability of the *pater familias*, it may be noted, has recently been revived in Manitoba with the *Parental Responsibility Act*, c. P8, C.C.S.M. Under this provision, parents may be civilly liable for property losses arising from offences committed by their children.
sixteenth century in favour of a fairness-based concern for direct fault on the part of the master. Consequently, liability was imposed only where the employer or master had expressly authorised or commanded the tortious acts in question. Yet it is generally agreed that the eighteenth century saw the rise of the concept of the “implied command,” whereby the law allowed that a servant’s or employee’s act, though not directly authorised, could yet be implied by the acts generally authorised within the employment context. This, it is suggested, marked the dawning of the modern form of vicarious liability, as the employer’s liability was to be established through an analysis of the act in question and its connection to employment duties or business activities. Notably, though, the implied command standard yet had the effect of denying vicarious liability for intentional torts of employees, on the argument that “it could not be implied that such acts were authorized.”

In an early case indicative of vicarious liability concepts, Jones v. Hart, Lord Holt presented the notion of implied authority in terms of an “identity” between the employer’s and employee’s acts. In that case, a pawnbroker’s servant had taken in and then lost the plaintiff’s goods. Lord Holt posed as the basis of the employer’s liability the principle that “whoever employs another, is answerable for him, and undertakes for his care to all that make use of him,” further stating this principle in the form of an identity of acts:

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27 Wigmore, supra note 26 at 392. And see Keeton et al., supra note 8 at 500; and Krueger, supra note 26 at 422. But see Baty, supra note 24 at 148-49.

28 P. Hogg also writes that the modern doctrine of vicarious liability arose with the fiction that the master had impliedly commanded the servant to commit the tort” (P. Hogg, supra note 7 at 86).


30 (1698) 90 E.R. 1255 (K.B.).
"[t]he act of a servant is the act of his master, where he acts by authority of the master." This is essentially equivalent to the dictum often posed as one of the major touchstones of vicarious liability—a statement which equally suffices as the rationale behind the law of agency generally and also the notion of the non-delegable duty: *qui facit per allium facit per se* (whoever acts through another acts through himself).

Notably, insofar as it precedes and reflects the modern conflict in scope of employment analysis between emphasis upon identity of acts and upon conferral of authority or trust, in a further case addressing vicarious liability, this time for an intentional wrong—*Hern v. Nichols*—Lord Holt’s analysis specifically invoked the employer’s placing of trust upon the employee (and the employee’s abusing that trust) as the basis for vicarious liability. There, a merchant was held vicariously liable for his agent’s having fraudulently misrepresented the quality of some silk. In the words of Lord Holt, “seeing somebody must be a loser by the deceit, it is more reason [sic] that he that employs and puts a trust and confidence in the deceiver should be a loser than a stranger.”

By the early part of this century, the more formalistic “identity of acts” rationale seemed to have fallen out of fashion in favour of a compensation-driven “deep pockets” rationale. In his influential history of vicarious liability, Thomas Baty concluded that despite multiple purported justifications for vicarious liability doctrine—Baty discusses nine such justifications, a multiplicity which he deems to be in itself indicative of “no very firm basis of policy”

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31 (1709) 1 Salk. 289 at 289, 91 E.R. 256
32 See, for instance, Oliver Wendell Holmes, “Agency,” *supra* note 25 at 357. In recognizing the practical force of this rationale within the modern law of vicarious liability, Holmes does not endorse it as a legally sound principle.
34 *Ibid.* at 148-54. Baty’s nine bases of purported justification (somewhat akin, in his discussion, to the Seven Deadly Sins) are Control, Profit, Revenge, Carefulness and Choice, Identification, Evidence, Indulgence, Danger, and Satisfaction.

Yet while Baty suggested that vicarious liability must have a single, unified rationale, Bryant Smith argued in response that a multiplicity of justifications is in accordance with a wider notion of the multiple rationales for and functions of tort law: Why should a doctrine that has nine reasons to sustain it, assuming they are not mutually antagonistic, be less rather than more securely anchored than a doctrine that has only one? The sounder
none revealed the practice of holding employers liable in the absence of direct fault to be a principled application of tort law. For Baty, it was simply the plaintiff's will to reach the employer's deep pockets that stood as the doctrine's (or for Baty, the dogma's) essential rationale—a basis of liability which Baty deemed to be in opposition to the fault-based purposes of tort law, and in turn in opposition to the demands both of conscience and industry.

In variously elaborated forms, the thesis of an identity between employer and employee acts; that of the relevance of the employer's conferral of trust; and that of the deep pocket have retained force within modern analyses of vicarious liability. At this point, since the boundaries of vicarious liability under the scope of employment rule are, in cases of sexual assault as much as any other form of employee tort, bound up with the doctrine's justificatory basis, an examination of some of the leading modern justificatory arguments may be helpful. The arguments surveyed below conform with three distinct and competing interpretations of the purposes of tort law: distributive justice, corrective justice, and commutative justice.

2. Modern Justifications of Vicarious Liability Doctrine

i. Distributive justice: optimal efficiency

Many modern theorists of vicarious liability and courts applying the doctrine have based their analyses in notions of efficiency under a practice, though more difficult, in law as in extra-legal affairs, is to consider the cumulative effect of many reasons for a rule, or, indeed, to balance the cumulative effects of many reasons for and against

(B. Smith, "Cumulative Reasons and Legal Method" (1949) 27 Tex. L.Rev. 454 at 468).


In the thicket of the law, the boundary of enterprise liability [including, for Keating, vicarious liability] is entangled with the justifications for such liability. The principle of fairness and the policies of optimal deterrence and optimal insurance draw that boundary in different places.
model of distributive justice.\textsuperscript{36} Such analyses, following upon the work of Fleming James and Guido Calabresi,\textsuperscript{37} as well as P.S. Atiyah in his influential book *The Law of Vicarious Liability*,\textsuperscript{38} assess vicarious liability in light of the efficiency-based notions of optimal risk and loss-spreading and optimal deterrence. The ensuing conception of vicarious liability is simply put by Prosser and Keeton as “a rule of policy, a deliberate allocation of risk.”\textsuperscript{39} The combined effect of risk and loss-spreading was set out under a wider notion of “enterprise liability” early in the century by Y.B. Smith, with the argument that it is “socially more expedient to spread or distribute among a large group of the community the losses which experience has taught are inevitable in the carrying on of industry than to cast the loss upon a few.”\textsuperscript{40} As such, Smith reasoned, “the employer should be made responsible for injuries caused others by his employees not merely because the employer is better able to pay, but because he is in a better position than the employees to effectuate the spreading and distribution of the loss.”\textsuperscript{41}

\textsuperscript{36} Dennis Klimchuk concisely contrasts corrective and distributive justice, drawing on the Aristotelian distinction: “Corrective justice is justice in transactions, distributive justice is justice in holdings.” (From notes to a seminar conducted at Dalhousie Dept. of Philosophy, Nov. 1997). While corrective justice is concerned to correct correlative losses incurred through one party’s infringing another’s rights, distributive justice is concerned to achieve an optimal allocation of resources across a wider set of individuals. See Aristotle, *Nichomachean Ethics* bk. V, ch. 4, trans. D. Ross (Oxford: Oxford University Press, 1980) at 114–17.


\textsuperscript{38} Atiyah, *supra* note 7.

\textsuperscript{39} W. Keeton et al., *supra* note 8, at 500.

\textsuperscript{40} Y. B. Smith, “Frolic and Detour” (1923) 23 Colum. L. Rev. 444 at 456. Also see R. Rabin, “Some Thoughts on the Ideology of Enterprise Liability” (1996) 55 Maryland L.R. 1190, for a recent discussion of the spreading of enterprise liability theory from the domain of enterprises and products-liability cases to the sphere of professional service liability. Carried over to this new domain is the justificatory principle that “ordinary business activity... involves risks to outside parties that can best be borne by the enterprise responsible for creating the risks in the first instance” (at 1203).

\textsuperscript{41} Ibid. at 460. Similarly, and earlier still, Harold Laski wrote that vicarious liability is based not in fault but in the understanding that “in a social distribution of profit and loss, the balance of least disturbance seems thereby best to be obtained” (“The Basis of Vicarious Liability” (1916) 26 Yale L.J. 105 at 112).
The efficiency aim of optimal deterrence is often invoked along with risk- and loss-spreading as a rationale for the imposition of vicarious liability. Thus the assumption is made that the employer is not only the optimal insurer for employee torts (and, in the wider ambit of enterprise liability theory, also for non-negligent enterprise-based accidents), but also, as the one in control of the enterprise’s activities generally, the optimal target for a liability rule encouraging precautionary measures. As one writer sums up the leading efficiency-based rationales for general application of vicarious liability doctrine: “Not only can the employer absorb, distribute, and shift the costs of injuries, but presumably the employer will also be more careful in making hiring decisions, in training and in supervision.”

While these efficiency-based rationales identify the general concerns of the economic analysis of vicarious liability, it is not always clear that the imposition of such liability is the means to achieving the efficient result. Alan O. Sykes, whose application of economic theory to vicarious liability doctrine was particularly influential on the judgment of Huddart J.A. in B.(P.A.), indicates that a further complexity of analysis is required under the economic model. Sykes writes:

Economic theory suggests that between any employer and employee there exists an optimal allocation of the risk of financial loss attendant upon any judgment against the employee. This allocation must take into account each party’s attitude toward risk-bearing, the employee’s incentives to avoid whatever conduct might lead to a judgment against him, and the incentives available to the employer to monitor the employee or otherwise to guard against the occurance of a wrong.

Sykes’s analysis of vicarious liability acknowledges that while under idealized conditions, according to economic theory, parties will contract into an optimal allocation of risk regardless of the liability rule in place, in practice, significant obstacles to the

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42 Hahn, supra note 26 at 589, with reference to Keeton et al., supra note 8 at 500-01.
44 Ibid at 565.
efficient result arise. This is so on the one hand because of the high costs of negotiating and enforcing private risk-allocation contracts. But further obstacles arise out of the fact that employees may be insolvent, such that the costs arising from their torts may not be fully met under an employee liability rule.\textsuperscript{45} In such circumstances, the costs will be forced onto the victim of the tort, and more generally, society at large.

Among the potential efficiencies of vicarious liability which Sykes discerns, then, is a cost internalisation rationale, responsive particularly to the prospect of employee insolvency. Taking potential employee insolvency into account, an employee liability rule is not likely efficient. Sykes suggests:

\[\text{[B]ecause the employer's business does not bear the full cost of the compensable wrongs attendant upon its operation (either directly through liability payments or indirectly through wages paid to employees who make liability payments), its profitability is inflated relative to what it would be if the employee could pay judgments in full. In a competitive market, the employer is then likely to expand production beyond the socially optimal level because his private marginal costs of production are lower than the social marginal costs of production.}\textsuperscript{46}\]

On the deterrence point, though, Sykes adds that:

\[\text{The ultimate efficiency or inefficiency of vicarious liability also depends, however, on its effect upon employees' incentives to avoid wrongful conduct. The effect of vicarious liability on such incentives depends in turn upon the devices available to the employer to induce careful behaviour and the costs of those devices.}\textsuperscript{47}\]

Among the preventive measures which might stand in place of an employee liability rule as effective deterrents are direct observation or supervision of employees' activities, along with intervention to prevent enterprise-related torts from occurring and threats of discharging employees for tortious acts.

Yet as Sykes recognizes, "[t]he ability of the employer to affect the employee's incentives is much more limited, however, when the

\textsuperscript{45} \textit{Ibid.} at 566.
\textsuperscript{46} \textit{Ibid.} at 567.
\textsuperscript{47} \textit{Ibid.} at 569.
employee's behaviour is not easily observed or when the employee has no interest in maintaining a long-term employment relationship." 48 It might be suggested that in settings such as residential care facilities, where employee access to intimate settings is required and resources are often limited, deterrence measures are more difficult to institute. Still, it may further be argued with regard to sexual assault that the potential for criminal culpability would be as strong a disincentive to the employee as any liability rule, and that sexual predators are not as such rational actors responsive to the economic incentives of liability rules. In these circumstances, then, it might be concluded that the deterrence rationale does not apply either to the employer or employee. Alternatively, it might be concluded that employer preventive measures, however unlikely or ineffectual, are the only potentially workable form of deterrent. The deterrence rationale, therefore, would favour an employer liability rule.

Central to Sykes's efficiency analysis of vicarious liability is his concern to delineate a principle of "enterprise causation" with which to decide the scope of employment issue. As Sykes suggests, the analysis of scope of employment is vital to the economic analysis of vicarious liability, as it is in the interests of efficiency and economic growth that only those costs proper to employment activities should be internalized. This avoids the possibility of driving a productive or socially-beneficial enterprise (which has not forced hidden costs or "externalities" on society), out of business, or causing it to contract excessively. In such a case, "society then will lose at least some of the economic surplus from the production of the enterprise." 49 This concern to set efficient limits to vicarious liability with the concept of enterprise causation will be discussed in Parts IV and V below, with the scope of employment test as addressed by the B.C. Court of Appeal. There, as Huddart J.A. suggests, the application of the cost internalization analysis to either private non-profit or government services requires further consideration. 50

48 Ibid. at 570.
49 Ibid. at 574.
50 Notably, support for an efficiency-based theory of vicarious liability was expressed by La Forest J. in his dissenting opinion in London Drugs Ltd. v. Kuehne & Nagel International Ltd., [1992] 3 S.C.R. 299, in obiter comments on the
a. Fairness/Interparty Justice Critiques of the Distributive Justice Analysis

While the efficiency-based conception of vicarious liability under the model of distributive justice has gained much approval in modern academic and judicial treatments of the issue, there is also a persistent current of opposition to this conception. Ernest Weinrib, in his commitment to a corrective justice model of tort law, is one who has posed such arguments. For Weinrib, opposition to the distributive justice analysis of vicarious liability is part of a wider opposition to what he identifies as the more fundamental flaw of the economic analysis of torts. In Weinrib’s critique, economic analysis attempts to expand the ambit of this form of law beyond its proper concern with correlativity, so rejecting what Weinrib regards as the proper conception of tort law as a rights-based and transaction-based model for redressing the doing and suffering of harm between parties. With specific regard to vicarious liability doctrine, he argues that the efficiency-oriented distributive justice model fails to explain indemnity laws, as well as this...

“developing logic” (at 340) of the vicarious liability regime (at 334-358). There, Justice La Forest opposed the principle that an employer found vicariously liable could subsequently claim indemnity from the employee at fault. For, he argued, this would contravene the efficiency-based requirement that employers bear enterprise losses.

In support of this claim, he endorsed a set of four essential rationales for vicarious liability doctrine. First is compensation (the deep pocket principle). Second is a notion of fairness which reflects both the cost internalization principle and the principle of commutative justice:

a person, typically a corporation, who employs others to advance its own economic interest should in fairness be placed under a corresponding liability for losses incurred in the course of the enterprise [such that] the cost of such liability is thus internalized to the profitable activity that gives rise to it [ibid. at 338].

Third is the aim of optimal risk and loss-spreading: the notion that insurance is more affordable and risks easier to anticipate for the employer than the employee, such that the employer may pass those losses on through liability insurance and higher prices. And fourth is the concept of deterrence; that is, vicarious liability is posed as a form of incentive for corporations to adopt policies reflecting greater care regarding the tort at issue.
vicarious liability for sexual assault (the tort of the employee). In *The Idea of Private Law*, Weinrib writes:

Loss-spreading cannot, however, account for respondeat superior in its entirety: if respondeat superior were really based on loss-spreading, not only would it preclude the further shifting of the loss to the employee, which was sanctioned in *Lister v. Romford Ice and Cold Storage Co. Ltd.* [1957] App. Cas. 555 (H.L.), but it would apply even to injuries that were not the result of the employee's fault.

Economic theorists may have a response to the first of these concerns, apart from outright opposition to the *Lister* principle. Indeed, Sykes writes that the threat of an indemnity action against the employee might serve economic efficiency in providing a disincentive to wrongdoing, although such actions are costly and may be valueless if the employee lacks financial resources. As to Weinrib's second concern, while economic analyses such as Sykes's do seek to establish a defensible limit to employer liability in the interests of efficiency, the point holds as to the theoretical indefensibility under such an analysis of the requirement of a legal wrong or tortious fault on the part of the employee. Thus one suggestion raised by the economic analysis of vicarious liability is that the doctrine is but a subset of a wider model of enterprise and products liability whereby employers may be made to compensate for accidents which qualify as characteristic risks, where neither employer or employee negligence is shown. Insofar as this wider model of enterprise liability would sanction liability without any instantiation of tortious fault, with the objective of reducing and spreading risks and losses across society at large, it exposes more starkly the conflict between corrective and distributive justice.

52 *Ibid.* at 185 footnote 27.
53 Sykes, *supra* note 43 at 570.
54 This notion of enterprise causation in the absence of negligence is based upon the two-pronged U.S. assessment of negligence which considers not only foreseeability of risk but also the relative cost of precautions. Hence it might be argued by the economically-minded theorist that in fact a wider principle of liability for characteristic risks beyond those of negligence is not cost-justified. Sykes argues that vicarious liability may be cost-justified in the wider context of economic gains and losses across society at large; in this wider context, the aims of
Selecting between these models depends upon one's view of both the formal and social requirements of a defensible approach to tort law.

Weinrib's brief discussion of vicarious liability doctrine in *The Idea of Private Law* invokes the U.S. case *Ira S. Bushey & Sons, Inc. v. United States*,\(^55\) in which further critique of the efficiency-based conception of vicarious liability is raised. There, a sailor returning from a night of drinking had turned a number of wheels on the wall of the floating drydock where his ship (a U.S. Coast Guard vessel) was berthed. This caused the flooding of a set of tanks on one side of the drydock, such that not only did the ship list and partially sink, but parts of the drydock sunk as well. In assigning vicarious liability to the U.S. government (the sailor's employer), Friendly J. indicated that he nonetheless did not endorse the notion that either deterrence, loss spreading, or compensation could stand as the justification for his decision. On the deterrence argument, Justice Friendly wrote:

> It is not at all clear, as the court below suggested, that expansion of liability...will lead to a more efficient allocation of resources. As the most astute exponent of this theory [Calabresi] has emphasized, a more efficient allocation can only be expected if there is some reason to believe that imposing a particular cost on the enterprise will lead it to consider whether steps should be taken to prevent a recurrence of the accident.\(^56\)

In particular, Friendly J. continued, on the facts of *Bushey*, "the suggestion that imposition of liability here will lead to more intensive screening of employees rests on highly questionable premises." Moreover, application of the scope of employment test in its more traditional form, so as to deem the sailor's intentional wrongs outside the scope of employment, might have had greater preventive effect:

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\(^55\) 398 F.2d 167 (2d Cir. 1968).

\(^56\) Ibid. at 170.
It could well be that application of the traditional rule might induce drydock owners, prodded by their insurance companies, to install locks on their valves to avoid similar incidents in the future, while placing the burden on shipowners is much less likely to lead to accident prevention.  

In *Bushey*, then, it would seem that the plaintiff drydock owner and not the defendant employer was in the best position to take cost-effective precautions. And finally, Friendly J. also challenged the loss-spreading justification, though essentially reducing this to a compensation or deep pockets issue:

> It is true, of course, that in many cases the plaintiff will not be in a position to insure, and so expansion of liability will, at the very least, serve respondeat superior’s loss spreading function. See Smith, Frolic and Detour, 23 Colum.L.Rev. 444,456 (1923). But the fact that the defendant is better able to afford damages is not alone sufficient to justify legal responsibility, ... and this overarching principle must be taken into account in deciding whether to expand the reach of respondeat superior.  

Thus Friendly J. arrived at a finding of vicarious liability on a principle not of economic efficiency, but on what was presented as a principle of fairness. This principle was in essence that an enterprise should be held responsible for materialization of its “characteristic risks”:

> [R]espondeat superior...rests not so much on policy grounds...as in a deeply rooted sentiment that a business enterprise cannot justly disclaim responsibility for accidents which may fairly be said to be characteristic of its activities.  

Friendly J.’s analysis of the essential rationale for vicarious liability is thus closely bound up with a particular approach to the scope of employment issue; that is, justifiable findings of vicarious liability require identification of an enterprise’s characteristic risks, presented in *Bushey* as risks foreseeable in a sense other than that implied under negligence. This idea must be examined further, along with the notion of enterprise causation, in assessing the B.C.

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57 Ibid. at 170-71.
58 Ibid. at 171.
59 Ibid.
Court of Appeal’s approaches to scope of employment. Yet insofar as Friendly J.’s analysis raises the spectre of “fairness” against prevailing economic analyses, calling into question the distributive justice rationales whereby vicarious liability is premised on the notion that the least-cost insurer and taker of preventive measures against employee torts is the employer, just what this notion of fairness implies must be further explored. Indeed, the economic analysis may respond that the notion of responsibility for characteristic risks raised in *Bushey* is none other than the cost-internalization principle discussed by Sykes, to be embraced as one important element in a nuanced economic analysis.

So, just what form of justice-as-fairness might be posed as an alternative to the prevailing efficiency-based interpretation of vicarious liability is yet a contestable issue. And, as Friendly J. suggests with his analysis of the least-cost insurer and taker of preventive measures in *Bushey*, this is an issue which may affect the assessing of liability in some cases. In what remains of this look at the leading justificatory bases for vicarious liability doctrine, then, interpretations of the doctrine as primarily serving a standard of fairness and not efficiency will be examined, with reference to the differing models of corrective and commutative justice.

**ii. Corrective Justice: The Extension of Employee Fault to Employers**

Ernest Weinrib’s conception of vicarious liability emphasizes that the doctrine is not as such one of no-fault liability, but rather may be found to accord with the notion of fault-based liability which is required under the model of corrective justice. Thus Weinrib seeks to interpret vicarious liability in accordance with an emphasis on interparty fairness or correlativeity (“justice in transactions”),60 as opposed to the emphasis of distributive justice on justice in holdings across society at large, or, in its efficiency-based form, justice as served by overall economic gains.

Liability under corrective justice reflects a correlativeity of right and harm, such that an injustice by which one party infringes another’s rights demands a corrective extraction of compensation

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60 See *supra* note 36. Weinrib writes: “Correlativity locks the plaintiff and defendant into a reciprocal normative embrace, in which factors such as deterrence and compensation, whose justificatory force applies solely to one of the parties, play no role.” (*supra* note 9 at 142).
from the one who has wronged, in order to restore the position of
the one who has been wronged. Weinrib writes: "Liability is not the
retrospective pricing, licensing, taxing of a punishable act—nor is
the defendant singled out as a convenient conduit to an accessible
insurance pool."\(^{61}\)

Under the corrective justice model, then, vicarious liability is
coherent only if the employer may be regarded as in some sense
sharing in the fault of the employee. As such, this interpretation of
vicarious liability draws upon the notion suggested early on by Lord
Holt in *Jones v. Hart* regarding an identity of employer and
employee acts. Weinrib finds this notion of identity (or "close
association") to be consistent with the logic of correlativity:

Since corrective justice is the normative relationship of doer and
sufferer, respondeat superior fits into corrective justice only if
the employer can, in some sense, be regarded as a doer of the
harm. Corrective justice requires us to think that the employee at
fault is so closely associated with the employer that responsibility
for the former's acts can be imputed to the latter.\(^{62}\)

On this understanding of vicarious liability, then, wrongful
commission of an injury "[w]here the faulty actor is sufficiently
integrated into the enterprise and where the faulty act is sufficiently
close to the assigned task,"\(^{63}\) allows liability to be imputed to the
larger unit of the enterprise or organization. Where such conditions
are met, the doctrine of vicarious liability "construes (indeed,
constructs) the doer as composite: the-employer-acting-through-
the-employee."\(^{64}\)

In invoking the notion of a sufficient closeness between the
tortious act and assigned task, Weinrib is not necessarily limiting
the assessment of scope of employment to the traditional Salmond
criteria, requiring the tortious act's ultimate identity with (as a
"mode" of performing) a more general class of authorised act. And

\(^{61}\) Weinrib, *supra* note 9 at 142. As G. Keating (*supra* note 35 at 1270) explains
it, in a "rough generalization": "The guiding idea of corrective justice theories is
that the proper end of tort law is the restoration of a preexisting equilibrium
between victim and injurer, an equilibrium wrongly disrupted by injurer's...infliction
of harm on the victim".

\(^{62}\) Weinrib, *supra* note 9 at 186.


\(^{64}\) *Ibid.* at 186.
even if such a restriction is necessary to trigger employer liability, as long as such identity does not require an identity of objective, it might be argued that there is no necessary limit to the extension of fault under the corrective justice model where the tortious wrong is intentional, or even criminal.

Further, recalling that Weinrib has cited the judgment of Friendly J. with apparent endorsement, it may be asked whether the corrective justice model might admit an analysis of scope of employment based on assessment of an enterprise’s “characteristic risks.” That is, is it possible on this model to impose liability for the non-negligent imposition of risks by an employer or business enterprise, with regard to potential wrongs likely to be done by its employees over and above background risks? A key question arising here (and one suggested by Newbury J.A. in *B. (P.A.)*) is how this analysis of risks could be distinguished from that of reasonable foreseeability applied in assessing negligence. But given that a distinction between these types of risk-imposition might be established (we will look to this further in Part IV), could the employer’s non-negligent risk imposition with regard to employee torts—including those which might be deemed categorically different in kind from authorised duties—establish a close enough association between employer and employee to construct the doer of harm as the employer-acting-through-the-employee? Here, it might again be asked under the corrective justice model whether there is any principled distinction, now under an analysis of characteristic risks, between extending tortious fault to the employer for negligent and intentional, and even criminal, employee acts.

These are questions raised by the B.C. Court of Appeal’s treatment of the scope of employment issue—specifically its orientation to the principle of enterprise causation, requiring assessment of increased probability of risk or characteristic risk. Here it seems this principle opens on to a wider question regarding the justificatory models for vicarious liability. That is, if indeed the corrective justice model might admit a principle of employer responsibility for the non-negligent imposition of characteristic risks, where these characteristic risks are employee torts, then is the fault-based approach to assessing vicarious liability significantly different from the test of enterprise causation, understood under distributive justice to serve efficiency aims? Or might the corrective
justice model of vicarious liability, despite its primary orientation to correlativity and fault, converge, at least in part, with that of distributive justice on the limited point of how best to gauge scope of employment? Similarities aside, it should again be noted that the corrective justice model supports liability only for those characteristic risks that materialize as instances of tortious fault, and not for all injuries that may be linked to an enterprise’s products or activities. In this respect, and if it is the case that such limits are not justified by efficiency concerns, it seems it is more properly the corrective justice model which informs the doctrine of vicarious liability, or informs the limits of that doctrine.

iii. Commutative justice: the alignment of enterprise benefits and costs

An alternative to either of the above two models of liability, though one which bears some relationship to the cost internalization principle forwarded under the distributive justice model, is suggested by G. Keating in his article, “The Idea of Fairness in the Law of Enterprise Liability.” Keating’s analysis, as has been suggested also of the distributive justice analysis, regards vicarious liability as a subset of a wider system of enterprise liability, which includes (in the American system) strict products liability or liability for accidents where no direct negligence can be shown on either the employer’s or employee’s part. Yet this analysis of the justificatory grounds of enterprise and vicarious liability differs from that of distributive justice.

The general principle endorsed by Keating as that which animates enterprise liability requires that enterprises align their benefits and costs, or spread the costs flowing from profitable enterprise activities across those who benefit from those activities. An earlier version of this principle was suggested by Glanville Williams in 1957: “Just as liability for damage can be equitably balanced against the defendant’s fault, so it can be equitably balanced against his benefit.” Joel Feinberg too had invoked as one of the rationales of enterprise liability “the benefit principle (of commutative justice) that accidental losses should be borne

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65 Supra note 35.
66 “Vicarious Liability and the Master’s Indemnity” (1957) 20 Mod. L. Rev. 220 at 230. And see Baty, supra note 24 at 32.
according to the degree to which people benefit from an enterprise or form of activity.\textsuperscript{67}

Keating traces this burden-benefit principle back to Aristotle’s model of “justice as proportionality,” or the proportional alignment of burdens and benefits, distinguished in the \textit{Nichomachean Ethics} from corrective and distributive justice.\textsuperscript{68} This is termed by Keating, following Feinberg, “commutative justice,” a principle which in Keating’s interpretation brings together the foundational moral requirement of assessing tort liability based on conduct with a particular redistributive aim. Keating writes:

Although the principle of proportionality is concerned with the distribution of burdens and benefits of accidental risk imposition, it differs from distributive justice as Fletcher, following Aristotle, understands it. Distributive justice distributes goods on the basis of status or virtue. The principle of burden-benefit proportionality attributes responsibility on the basis of conduct. It assigns liability to the activity responsible for the accident, and so parcels out financial responsibility for harm on the basis of voluntary risk creation. Although the principle of proportionality is concerned, like corrective justice, with what has been done, it differs from corrective justice as much as it differs from distributive justice. Corrective justice seeks to restore a wrongfully disrupted preexisting equilibrium, whereas the principle of proportionality seeks to create a new equilibrium in which the burdens and benefits of accidents are aligned. The principle of proportionality is, in short, neither distributive nor corrective, but commutative.\textsuperscript{69}

Keating’s conception of the fair assignment of liability based on conduct differs from corrective justice, as enterprise liability “spreads accidents across those who benefit from creating the risks that result in accidents, rather than simply shifting concentrated harms from victims to injurers.”\textsuperscript{70} Further, while this principle is not necessarily or in all instances in conflict with distributive justice aims, Keating wishes to affirm the priority of a principle of responsibility for characteristic risk under commutative justice

\textsuperscript{67} Doing and Deserving (1970) at 221 footnote 21, as quoted in Keating, \textit{supra} note 35 at 1272 footnote 20.

\textsuperscript{68} See Aristotle, \textit{supra} note 36, bk. V., ch. 4 at 114-17.

\textsuperscript{69} \textit{Supra} note 35 at 1330.

\textsuperscript{70} \textit{Ibid.}
where this results in spreading the costs of those risks which materialize specifically across those who benefit from the risk-imposition over the efficiency-based "policies of accident reduction and loss dispersion."\textsuperscript{71}

Keating thus argues that enterprise liability may be understood through the principle of commutative justice as based in concerns of fairness and not (or not solely) efficiency. His analysis is premised upon a conception of tort law as a system of reconciling the competing claims of liberty and security. According to Keating, enterprise liability (and so vicarious liability) is the most adequate means of reconciling these claims where one party is a corporate body deriving profits from activities imposing systematic risks and losses upon individuals.

On the one hand, then, Keating suggests that liability in negligence is concerned with the discrete and independent actions of individuals and small firms, conceived under a model of reciprocal risk imposition whereby risks are "equal in probability and magnitude."\textsuperscript{72} In this area of tort law, a single standard of reasonable precaution allows the best compromise between freedom of action and security. In contrast, enterprise liability is concerned with a sphere of activities where the risks imposed between parties are not equal in magnitude.\textsuperscript{73} Risks of accident and the accidents which ensue are systematic and not discrete, imposed unilaterally upon individuals by corporate bodies which profit from organized activities involving large scale risk imposition. As such, stricter

\textsuperscript{71} Ibid. at 1359. Keating adds:

Conflicts among these principles are hardly endemic. On the contrary, there is good reason to believe that enterprises are generally in the best position to control the risks that are characteristic of their activities, and there is some reason to believe that they are usually in the best position to insure against those risks as well.

\textsuperscript{72} Ibid. at 1350.

\textsuperscript{73} Keating poses the notion of the increased responsibility of corporate bodies for imposing non-mutual risks upon individuals in relation to the traditional treatment of "special relationships." In such relationships, parties cannot be conceived as "free and equal": the assumption of positions of authority and trust extends the reach of responsibility, such that citizens "acquire duties they are not free to disclaim" [\textit{Ibid.} at 1326].
requirements upon such enterprises to bear the costs of freedom of action are required.

On Keating’s analysis, enterprise liability is concerned with the justifiability of assigning employers the costs of characteristic risks which materialize in the course of enterprise activities, as opposed to the justifiability of the enterprise’s activities as such. On the one hand, then, Keating writes: “it is reasonable for enterprises to impose the nonnegligent risks characteristic of their activities.”74 This notion encompasses (in Keating’s analysis, which is again primarily directed not at intentional or even negligent employee torts but industrial and products-related accidents) most specifically those risks for which precautionary measures were not cost-justified—that is, on the American model of negligence according to the Learned Hand test, those risks for which the cost of precautions exceeds that of probable harms.75 But, Keating adds, even in cases of reasonable risk-imposition, it may be “unreasonable of [enterprises] not to accept responsibility for the financial costs of those risks.”76

In essence, then, Keating’s argument requires that corporations which reasonably (according to this principle) avoid precautions should pay out the lesser sum needed to compensate where the risk materializes. Yet a question this analysis raises is whether a similar principle would apply in Canadian tort law, with regard to risk imposition which may be considered non-negligent due not to reasons of economic efficiency, but, for instance, the non-specificity of the risk of harm. Or, with regard to employee acts of sexual assault, might this principle of no-fault compensation be invoked where the absence of fault is related to the difficulty of detecting and preventing particular instances of a generally foreseeable abuse of employee authority, which materializes through covert intentional acts? In such cases, does Keating’s analysis of the reasonableness of the enterprise activity despite characteristic risks, but unreasonableness of not paying out for harms resulting from those risks, apply? We will address this further, in connection to the

74 Ibid. at 1328.
75 This principle is formulated in US v. Carroll Towing, 159 F. 2d 169 at 173 (2d Cir. 1947).
76 Keating supra note 35 at 1328.
B.C. Court of Appeal judgments in B.(P.A.) and Griffiths, in Part V below.

In sum, Keating offers both a general and a specific claim regarding enterprise (and vicarious) liability:

The general argument for enterprise liability is the argument that it is fair to make enterprises pay for the accidental injuries characteristic of their activities whenever doing so will distribute the financial burdens of those accidents among those who have benefitted from the underlying risk impositions. The particular conception is liability for the distinctive risks of an enterprise—those risks it creates that are ‘different from those attendant on the activities of the community in general’ [citing Bushey].

The first part of this analysis, which suggests that the principle of commutative justice is satisfied only where the financial costs of injuries may be spread across those who benefit from the relevant risk imposition, raises some further questions. Does this add a requirement for vicarious liability beyond that of identifying the tort as a characteristic risk (the latter being a move which it seems both distributive and, with some possible reservations, corrective justice models might endorse)? Or is insurability implied in the notion of the characteristic risk—understood perhaps as a systematic risk amenable to inclusion in a homogeneous risk pool? Keating indicates that the type of injury giving rise to vicarious liability must meet the “basic criteria of insurability,” allowing for the cost-efficient organizing and maintaining of a homogeneous risk pool. Only as such may costs in fact be spread across a class which benefits from a form of risk imposition. Thus Keating writes, again with reference to accidental injury:

The critical point is not that the ebb and flow of enterprise liability has been sensitive to the availability, and perceived efficacy, of liability insurance, though sensitive it has been. For our purposes, the critical point is that the fairness of imposing enterprise liability depends on its ability to connect the financial costs of accidental injury with the characteristic risk. The enterprise liability principle of fairness therefore makes questions of insurance fundamental.

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77 Ibid. at 1360.
78 Ibid. at 1336-38.
We will return to the issue of insurance and insurability, and whether this may be relevant to findings of vicarious liability in cases involving sexual assault—and in particular, cases involving Crown and private non-profit defendants providing services to vulnerable populations. But first, we must examine the issue of scope of employment and the B.C. Court of Appeal’s two tests in more detail. In this, the principles of enterprise causation, close association, and characteristic risks, variously raised by the three justificatory models of vicarious liability examined here, may be more specifically assessed.

IV. SCOPE OF EMPLOYMENT: TRADITIONAL AND NEW APPROACHES

1. The Traditional Analysis: Proximity of Acts

i. The Salmond Test

The test for scope of employment which has reigned since the middle part of this century in England and Canada, such that it is now deemed “traditional,” is the Salmond test, as stated in Salmond and Heuston on the Law of Torts.79

While on the first branch of the test, vicarious liability is imposed for those tortious acts which an employer has actually authorised, on the second branch:

a master...is liable even for acts which he has not authorised, provided they are so connected with acts which he has authorised that they may rightly be regarded as modes—although improper modes—of doing them. In other words, a master is responsible


80 Alternatively, it has been suggested (by P. S. Atiyah, supra note 7 for one) that the first branch of the test concerns those acts which have been actually, impliedly, or ostensibly authorised. This is of some relevance to the issue of whether the precedents concerning fraud, decided with regard to the principle of ostensible authority, have bearing upon cases of sexual assault, which, it is argued, must be decided according to the second branch concerning unauthorised acts.
not only for what he authorises his servant to do, but the way in which he does it. If a servant does negligently that which he was authorised to do carefully, or if he does fraudulently that which he was authorised to do honestly, or if he does mistakenly that which he was authorised to do correctly, his master will answer for that negligence, fraud or mistake. 81

Under the second branch of the test, then, conduct need not be authorised to be deemed within the course or scope of employment. But on the other hand, as the Salmond and Heuston text continues, "if the unauthorised and wrongful act of the servant is not so connected with the authorised 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 within the course of his employment but has gone outside of it." The example given is General Engineering Services Ltd. v. Kingston & St. Andrew Corporation. 82 There, vicarious liability was denied where the defendant employer's firemen had deliberately delayed response to a fire during an industrial dispute, such that the plaintiff's premises burnt down. Lord Ackner wrote: "Such conduct was the very negation of carrying out some act authorised by the employer, albeit in a wrongful and unauthorised mode." 83

Standing alone, the Salmond test does not convey much regarding what specific criteria should be applied in determining the relationship between the particular wrongful act of sexual assault and an employee's authorised acts. Here it may help to look to specific lines of cases, first those taking traditional approaches to scope of employment under the Salmond test, and then to those taking new approaches, most particularly B. (P.A.) and Griffiths at the B.C. Court of Appeal.

a. Unauthorised Mode or Independent Act?

The notion of the independent act, which under the Salmond test is contrasted to that of the wrongful mode of authorised action, has been portrayed in the case law in terms of the servant's embarking

81 Supra note 79.
83 Ibid. at 73.
upon a “frolic of his own.” 84 But how is such a frolic or independent act distinguished from an unauthorised mode of authorised action, from which vicarious liability may arise?

Fleming suggests that “the less precise the defined scope of the employee’s duties, the more likely that his deviation will be regarded as a mere mode of performing his authorized tasks.” 85 Yet while this may seem to suggest that specific instructions or prohibitions might serve to establish certain acts as clearly beyond the scope of employment, this is not always so. Thus in some cases vicarious liability has been rejected where an employee disregarded specific instructions, 86 while in others, an act contrary to instructions may yet be within the scope of employment. 87

Where the tortious act involves prohibited conduct, the key issue, according to Fleming, is “whether the order transgressed actually limited the sphere of employment or merely regulated [the employee’s] conduct within that sphere.” 88 In the latter case, vicarious liability may be imposed for prohibited conduct. This principle is expressed in Bugge v. Brown, 89 where it was held that a prohibition relating only to the manner, time, or place of committing an act would not necessarily exclude from the scope of employment an employee tort in direct violation of it. 90

It may be suggested that this attempted distinction between restrictions on the mode of performing authorised duties and on

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88 J.G. Fleming, supra note 7 at 378.

89 (1919) 26 C.L.R. 110

90 In J.G. Fleming’s example (supra note 7 at 379), referring to Lockhart v. C.P.R., [1942] 3 W.W.R. 149 (P.C.), an absolute prohibition against using private transport in connection with a business was contrasted with a prohibition against using uninsured private vehicles. The latter was taken to suggest only the purpose of transferring liability for damages, and so, according to the court, did not preclude vicarious liability.
the actual scope of those duties is problematic and perhaps merely semantic. Indeed, the reliance on semantics in either broadly or narrowly defining the authorised act of which the tort may or may not be a mode has been suggested in Canada, most notably by the B.C. Court of Appeal, to be the primary problem with the Salmond test generally. This problem is particularly heightened in cases of intentional torts, where the inclusion of an intentional or criminal act amongst authorised employment duties often leads to counter-intuitive results.

As we will explore further in what follows, both the courts and academics have attempted to apply various criteria in order to elaborate, extend or surpass the Salmond test, and this most particularly in the case of intentional torts. As Huddart J.A. notes, the scope of employment issue typically generates "[a] constellation of questions" involving analysis not only of specific prohibitions and general authorised duties, but of employee motives, the temporal and spatial circumstances of the tort, foreseeability of the tort, and more.\(^91\) Thus the challenge in broaching the scope of employment issue is to determine which elements of this constellation accord best with what is deemed the rationale for vicarious liability generally, while allowing sensitivity to the particular circumstances of the tort and employee role at issue.\(^92\)

ii. Proximity of Acts and Intentional Torts

a. Motivation to Serve Test: Assault Cases

Particularly in early cases, the test for scope of employment has sometimes had particular regard for the connection (or lack of connection) between the employee’s purposes in committing the wrongful act and the employer’s purposes generally, so limiting employer liability to those instances in which the tortfeasor was

\(^91\) B. (P.A.), supra note 14 at 22.

\(^92\) A recent account of the different conceptual models under which the scope of employment is assessed is given by Susan Vella in her article “Balancing Power With Responsibility: Institutional Liability in Sexual Assault Claims” in Sexual Abuse: The Civil Remedy, Dept of Continuing Legal Education, (Law Society of Upper Canada, 1993). Vella suggests four categories of test regarding the scope of employment which are of relevance to claims of vicarious liability for sexual assault (at 8). While these tests are categorized slightly differently in this paper, I believe there is no substantial conflict with Vella’s position.
acting in desired furtherance (under a standard of reasonableness) of the employer's objectives. 93 In more recent times, while motive has not generally been deemed relevant under the Salmond test,94 this appears to be subject to an exception in cases of assault. Thus some cases suggest that an employer will not be liable for an employee's act of assault unless it "was prompted by a desire to further the interests of his employer and was reasonably incidental to his allotted duties."95

In some cases, then, acts of aggression which cannot reasonably be construed as in desired furtherance of the employer's interests have been deemed unamenable to a finding of vicarious liability.96 Under this principle, too, excessive use of force, even where some force is authorised, may be deemed outside the scope of employment.97 In certain assault cases, the rejection of vicarious liability has reflected in part the insufficiency of other bases of connection between the tortious act and employment role, besides employee purpose and the amount of force applied.98

Yet in other assault cases, vicarious liability has been found where the employee's acts may be regarded as the desired performance of duties involving an explicit or implicit authorisation

93 See Willes J. in Barwick v. English Joint Stock Bank (1867), L.R. 2 Ex. 259.
94 See Heuston & Buckley, supra note 79 at 448.
95 Hayward v. Georges [1966] V.R. 202. The Salmond and Heuston text states: "[T]he courts have shown a distinct reluctance to hold an employer liable for aggressive acts committed by a servant even though they are generated by the latter's employment" (ibid. at 448).
96 See Griggs v. Southside Hotel Ltd. [1947] O.R. 674 (C.A), (a barman's assaulting a patron was deemed to have occurred due to sudden provocation, not in attempting to eject the plaintiff). Also see Deatons v. Flew (1949), 79 C.L.R. 370; Fontin v. Katapodis (1962), 108 C.L.R. 177; and Keppel Bus Co. v. Ahmad [1974] 1 W.L.R. 1082 (P.C.).
97 See the statement of this principle in Poland v. John Parr and Sons, [1927] 1 K.B. 243 at 245 (C.A). The principle is also acknowledged in Cave v. Ritchie Motors Ltd. (1972), 34 D.L.R. (3d) 141 at 144 (B.C.S.C.), where Berger J. held that even if the car salesman had had the authority to eject customers, the force used in the incident in question "was so excessive that it went quite beyond the limits of any authority he had."
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to use force.99 Two notable examples in the Crown context100 are Abbott v. Canada101 and Peeters v. Canada.102 Both cases involve excessive or unnecessary use of force by prison guards and suggest that, where some use of force is authorised and further, it may be implied, where employees are placed in a position involving a high degree of trust, vicarious liability may arise. Peeters in particular, in

99 An early example of such a case is Twerdochlib v. Hanns [1935] 1 W.W.R. 533 (Alta. C.A.), where a beer hall proprietor was liable for his employee's negligently causing death in ejecting a patron. Similarly, see Wenz v. Royal Trust Co., [1953] O.W.N. (H.C.). In Cole v. California Entertainment Ltd. [1990] Doc. V00861 (B.C.C.A.), the employer of some bouncers was vicariously liable for assault where he had issued instructions to clear a doorway, leaving the means of doing so to the bouncers' discretion. Also see Bellecourt v. Edmonton Royal Hotel Co. (1979), 19 A.R. 50 (Q.B.), and Rose v. Plenty [1976] 1 W.L.R. 141. Some of these cases are discussed by F.D. Rose in "Liability for an Employee's Assaults" (1977) 40 Modern L.R. 420; and see B.(P.A.), supra note 14 at 27-28.

100 The doctrine of vicarious liability applies to the Crown by the operation of section 3(a) of the Crown Liability and Proceedings Act, R.S.C. 1985, c. C-50 (title am. 1990, c. 8, s. 21 [hereinafter CLP.A.]). Section 3 of the CLP.A. states:

The Crown is liable in tort for the damages for which, if it were a private person of full age and capacity, it would be liable

(a) in respect of a tort committed by a servant of the Crown; or

(b) in respect of a breach of duty attaching to the ownership, occupation, possession or control of property.

101 (1993), 64 F.T.R. 81 (Fed. T.D.) [hereinafter Abbott]. In Abbott, the Crown was found vicariously liable for assault, battery, negligence and false imprisonment. This case involved a prison guard's wounding and otherwise assaulting an inmate during an altercation in which the plaintiff was not directly involved; upon return from hospital, the inmate was placed in segregation. The court assigned vicarious liability to the Crown despite the fact that the guard's discharging the firearm in the circumstances was in contravention of Corrections regulations.

102 (1992), 54 F.T.R. 289, affirmed (1993), 108 D.L.R. (4th) 471 (Fed. C.A.) [hereinafter Peeters]. In Peeters, the Crown was held vicariously liable for assault and battery when a prisoner was beaten by a group of guards escorting him to hospital after a hostage taking. While the Crown in that case admitted vicarious liability for the assaults at trial, it tried to argue at the Federal Court of Appeal that it was nonetheless 'blameless', and so should not be subject to punitive damages. In response the court held that, despite evidence of relevant prohibitions and precautions on the part of Corrections, the fact that the authorised duties of the guards involved the use of force, and force had been unnecessarily applied, justified the finding that Corrections was both vicariously liable and blameworthy. In particular, the implication was made (in the absence of a finding of negligence on this point) that insufficient training had been provided. Thus the Court of Appeal affirmed the assigning of punitive damages.
assigning punitive damages to the Crown along with its finding of vicarious liability, suggests that public authorities which place employees in positions of significant power or authority may be held to a strict standard of responsibility when that authority is abused. Again, though, such a finding is premised on there being some authorization of the use of force. Moreover, it is less clear, on the Salmond-based reasoning applied here, that vicarious liability would arise from an employee's use of a different type of force than that which was authorized; such an argument might be used to deny vicarious liability for an employee's act of sexual assault.

In her assessment of the case law on vicarious liability for assault, Huddart J.A. suggests in B. (P.A.) that "courts are reluctant to impose liability on an employer vicariously for an employee's assault where the sort of violence used was not authorized, and where the assault was not committed in furtherance of an employer purpose." As such, Huddart J.A. deems the assault cases to be inappropriate precedents for determining vicarious liability for sexual assault. Rather, she draws analogies to cases involving fraud and theft, which in some instances have given rise to vicarious liability despite personal motives contrary to employer purposes. These alternative precedents are discussed below, as we take up Huddart J.A.'s reasoning in B. (P.A.) in more detail. But first, it may be helpful to set the stage with an earlier attempt to surpass the Salmond test and render it more applicable to intentional torts, through the notion of foreseeability.

b. Foreseeability: from Salmond to Atiyah

In determining whether unauthorized or prohibited conduct will give rise to employer liability, some importance may be placed on whether the wrongful act in question may be regarded as a broadly foreseeable risk of the employer's business—or, in what is sometimes presented as an equivalent concept, whether the act is among the broad risks incidental to the enterprise.

103 B. (P.A.), supra note 14 at 29.

104 The scope of what may be considered reasonably incidental may be broad. In Century Ins. v. N.I. Road Transport [1942] A.C. 509, a truck driver's striking a match to light a cigarette while transferring gas to an underground tank, resulting in an explosion, was regarded as within the scope of his employment, despite an express prohibition—this because smoking, though for the employee's personal
According to the principles of negligence, a defendant will be liable for the harm that materializes from the creation of an unreasonable risk. In Weinrib’s account, the requisite foreseeability must be of “a more limited category of injury than injury simpliciter.” This is so because liability for an excessively general risk would effectively delegitimize action, as all action has some risk of injury; instead, it is necessary to be able to anticipate the risks contingent upon a certain action rather than another. The broadness or specificity of the risk at issue in any particular case is not determined according to a set formula, but rather demands a judgment about “what, on the facts of a specific case, is the sort of consequence that a reasonable person ought to have anticipated and guarded against.”

Vicarious liability doctrine, in contrast, does not countenance considerations of the reasonableness or unreasonableness of the risk. Still, foreseeability has been raised as a means of assessing liability under the scope of employment test leading to questions of how specific a risk must be foreseen, and whether intentional employee wrongs should be regarded as foreseeable, particularly where the wrongs at issue are criminal and on some level shocking. Moreover, questions arise as to how such considerations of foreseeability may be distinguished from the assessment of direct liability in negligence.

The suggestion of applying a test of foreseeability in determining vicarious liability is raised by Atiyah in *Vicarious Liability in the Law of Torts*. Atiyah proposes a reformulation of the Salmond test, involving consideration first of what the employer has expressly, impliedly, or “ostensibly” authorised his employee to do; and second, whether there is a substantial risk of benefit, was to be regarded as a normal, though regrettable, incident during the performance of most kinds of work. Yet in *Kirby v. N.C.B. (1958)* S.C. 514, a miner’s lighting a cigarette in a prohibited area was not regarded as giving rise to his employer’s liability, as the conduct could not be treated as but a prohibited mode of performing an authorized task.

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106 Ibid. at 166.
107 Ibid. at 167.
108 *Supra* note 7.
109 Ibid. at 178.
that, in doing this, the employee will commit a tort of the kind he has committed.\textsuperscript{110}

Atiyah discusses the potential of applying a broadly-conceived foreseeability test after the analysis of employee authority, at the second stage of analysis of incidental risks:

When one moves to the next stage of asking what risks ought fairly and reasonably to be considered incidental to a particular type of business there is a strong argument in favour of treating foreseeability as an important factor. If it can be foreseen that an enterprise cannot be profitably carried on without involving certain types of risks there is clearly much to be said for treating that sort of risk as an inevitable concomitant of that type of enterprise. But it must be stressed that here again a broad perspective is required. One is not looking here at a particular incident and asking whether that could have been foreseen, in the way that the law does when questions of negligence are in issue.... From the broader point of view it must be recognized that, whatever precautions are taken to avoid particular events, and however much care and skill is used in carrying on an enterprise, certain types of accidents are more or less inevitable. And where, from this broad point of view, such accidents are foreseeable, policy would seem to point strongly in favour of holding the employer liable.\textsuperscript{111}

Thus a form of general foreseeability is invoked. Atiyah distinguishes this from foreseeability of a particular incident, or a particular instance of the type of accident (or, it may be added, employee tort) which is broadly foreseen. Such a generally conceived foreseeability does not imply an unreasonable imposition of risk or a breach of duty. As suggested above, Friendly J. in \textit{Bushey} invoked a similar test of foreseeability for assessing vicarious liability. Friendly J. cited Harper and James: "The foresight that should impel the prudent man to take precautions is not the same measure as that by which he should perceive the harm likely to flow from his long-run activity in spite of all reasonable precautions on his own part."\textsuperscript{112} Yet how broadly, on Atiyah's test, might the risks at issue be construed? Would an open-ended risk of injury pursuant

\textsuperscript{110}\textit{Ibid.} at 183.

\textsuperscript{111}\textit{Ibid.} at 172.

\textsuperscript{112}Harper & James, \textit{supra} note 37 at 1377-78.
to abuse of employee authority be admissible? Or might the analysis have regard to the statistical probability of particular types of accidents or employee torts? Such approaches may be limited by the first stage of Atiyah's test, requiring identification of the employee's particular type of authorised duties, with the risk analysis then referring to risks incidental to the specified type of act.113

While Atiyah on the one hand endorses a notion of vicarious liability based on the materializing of broad risks incidental to enterprise activities, he also makes some suggestion of the unlikelihood that intentional torts or wilful acts will be admitted under such broadly defined risks. Still, he suggests that policy considerations might lead courts to stretch the limits of foreseeability for certain intentional torts of frequent occurrence. These comments occur in a passage which calls for the rejection of the Salmond test in assessing intentional torts yet simultaneously places what Huddart J.A. in B. (P.A.) considers unwarranted restrictions on liability for intentional torts. Atiyah writes:

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 an act of a kind sufficiently similar to the acts he has been authorised to perform?; is there a substantial risk that 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.... 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

113 The potential for employer liability for broadly foreseeable risks was acknowledged in the context of an intentional employee tort in obiter by Berger J. in Cave v. Ritchie Motors, supra note 97 at 144. There, Berger J. invoked the notion of foreseeability with reference to Atiyah's two-stage test, and suggested that if it had been established that the salesman in that case had the authority to eject customers, "the risk that excessive force would be used might well be foreseeable." Thus he concluded that "[i]t might well be appropriate to hold an employer liable in such a case." In such a case, it seems, both the Salmond and Atiyah tests might be satisfied, insofar as the general type of act which was abused, the use of force had been authorised.
generally imposed for torts of this kind shows that the courts are not unmindful of considerations of policy.\textsuperscript{114}

Huddart J.A. responds: "Atiyah’s emphasis on authority as the first enquiry and on risk assessment as a corollary consideration reflect a policy designed to limit more stringently an employer’s burden for an employee’s deliberate wrongdoing than for the employee’s negligent wrongdoing."\textsuperscript{115} It would seem her response is based both on Atiyah’s suggestion that intentional torts are less likely to be deemed broadly incidental risks, and further, on the potential for the initial authority inquiry merely to duplicate the errors of the Salmond test, in its requirement of a sufficient similarity between authorised and wrongful acts.

The potential for the Atiyah test to limit employer liability for intentional torts was reflected in \textit{Plains Engineering Ltd. v. Barnes Security Services Ltd.}\textsuperscript{116} There, a security guard’s committing arson on a customer’s premises was deemed not to give rise to vicarious liability. While the decision turned upon the lack of a prior relationship between the employer and plaintiff, it was mentioned in obiter that the question of foreseeability could be determinative in such cases. That is, the court suggested that arson was in this case neither reasonably foreseeable nor incidental to the guard’s duties, nor reasonably interpreted as a mode of performing those duties. As such, this argument suggests the potential for convergence between Salmond test-based notions of unauthorised mode versus independent act and the analysis of foreseeability, both supporting the notion that the wrongful act “involved so substantial a departure that the servant must, pro hac vice, be regarded as a stranger vis-a-vis his master.”\textsuperscript{117} This, as we will see, was essentially the argument accepted by the Nova Scotia Court of Appeal in \textit{McDonald v.}

\textsuperscript{114} P. S. Atiyah, \textit{supra} note 7 at 263.

\textsuperscript{115} \textit{B.(P.A.)}, \textit{supra} note 14 at 14.

\textsuperscript{116} (1987), 43 C.C.L.T. 129 at 150 (Alta. Q.B.). But note the recent B.C. Supreme Court decision \textit{B.C. Ferry Corp. v. Invicta Security Service Corp.} (1997) 35 C.C.L.T. (2d) 182, which applies the reasoning of the B.C. Court of Appeal in \textit{B.(P.A.)} to find the vicarious liability of a security company for an act of arson committed by its guard. There, the fact that the security company had given the guard exclusive responsibility for security of the premises, amounting to total control of the premises, was key.

\textsuperscript{117} J. G. Fleming, \textit{supra} note 7 at 380.
Mombourquette,\textsuperscript{118} in overturning a finding of a diocese’s vicarious liability for sexual assaults committed by its priest.

The application of a foreseeability test to scope of employment issues has been adopted in some U.S. jurisdictions.\textsuperscript{119} Yet while some courts and commentators argue in favour of a broadly conceived test along the lines which Atiyah suggests,\textsuperscript{120} others use the test to reject employer liability for such intentional torts as may be deemed to involve “shocking” or “outrageous” conduct.\textsuperscript{121} Sexual assault in particular has been identified by some of these courts as falling outside foreseeable risks of employment.

\textsuperscript{118} Supra note 13.

\textsuperscript{119} The Restatement (Second) of Agency (St. Paul: American Law Institute, 1958) provides a narrow test for scope of employment, requiring an identity in kind between authorised acts and the employee tort, as well as of employer and employee purpose. But tests for scope of employment vary between states. The California test allows the assignment of vicarious liability if either of two tests is met: “1) the act performed was either required or ‘incident to his duties’ or 2) the employee’s misconduct could be reasonably foreseen by the employer in any event” (from Clark Equipment Co. v. Wheat 154 Cal. Rptr. 874 (Ct. App. 1979). See C. Krueger, \textit{supra} note 26 at 432-37.

\textsuperscript{120} See Weber, \textit{supra} note 29 at 1534, for an argument in favour of a ‘broad’ foreseeability test:

When courts use the outrageousness standard, they are asking whether the risk is foreseeable, or whether it is so unusual or outrageous that it should not be characterized as part of the job. Courts that use this standard often unwittingly rely on negligence principles rather than on respondeat superior. Negligence focuses on what can reasonably be avoided...Respondeat superior, on the other hand, focuses on the risks of an enterprise; it is foreseeable that a teacher may abuse his authority, even though the precise manner in which he does so may not be specifically foreseeable. Foreseeability is relevant to respondeat superior only in an evaluation of what is a general foreseeable risk of a business.

\textsuperscript{121} Thus in Bates v. United States 701 F.2d 737 (8th Cir. 1983), where an on-duty military policeman had raped and murdered teenagers on a military base, vicarious liability was found not to arise. For, the court reasoned, the acts at issue were “so outrageous and criminal, so excessively violent as to be totally without reason or responsibility”. Cited in Weber, \textit{supra} note 29 at 1525. Also see Desotelle v. Continental Casualty Co., 400 N.W.2d 524 (Wis. Ct. App. 1986) (sexual assault committed by an on-duty sheriff in his squad car); and Gambling v. Cornish, 426 F. Supp. 1153 (N.D. Ill. 1977) (rapes committed by police officers constituted outrageous and so not “expectable” conduct).
It may be suggested that such judgments ignore the broad or general foreseeability proper to vicarious liability in favour of a more limited foreseeability, circumscribed by the impossibility of anticipating the particulars of an employee’s intentional tort, or perhaps, circumscribed by moral indignation. But where the risks at issue are the intentional wrongs of moral agents, particular concerns do arise, if not for a strict statistical or probability-based analysis of causation, then for the more traditional orientation towards fault which is closely bound up with the very notion of foreseeability. The emphasis of some courts upon foreseeability in denying vicarious liability for some forms of intentional employee torts reflects a perception of injustice in holding the employer responsible for intentional and criminal acts which were not reasonably foreseeable with any specificity. With the imposition of vicarious liability for such acts, it is suggested in this foreseeability-regarding approach, the moral quality of the enterprise’s activities is impugned. Yet insofar as, in Canada at least, vicarious liability for some forms of intentional tort is possible, the distinction between extreme and less shocking wrongs may be difficult to maintain, and a strict probability analysis may be the only consistent approach.

Ultimately, then, it may be that the concept of foreseeability is, as Newbury J.A. suggests in B. (P.A.), too much bound up with direct liability or fault to be of assistance in determining the proper limits to scope of employment in the assessment of vicarious liability. Yet it must also be noted that just as, in the law of negligence, liability for an excessively general risk effectively delegitimizes action, so in the law of vicarious liability, imposing liability upon businesses or public authorities for a generally-conceived risk of injury resulting from abuses of employee authority, with no further limiting factors, might effectively delegitimize industry, along with institutions serving the vulnerable and needy.

122 Similarly, in the area of products liability in the U.S., foreseeability has been suggested as an appropriate addition or alternative to strict liability, in what seems an attempt to inject into the analysis some consideration of direct fault. Thus Rabin writes: “there is a strong inherent perception of injustice in holding a company responsible for risks that it had no reason to know about at the time that it put a product on the market” (Rabin, supra note 40 at 1205).
Perhaps a more promising way of framing the analysis of characteristic or incidental risks for the purposes of vicarious liability is that which is suggested by Sykes, and endorsed by Huddart J.A. in *B. (P.A.)*, under the heading of enterprise causation. Such a test may assess increased probability of risk without specific regard for foreseeability and its implications of direct fault, and perhaps give more guidance regarding the requisite risk. Whether such an analysis might displace the whole range of considerations of close connection in favour of an analysis directed specifically at conferred authority will be a further important question. First, though, we will look to the case law denying vicarious liability for sexual assault on the principles explored so far.

### iii. Sexual assault as insufficiently proximate: *McDonald v. Mombourquette*

*McDonald v. Mombourquette*123 was an action brought by a former altar server (McDonald) against a priest and the Roman Catholic and Episcopal Corporation of Antigonish for damages arising from three incidents of sexual assault occurring between 1969 and 1971. The action was brought under the headings of negligence, vicarious liability, and breach of fiduciary duty. At trial, the diocese was held vicariously liable for the priest’s negligence. But on appeal this finding was overturned on the reasoning that Mombourquette’s sexual misconduct had been not only wilful (and so not negligence *per se*) but the antithesis to the religious tenets of his office. Thus the assaults were deemed to have been beyond the course of employment.124

For the Trial Court, Mombourquette’s acts of sexual assault were considered sufficiently connected to his authorised duties, in view of his role as representative of Church authority to the

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123 *Supra* note 13 [hereinafter *McDonald*].
124 In sum, the Nova Scotia Court of Appeal in *McDonald* found that 1) the lower court had erred in finding that Mombourquette’s acts had constituted negligence rather than wilful acts (and insofar as the Nova Scotia Limitation Act has a shorter limitation period for assault, the limitation period was deemed to have expired); 2) the priest’s acts of sexual assault were outside the scope of his employment, and so did not give rise to vicarious liability; 3) there was no evidence of negligence on the part of the Church in appointing or supervising Mombourquette; and 4) there was no established breach of fiduciary duty on the part of the diocese.
community and particularly to children. The Court invoked the notion of fiduciary relationship to convey the connection between the authority conferred upon Mombourquette and his wrongful acts:

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

While this finding of sufficient connection between the employment role and tort on the part of the Trial Court was presented as an application of the Salmond test, the Nova Scotia Court of Appeal applied the same test and found an insufficient connection. Jones J.A. for the Appeal Court suggested that the Trial Court had misapplied the test: “the test is not simply that an employee is placed in a position of trust and authority that provides the opportunity to do wrong. Applying that test employers would be liable for all wrongful acts of their employees.” Again, the key point for the Appeal Court was that the priest’s sexual assaults had been “totally contrary to the religious tenets which he has sworn to uphold.” Thus both a motivation-to-serve test and a Salmond-based analysis, finding that the tort did not qualify as a mode of performing authorised duties, were applied.

The Nova Scotia Court of Appeal in McDonald referred to Cave v. Ritchie Motors, Plains Engineering, and General Engineering Services, which limit the scope of employment through reference to employer objectives. Further, it invoked two Canadian cases

125 McDonald (N.S.S.C.), supra note 13 at 377.
126 McDonald (N.S.C.A.), supra note 13 at 116-17.
127 Ibid. at 123.
128 Supra note 97.
129 Supra note 116.
130 Supra note 82.
131 Notice is also taken of fraud and conversion cases in which conflict of employer and employee objectives does not prevent vicarious liability; the attempt is then made to distinguish McDonald as involving a wrongful act which, unlike the fraud and conversion cases, is insufficiently connected to the area of authority conferred.
on the issue of vicarious liability for sexual assault: *Barrett v. 'Arcadia'*\textsuperscript{132} and *Q. v. Minto Management Ltd.*\textsuperscript{133} In these cases, an employee's act of sexual assault was held to have been outside the scope of employment and vicarious liability was denied. Also, Jones J.A. for the Appeal Court referred to a number of U.S. decisions where vicarious liability for sexual assaults by clergymen had been denied.\textsuperscript{134}

Jones J.A. suggested that his finding in *McDonald* was not necessarily in conflict with the principles applied by the B.C. Supreme Court in *B. (P.A.) v. Curry*\textsuperscript{135} at this point, *B. (P.A.)* had not been heard by the B.C. Court of Appeal. For in distinction

\textsuperscript{132} (1977), 2 C.C.L.T. 142 (B.C.S.C.). In *Barrett v. 'Arcadia*', the defendant company was found not to be liable where its employee, an officer's steward, posed as a cabin steward, entered the plaintiff's state room and assaulted her. As the employee did not have authority to enter the area in which the assault occurred, the act was considered to have been performed in service of a private and personal interest, rather than under cover of conferred authority. The analysis turned in part on the issue of the disparity between employer and employee objectives. But otherwise, it seems to have relied less upon an analysis of the difference or similarity of the act of sexual assault to any authorised acts of the steward than the steward's lack of authorised access to the room. Such an analysis may be regarded as loosely based upon the principle of ostensible authority, to be surveyed below with the fraud and conversion cases.

\textsuperscript{133} (1985), 49 O.R. (2d) 531 (H.C.J.), aff'd (1986), 57 O.R. (2d) 781 (C.A.). In *Q v. Minto Management Ltd.*, the landlord of an apartment complex was found not to be vicariously liable for a maintenance man's rape of a tenant in her apartment. The court placed some importance on the fact that the employee did not have authorised access to tenants' apartments. Here, though, the landlord was found to have been negligent in not adequately responding to previous assaults by enhancing security.


Further U.S. precedents for the finding that sexual assault is beyond the scope of employment were raised in *B. (P.A.)*, supra note 14. These include *Boykin v. District of Columbia* 484 A.2d 560 (D.C. App. 1984), where the connection between authorised physical touching by the coordinator of an educational program and sexual assault was deemed 'too attenuated' to give rise to vicarious liability. Also noted was *Doe v. Village of St. Joseph, Inc.* 415 S.E.2d 56 (Ga. App. 1992), which denies a boarding school's vicarious liability on the basis of a motivation to serve test. In *Jeffery Scott E. v. Central Baptist Church* 243 Calif. Rptr. 128 (Ct. App. 1988), a foreseeability test was applied to deny vicarious liability. See also *John R. v. Oakland Unified School District* (1989) 48 Cal. 3d 438 (Cal. S.C.); and *Desotelle v. Continental Casualty Co.*, 400 N.W.2d 524 (Wis. Ct. App. 1986).

\textsuperscript{135} *Supra* note 14.
from the role of the priest in *McDonald*, the duties of the assailant in *B. (P.A.)*, a residential care worker, involved “total intervention” in the lives of the minors in his care: “[T]he Foundation’s employees were expected to act as parent figures in the supervision they provided, which involved physical contact associated with daily activities such as bathing and putting the children to bed each night.”

Thus Jones J.A. suggested that a broader range of authorised intervention in a child’s life implies an increased scope of employment and an increased likelihood of vicarious liability. Notably, despite the commitment of the Nova Scotia Court of Appeal to the Salmond test, this assessment of the relevance of differing types or degrees of employee authority bears some similarity to that expressed by Huddart J.A. in *B. (P.A.)* and, more particularly, *Griffiths*.

2. Beyond the Salmond Test: Alternative Analysis in *B. (P.A.)* and *Griffiths*

i. Rejection of the Salmond Test

Lowry J. for the Trial Court in *B. (P.A.)* applied the Salmond test for scope of employment and, on an argument similar to that of the Nova Scotia Trial Court in *McDonald*, had found vicarious liability to flow from Curry’s acts of sexual assault. This finding was based on the fact that The Children’s Foundation had placed Curry in a position of authority and trust, which involved a wide scope of authorized intervention in the lives of the children in its care, in order to promote their emotional and physical well-being. Applying the Salmond test, Lowry J. reasoned that the degeneration of authorized conduct into protracted sexual abuse “was nonetheless a mode (albeit a most wrongful and clearly unauthorized mode) of [Curry’s] conducting himself while undertaking the responsibilities of his employment for which he was engaged.”

Yet the Appeal Court in *B. (P.A.)* unanimously rejected the Salmond test as inappropriate for intentional torts and particularly for sexual assault. In this decision, Huddart J.A. suggested that while the test may be helpful in assessing scope of employment in cases of negligence, it is of little help in assessing employer liability.

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136 *McDonald* (N.S.C.A.), *supra* note 13 at 120.
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for intentional torts. Newbury J.A. emphasized the Salmond test’s indeterminacy, due to its semantic flexibility regarding classes of authorised conduct and unauthorised modes of conduct: “Ultimately it comes down to semantics, depending simply on the specificity with which one defines the employee’s normal duties.”

As to employee acts of sexual assault, both judges suggested that applying the Salmond test led to counter-intuitive results. Newbury J.A. wrote: “[t]he ordinary person would surely reject the suggestion that sexual assault is not qualitatively different from touching a child to bathe him or put him to bed at night.” Huddart J.A. also pointed out the inadmissibility of justifying vicarious liability in this way: “The Salmond test requires a conclusion that the sexual assault of a child is an unauthorized mode of parenting.”

For neither Newbury nor Huddart J.J.A. does this indeterminacy or counter-intuitiveness of results under the Salmond test mean that vicarious liability for sexual assault must necessarily be denied. Rather, it means a new form of analysis is required—an analysis which, in the opinion of both judges, must have more regard for the context of the sexual assault in order to identify the significant connections between the employment role or setting and the act or acts of sexual assault.

138 Huddart J.A. cites Sykes’s efficiency-based analysis of whether vicarious liability should arise from employee’s frolics or detours (Sykes, supra note 43 at 587-88).

139 B.(P.A.) (B.C.C.A.), supra note 14 at 38.

140 Ibid. see also Atiyah, supra note 7 at 262–63: in his critique of the Salmond test, he suggests that “[i]t is only possible to treat a wilful act as an improper mode of performing an authorised act if a very wide view indeed is taken of what the servant is authorised to do.” Atiyah further writes:

In dealing with such wilful acts there is no doubt that the Salmond test really ceases to be of much help.... Although it is possible to do this the exercise is largely a semantic one for, as has already been pointed out, conduct can be correctly described at varying levels of generality, and no one description of the ‘act’ on which the servant was engaged is necessarily more correct than any other. The attempt, therefore, to answer all questions in this field by a blind application of the Salmond test is an unsatisfactory one, and it would be far better if other tests could be formulated for this purpose. (at 263).

141 B.(P.A.), supra note 14 at 32.
According to Huddart J.A., the proper test for determining scope of employment in cases of vicarious liability for sexual assault must be directly informed by policy concerns. She writes: “If the justification underpinning vicarious liability is a sufficient connection between the employee’s act and the employer’s enterprise, as I consider it is, the issue becomes one of policy to be addressed directly rather than by hidden assumption.” 142 The aim, she thus suggests, is to develop a test which will allow the most socially responsible result. In this, she takes guidance from Atiyah’s suggestion that: “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.” 143

Still, acknowledging the wisdom (and limits) of the common law, Huddart J.A. necessarily draws upon case precedents for guidance regarding the sufficiency of connection between the tortious act and the employment.

a. Rejection of a “mere opportunity” test

As Huddart J.A. suggests in her analysis in B.(P.A.), 144 the imposing of vicarious liability may be understood to require the court to determine the necessary limits of the formula expressed by Lord Holt in Hern v. Nichols, 145 that “it is more reasonable that he that employs and puts a trust and confidence in the deceiver should be the loser than a stranger.” That is, neither Huddart J.A. nor the rest of the Appeal Court wish to impose a form of absolute liability whereby an employer must in all circumstances bear the cost of an employee’s tort.

Thus both Huddart and Newbury JJ.A., along with other members of the court, affirm the general principle from the common law doctrine of vicarious liability that merely providing an employee the “opportunity” to commit a tort, by setting him into his position of employment, is not enough to incur vicarious

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142 Ibid. at 18.
143 Atiyah, supra note 9 at 263.
144 B.(P.A.), supra note 14 at 17.
145 Supra note 31.
liability.\textsuperscript{146} In Huddart J.A.'s example of \textit{Morris v. C.W. Martin & Sons, Ltd.},\textsuperscript{147} the fact that a cleaner's employee had the opportunity to steal a fur because of his position "would not suffice," on its own, to establish vicarious liability. This would appear to suggest that the employer's liability should not rest on the mere fact that the employee was, because of his or her job, at a certain place at a certain time, and so encountered someone against whom he or she committed a wrongful act. Further, Huddart J.A. suggests vicarious liability does not arise where the employment role has merely provided the opportunity for an employee to develop a relationship of trust with his or her eventual victim. The issue then is what, apart from the employment role's creating an opportunity for the tort, must be established to justify a finding of vicarious liability?

\textit{b. Huddart J.A.: Conferral of Authority}

Huddart J.A. provides the most extensive reasons of the five-judge panel in \textit{B.(P.A.)}, and writes for a 3-2 majority in \textit{Griffiths}. In \textit{B.(P.A.)}, she proposes a test for scope of employment which bears some similarity to the analysis of the Trial Court in \textit{McDonald} as well as that of Lowry J. at trial in \textit{B.(P.A.)}, yet which avoids the Salmond test requirement that the tortious act be cast as a mode of performing an authorised act. In her reasons, Huddart J.A. attempts to distinguish more precisely the mere provision of opportunity from a more significant enabling of the employee to commit the tort. The test she proposes requires analysis of the employer's conferral of authority upon the employee. More specifically, this test has two parts: an analysis of the authority conferred, and an analysis of the risks incidental to that conferred authority:

The unique features of sexual assault cases require a contextual approach that permits courts to examine the nature of the authority conferred on the employee and

\textsuperscript{146} See Heuston & Buckley, text, \textit{supra} note 79 at 463. In \textit{Armagas Ltd v. Mundogas SA}, at 392 [1986] 2 All E.R. 385 (H.L.), Lord Keith wrote that "[i]t is well settled that a master is not liable for the dishonest tort of his servant merely because the latter's employment has given him the mere opportunity to commit it."

the likelihood that the conferral of that authority will
increase the probability of a wrong occurring.\textsuperscript{148}

Thus it is the employer's specifically investing the employee
with such authority, as may be abused in the form of the tort that
has manifested, that gives rise to vicarious liability. While this test
seems on the surface to duplicate that suggested by Atiyah,
Huddart J.A. distinguishes her approach by emphasizing that the
analysis of authority here is not restricted to the identification of
types of authorized acts, but rather extends to analysis of positions
of authority over others, positions which in some cases may be
found to involve "the power over another that makes more probable
a wrong."\textsuperscript{149} Huddart J.A. states:

In my view, when the conferral of authority provides not
mere opportunity, but the power over another that makes
more probable a wrong, that employer should be
vicariously liable for any such wrong that results from the
abuse of that power.\textsuperscript{150}

On the issue of how such authority is set apart from mere
opportunity, Huddart J.A. addresses the suggestion of the Nova
Scotia Court of Appeal in \textit{McDonald} that "the test is not simply
that an employee is placed in a position of trust and authority that
provides the opportunity to do wrong. Applying that test
employers would be liable for all wrongful acts of their
employees."\textsuperscript{151} While Huddart J.A. agrees on this point, she takes
issue with the Nova Scotia Court of Appeal's reasoning in
\textit{McDonald} for having given insufficient attention to the key issue of
"job-related authority." In constructing her own analysis on this
point, Huddart J.A. looks both to precedent (cases on fraud and
conversion, as well as workplace harassment), and policy (drawing
upon economic analysis and fiduciary theory).

\textsuperscript{148} B.(P.A.) at 32.

\textsuperscript{149} Ibid. at 24.

\textsuperscript{150} Ibid.

\textsuperscript{151} McDonald (N.S.C.A.), \textit{supra} note 13 at 116-17.
ii. Huddart J.A. in B.(P.A.): Precedents

a. Ostensible Authority: fraud/conversion cases

Huddart J.A. in her judgment in B.(P.A.) invokes cases involving fraud and conversion as more appropriate precedents for assessing vicarious liability for sexual assault than assault cases. While she accepts that the principles used in assessing employer liability in the fraud and conversion cases may be limited in their application to cases of sexual assault, she draws from them a general principle that "employers can be vicariously liable for intentional employee torts not committed in furtherance of employer objectives." Moreover, she suggests that insofar as judicial analysis in such cases gives attention to aspects of covertness and secrecy in the commission of these types of wrongful acts, and to the issue of the employee’s betrayal of a trust, such reasoning may be adapted to the analysis of employee acts of sexual assault.

The cases on fraud may be taken to reflect the passage in the Salmond test which states: "if the servant does fraudulently that which he was authorised to do honestly...his master will answer for that...fraud". This is interpreted through a principle of ostensible authority, drawn from the law of agency. The Salmond and Heuston text later defines the conditions under which this principle applies: "Ostensible authority...may be held to exist if, whatever the true state of affairs, the stranger has been misled by appearances." Importantly, such appearances must bear some relationship to the actual authority which the employer has conferred upon the employee, even though the misleading aspect of that authority is likely, on the employer’s part, unintentional.

152 Lowry J. for the trial court in B.(P.A.) also accepted the plaintiff’s analogy between Curry’s sexual misconduct, occurring “in the course of his carrying out his duties during his hours of work at his employer’s facilities,” and cases of vicarious liability arising from acts of theft or fraud: “if a postal clerk’s theft and a solicitor’s clerk’s fraud can be said to have been committed in the course of their employment, I can see no sound principle on which it can be concluded that Curry’s criminal conduct should not attract vicarious liability” (supra note 14 at 8, Huddart J.A. quoting Lowry J. of the Trial Court).

153 Ibid. at 16.

154 Heuston & Buckley, supra note 79 at 443.

155 Ibid. at 445.
As Huddart J.A. discusses, there has been some controversy in the courts and academic literature over whether the principle of ostensible authority should be considered under the Salmond test's first branch, regarding authorised acts—potentially, acts which have been authorised actually, impliedly, or ostensibly—156—or the second, as an improper mode of performing an authorised act. But despite indications that this principle may bear relevance most specifically to the first branch of the Salmond test, deemed to have little bearing upon the issue of employee sexual assault, the principle and cases decided upon it are nonetheless deemed by Huddart J.A. to be useful analogies.

As suggested with regard to the assault cases, at one time it was held that an employer could not be liable for his employee's fraud or other dishonest conduct in furtherance of personal objectives. Yet modern fraud cases, drawing upon the principle of ostensible authority, indicate this is not always so. The shift to an endorsement of the ostensible authority principle is reflected in *Lloyd v. Grace Smith*.157 There, a firm of solicitors was vicariously liable for the fraudulent misrepresentations of their clerk, who had been entrusted with handling deeds of the sort used in the fraud.

Fleming explains the operation of the ostensible authority test in *Lloyd* as best understood not in terms of a general principle that an employer is always liable when its employee “does dishonestly what he has been employed to do honestly,” but rather that the employer may be liable only where the employee has, or is “held out as having,” the authority to perform the act at issue.158 Fleming invokes *Deatons v. Flew*,159 where Dixon J. held that vicarious liability may arise from tortious acts which are “acts to which the ostensible performance of his master’s work gives occasion or which are committed under cover of the authority the servant is held out as possessing or of the position in which he is placed as a representative of the master.” Thus it is not the employer’s provision of mere opportunity to commit the wrong, but his conferral of a type of actual authority which gives rise to reasonable

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156 See B. (P.A.), supra note 14 at 16.
158 J.G. Fleming, supra note 7 at 384.
159 (1949) 79 C.L.R. 370 at 381.
third party perceptions of apparent authority, that grounds such a finding of vicarious liability. 160

Courts have also imposed vicarious liability in conversion or theft cases. While the appellant in B. (P.A.) argued this line of cases to be limited to circumstances “where the employer authorised the employee to take possession of property,” 161 Huddart J.A. again found a wider basis for analogizing from these cases to other intentional torts. She invoked Morris v. Martin, 162 where an employer was liable when its employee stole goods entrusted for storing, because the servant had been given the authority to take custody of the items. In this, it was again not the provision of a mere opportunity to steal that gave rise to vicarious liability, but the fact that the tort was committed “in the course of doing that class of acts which the employer had put the servant in his place to do.” 163

One important Canadian conversion case was The Queen v. Levy Brothers Co. 164 There, the Supreme Court of Canada applied Lloyd v. Grace Smith to find the Crown vicariously liable for a theft committed by an employee or employees at a customs postal branch. The Court determined that the employee’s stealing goods which he was authorised to handle under his statutory authority to deal with dutiable mail was most properly regarded as an act committed under cover of authority conferred by the Crown.

Yet it seems that, as with the second branch of the Salmond test generally, some ambiguity may arise on the issue of how broadly to construe the class of authorised acts, or how liberally to construe the “cloaking” of tortious behaviour. In cases of sexual assault, it would seem a stretch to argue that the sexual act was one which the


161 B. (P.A.), supra note 14 at 17.

162 Supra note 147.

163 Ibid. at 737 per Diplock J.

employee (such as a residential care worker) was apparently authorised to perform, in the sense that the clerk’s fraudulent misrepresentation may appear to a third party to be a performance of authorised duties. Yet Newbury J.A. in particular suggests that such an act may be interpreted as committed under cover of authorised duties of handling or caring for a child: “cover” here involving in particular the trust vested in the employee in view of his duties. Thus Newbury J.A. in her judgment in B.(P.A.) analogizes directly from the fraud and conversion cases: “a high degree of trust was inherent in the employee’s duties such that those duties effectively cloaked or provided a cover for the wrongdoing complained of.”

Huddart J.A. recognizes that the principle of ostensible authority at work in the fraud and conversion cases is dependent on an appearance of authority to perform an act or take possession of property, such that a third party may perceive the wrongful act as an execution of employment duties. Still, she derives support from these cases for the ultimate principle she will apply to cases of sexual assault: that where authority over vulnerable charges is conferred upon an employee, the employee’s abuse of that authority in the form of sexual assault will give rise to vicarious liability. That is, she derives from these cases a more general principle that vicarious liability may arise from the employer’s conferring upon the employee authority of a type which may be abused in the form of the tort at issue—even where that tort reflects a personal motive and not a desired furtherance of employer objectives.

The analogy between the fraud, conversion, and sexual assault cases is not precise. But this is acknowledged in B.(P.A.), which draws upon this line of case law in order to derive support for principles with which to address the circumstances particular to sexual assault. In distinction from the cases of assault per se, where the wrongful act committed by the employee is generally both overt and overtly wrongful, in cases of sexual assault the employee’s abuse of authority is often committed furtively and in secret, and in some cases, due to a gradual building of trust through the employment relationship, the wrongfulness of the act may be unknown to the vulnerable party until some time after the assault. Thus despite the fact that the assault and sexual assault cases share

165 B.(P.A.), supra note 14 at 40–41.
the element of personal violence, the analogy may be stronger between sexual assault, fraud, and conversion. Huddart J.A. states:

When a small child is seduced by a substitute parent into sexual behaviour and secrecy, fraud or conversion are more appropriate analogies than physical assault. Like fraud and conversion, sexual assault of a child is a breach of trust, an abuse of authority or power.\textsuperscript{166}

\textit{b. Conferred Authority: Nervous Shock/Sexual Harrassment}

Huddart J.A. finds further support for the principle of conferred authority in a few Canadian cases on employee acts of intimidation and sexual harassment. One of these is \textit{Boothman v. Canada},\textsuperscript{167} where the Crown was held vicariously liable for a supervisor's intentional infliction of nervous shock upon a subordinate employee. This finding relied in great part on the principle that vicarious liability may arise out of intentional employee wrongs where "the wrong is directly attributable and connected to the duty or responsibility conferred on the servant."\textsuperscript{168}

According to Noel J. for the Federal Trial Court, the supervisor in \textit{Boothman} had exercised his specific hiring and supervisory powers "to inflict upon [the] plaintiff mental pain and suffering, to harass her, intimidate her, interfere with her, and on occasion assault her." In finding these acts to be a sufficient basis for vicarious liability, Noel J. continued: "In my view, when an employer places an employee in a special position of trust, he or she bears the responsibility of ensuring that the employee is capable of trust. That is the rationale that stands behind the vicarious liability of an employer."\textsuperscript{169} Thus \textit{Boothman} suggests, in support of the

\begin{itemize}
\item \textsuperscript{166} Ibid. at 31.
\item \textsuperscript{167} [1993] 3 F.C. 381 (T.D.).
\item \textsuperscript{168} Ibid. at 393-94.
\item \textsuperscript{169} Ibid. Insofar as this reasoning invokes a standard of care on the part of the employer (to ensure the employee is capable of trust), the decision would seem to turn upon an element of direct employer fault. That is, such reasoning is suggestive of an analysis of the employer's duty, as opposed to the scope of the employee's authority. Yet some confusion arises due to the fact that here, as in the Corrections cases noted above, the Crown is the ultimate employer, and may not be found directly liable other than for property-related or occupier's torts, but only vicariously liable for the torts of its employees (under s. 3 of the \textit{Crown Liability and Proceedings Act}, R.S.C. 1985, c. C-38).
\end{itemize}
position of Huddart J.A. in *B. (P.A.)*, that vicarious liability may follow from an employee tort where the employer has, in a significant sense, enabled the employee to commit the tort, by placing him or her in a special position of trust or power over others.

Huddart J.A. also notes two decisions of the Supreme Court of Canada under the Canadian and Manitoba Human Rights Acts, which contemplate the liability of employers for acts of their employees “in the course of employment” (Canada) or “in respect of employment” (Manitoba). These are *Robichaud v. Canada (Treasury Board)*, and *Janzen v. Platy Enterprises Ltd.* Both relate to the liability of an employer for the sexual harassment of one employee by another. In both cases, the Supreme Court found employer liability under the relevant statute, and in so doing invoked the fact that the employee had been enabled to commit the wrong by the authority invested in him by the employer.

Huddart J.A. suggests that in these two cases (again, not in the context of common law vicarious liability but *Human Rights Act* proceedings), the Supreme Court endorsed both the conferral of authority test and a form of the “enterprise causation” test which Huddart J.A. takes to be decisive in analysing scope of employment in the context of sexual assault. Indeed, in *Robichaud*, La Forest J. quoted with approval a passage from a U.S. Supreme Court judgment which is suggestive of both the conferral of authority and enterprise causation principles which Huddart J.A. supports: “[I]t is the authority vested in the supervisor by the employer that enables him to commit the wrong: it is precisely because the supervisor is understood to be clothed with the employer’s authority that he is able to impose unwelcome sexual conduct on subordinates.”

### iii. Huddart J.A.: Doctrine and Policy Rationales

On the one hand, Huddart J.A. in *B. (P.A.)* looked to case precedents on vicarious liability, or employer liability more generally, in order to identify principles appropriate to a contextual analysis of vicarious liability for sexual assault. But perhaps most importantly, Huddart J.A.’s conferral of authority test relies upon a

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conjoining of certain elements of economic and fiduciary theory. That is, the test rests on the one hand on a principle of "enterprise causation," based in an efficiency-oriented analysis of risk. Yet it further requires that this principle be informed by an analysis of employee authority, consisting particularly, it seems, in attention to the hallmarks of fiduciary relationships. Ultimately, the test of Huddart J.A. for scope of employment places both the analysis of risk and that of employee authority under a wider commitment less to efficiency than to a notion of civic responsibility to society's most vulnerable.

a. Enterprise Causation and Civic Responsibility

In her assessment of the policy grounds for vicarious liability in B. (P.A.), Huddart J.A. drew upon law and economics theory, and in particular the principle that the employer may be regarded as having assumed the costs along with the benefits of its enterprise. As we have seen, this may be regarded both as a principle of commutative justice premised on fairness, requiring the spreading of costs of an enterprise across its beneficiaries, and a cost internalization principle, understood as serving the greater object of efficiency and maximizing wealth.

Huddart J.A.'s analysis in B. (P.A.) is framed not in terms of efficiency but fairness with respect to vulnerable parties, or on the level of social policy, responsibility to those who are harmed by power relationships instituted to serve the purposes of individual enterprises or society at large. In this, Huddart J.A. overtly rejects the distributive justice policy rationale of loss-spreading and deterrence as remote from the purposes of tort law. But she endorses nonetheless a test of "enterprise causation," designed, as we have seen with reference to Sykes, in accordance with efficiency aims. Whether Huddart J.A. is able to realize all of her

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174 Thus Huddart J.A. notes (supra note 14 at 18) that, according to Weber in "Scope of Employment Redefined" (supra note 29), the key policy rationales for vicarious liability are 1) the fairness of having employer bear the costs resulting from the risks of their enterprises; 2) the efficiency of putting the onus on employers to 'distribute costs and shift them to society' (i.e. through insurance); and 3) the providing of an incentive "for exercising care in choosing, training, and supervising employees." While Huddart J.A. rejects points 2 and 3 as too removed from the purposes of tort law, she accepts the argument, also made by Sykes (supra note 43), "that enterprises ought to be fixed with the costs of all the risks they create."
commitments under this efficiency-based test—to fairness and social justice, and to the objective of not forcing employers to be insurers for employee torts—or whether she realizes a commitment even to the enterprise causation test itself, is questionable. But her position may at least be a defensible compromise.

As noted in Part III above, Sykes's efficiency-based analysis of vicarious liability turns on whether the risk which materialized in the form of the employee tort may be deemed "a cost of the employer's business," or in other words, whether "the business is the 'cause' of the wrongs that led to the judgments." In order to decide this, Sykes suggests "a definition of causation that captures the relationship between the existence of an employer's business and the occurrence of a wrong by an employee." The resulting principle is that of enterprise causation, wherein "[t]he crucial variable...is the extent to which the employment relation increases the probability of misconduct."

Apart from the possibility of no causal relationship between the enterprise and employee tort, whereby the employee's lack of employment would not affect the probability of the tort's occurring, in Sykes's definition,

[a]n enterprise 'fully causes' the wrong of an employee if the dissolution of the enterprise and subsequent unemployment of the employee would reduce the probability of the wrong to zero...[while] partial causation [implies that] the dissolution of the enterprise and subsequent unemployment of the employee would reduce the probability of the wrong but not eliminate it.

Both full and partial enterprise causation support vicarious liability, as "the efficiency of resource allocation is enhanced if each business enterprise bears the incremental social costs associated with its operation." Yet whereas liability for full causation is fully efficient, liability for partial causation, if there is no means of assigning only partial damages, may cause the enterprise to contract excessively. Thus where partial damages cannot be assigned,
liability for partial enterprise causation is a second best rule. Yet under such circumstances, it would seem a standard of “substantial” causation is needed, particularly where effective deterrents to the employee tort at issue are unavailable.

In elaborating further upon the concept of enterprise causation, Sykes cites Friendly J.’s comments on characteristic risk in Bushey, where it is suggested that vicarious liability should arise only where the employment creates risks “different from those attendant upon the community in general.” Thus Sykes suggests that where an intentional tort occurs “because the existence of the enterprise causes the employee to encounter unusual circumstances that he would not otherwise encounter,” then the business enterprise may be deemed to have caused the tort, “even though the employee’s tortious behaviour may evince a purely personal motivation.” In developing the idea of unusual employment-related circumstances, Sykes invokes, as one of many possible examples, intrinsically stressful occupations. Further, as Huddart J.A. argues, it would seem that occupations that confer substantial authority or control over others may qualify; and, it might be added, so might occupations which grant employees special access into others’ residences or other intimate settings.

Sykes notes two California cases which found vicarious liability for employee acts motivated by personal ill will, in which the principle of enterprise causation is suggested. In Rodgers v. Kemper Const. Co., an employee’s assault on another worker at a construction site led to vicarious liability. In that case, there was some suggestion that such altercations were to be expected as part of the normal risks incidental to the business. The Court also noted that the employee’s act resulted from his perception of his rights as an employee. In Lyon v. Carey, a deliveryman’s rape of a customer on her premises was deemed within the scope of employment, partly because of his job-related powers of access, and partly because the rape followed a job-related dispute.

Under the enterprise causation test it seems that if it can be shown that the tort arose during an activity that probably would not have occurred absent the employment relationship, or the

179 Ibid. at 588–9.
181 533 F. 2d 649 (D.C. Cir. 1976).
probability of the tort was otherwise substantially increased by the employment relationship, then vicarious liability should be assigned. Yet on this test, is Huddart J.A.’s conferral of authority analysis in fact too restrictive? This might be suggested by the majority finding in *Griffiths*, where Huddart J.A. was more concerned than in *B. (P.A.*) to set down limits to the type of authority or trust relationship that might give rise to vicarious liability. Or does the conferral of authority analysis of Huddart J.A. satisfy the enterprise causation test more adequately than the analysis of Newbury J.A., in that it attempts to identify only those circumstances of employment which may be deemed relevant to the tort and significantly different from background conditions? In order to gauge these issues, we must look more closely to the place of fiduciary theory in the conferral of authority test.

*b. Fiduciary Relationships and Probability of Risk*

Huddart J.A. accepted the respondent’s submission in *B. (P.A.*) that:

The rationale for the imposition of vicarious liability on the employer is based on the idea that the employer has deliberately created the situation of trust for the employee. The employee then abuses that position of trust to cause harm to an innocent third party. As a deliberate policy choice, the Courts have concluded that the employer should bear the risk of the loss, not the innocent victim. ¹⁸²

This was also the principle at work, though expressed in terms of the Salmond test, in the Trial Court decision of *McDonald*.¹⁸³ But there, as noted above, the Nova Scotia Court of Appeal later held that the defendant diocese had merely provided the priest, Mombourquette, with an opportunity to establish relationships with potential victims. A key task for Huddart J.A. in *B. (P.A.*) then was to distinguish liability for abuse of conferred authority more clearly from the notion of the employer’s providing the employee with the mere opportunity to commit the wrong.

Huddart J.A. suggested that the relevant distinction may be made by analyzing further the nature of relationships of authority

¹⁸² *Supra* note 14 at 22-23.
¹⁸³ *Supra* note 13.
or trust, and thus identifying more particularly in what instances conferred authority over others may be deemed significant, in the sense of the employer’s significantly enabling the employee to commit the tort. In this, Huddart J.A. suggested a certain connection between the principle of conferred authority and the doctrine of fiduciary duty, both being fundamentally concerned with relationships of authority or trust. She stated: "The view of the trial judge in [McDonald] can be seen as informed by the inclination of Canadian courts to protect the vulnerable in relationships categorized as fiduciary." Moreover, Huddart J.A. asserted that the hallmark of a fiduciary relationship, as set out by McLachlin J. in Norberg v. Wynrib, was also present in B.(P.A.): "the trust of a person with inferior power that another person who has assumed superior power and responsibility will exercise that power for his or her own good and only for his or her own good and in his or her best interests." 

Huddart J.A. noted that Curry had discretion or power with regard to the vulnerable minors in his care—here she referred to the list of parental duties Curry was entrusted to perform—and he was able to “unilaterally exercise that discretion or power so as to affect the respondent’s vital non-legal or practical interests.” Further, she found that the social bases of fiduciary duty were engaged, insofar as “society has an interest in ensuring that the power entrusted in caregivers of children in need of protection not be used in corrupt ways.”

Finding that the elements of the fiduciary relationship were satisfied was not, for Huddart J.A., an end in itself, but an important step in assessing the vicarious liability of The Children’s Foundation. In this, Huddart J.A. linked the high level of trust implicit in the fiduciary relationship to the further notion of enterprise causation, or increased probability of an employee tort. In reference to Boothman, she stated:

The conferral of power over a subordinate is qualitatively different from the provision of opportunity. Every employee has the opportunity to harass a colleague. Not

184 Supra note 14 at 23.
186 Norberg, supra note 3 at 272, cited in B.(P.A.), supra note 14 at 23.
187 Supra note 14 at 23.
all are given the authority or power that makes harassment significantly more probable. 188

Regarding The Children’s Foundation’s position in B. (P.A.), Huddart J.A. held:

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 the parental figure. 189

Thus Huddart J.A. based her finding of The Children’s Foundation’s vicarious liability in its investing parental or fiduciary authority in Curry, as well as “permitting that power to be exercised in the absence of any other person.” 190 For Huddart J.A., this level of authority conferred increased the probability of misconduct beyond the ordinary risk of misconduct in a relationship between an adult and an unrelated child.

In obiter, Huddart J.A. suggested that parental authority constitutes the highest form of authority or trust, contrasting this with other trust relationships: “[t]eachers, police officers, bouncers or priests who abuse in non-residential settings do not have the same degree of control over every aspect of a child’s emotional and physical well-being as a parental figure does.” 191 Here it is not clear whether these other forms of authority or trust relationships would suffice to trigger vicarious liability. For instance, while the reasoning of the Trial Court in McDonald had appeared to be supportable under a principle of conferred authority, here it might be concluded that the Nova Scotia Court of Appeal was correct in construing the priest’s employment as merely providing the opportunity, but not the authority, to enter into relationships of trust with minors. Yet if Huddart J.A. is indeed requiring parental authority and a context of residential care in order for vicarious liability for sexual assault to arise, is she in fact adhering to a

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188 Ibid. at 26.
189 Ibid. at 25.
190 Ibid. at 31.
191 Ibid. at 32.
principle of enterprise causation? For it would seem that in such a case as *McDonald*, despite the fact that no residential care of children was involved, the test for substantial causation might be met, insofar as the priest’s unemployment (and the Church’s dissolution) would substantially reduce the likelihood of his sexually abusing minors in his parish. The question remains, then, whether it would be justified under a principle of enterprise causation to deny vicarious liability for a priest’s abuse of his authority over those in a religious community.

In sum, Huddart J.A. suggests that the conferral of authority principle applies particularly where an employer has set its employee into a fiduciary relationship with others; such relationships, she suggests, are by their very nature susceptible to abuse. Yet insofar as the doctrine of fiduciary duty is itself an emerging area of law, this does not put to rest questions and concerns regarding the limits to employer liability. Even given the limits set by analysis of the hallmarks of the fiduciary relationship, it may be that certain instances of employee wrongs which, under an enterprise causation analysis bear a significant connection to the employment role, could be deemed not to give rise to vicarious liability. On the other hand, without any limits under the conferral of authority test, employers may effectively be made insurers for employee torts. This is a concern raised by Newbury J.A. in putting forward her test for scope of employment in *P.A.B.*, while the issue of the degree of employee authority necessary to warrant vicarious liability is further explored in *Griffiths*.

*iv. Newbury J.A.: Expanded Proximity Test*

Newbury J.A., in her reasons in *B.(P.A.)*, put forward a different version of new test for scope of employment than that of Huddart J.A. In it, Newbury J.A. expressed caution regarding the conferral of authority test, insofar as she perceived that it might “cast the net too widely”¹⁹² and assign liability based on abuse of a relationship of trust where other important elements of close connection between the employment role and the tort were absent. She suggested that the enterprise causation standard of increased probability of risk is an insufficient measure of close connection, as

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on this standard the mere conferring of an opportunity to commit a wrong may be sufficient. Consequently, Newbury J.A. did not consider in any detail the requirement under the enterprise causation test that the risks at issue be substantially increased over the background risks in the community, but equated this test with one of foreseeability. Newbury J.A. stated:

[T]he conferral of authority or 'power' on a person almost always makes more probable (and hence 'foreseeable') the abuse of that power. I do not believe it is for us, in furtherance of policy considerations, however valid, to make a radical change in the nature of vicarious liability such that it becomes a substitute for the law of negligence but without the necessity of proof of the other elements thereof and without the protections given to defendants by that law.\(^{193}\)

In developing this idea of the problems inherent in a conferral of authority test which assigns liability based strictly on a notion of increased risk, Newbury J.A. suggested that under such a test a teacher’s approaching a student in a park during summer holidays, and subsequently abusing the child, would give rise to the school board’s vicarious liability. For the relationship of trust established in the context of his position as teacher could be construed as involving a foreseeable risk of abuse which had in this instance materialized; or it might be argued under the enterprise causation test that this relationship of trust increased the risk of abuse beyond the background risks between unrelated adults and children in the community at large. Yet both Newbury J.A. and Huddart J.A. seek to avoid a test which will assign employer liability for the torts of employees which occur, as in this example, in circumstances which suggest the relationship has been extended beyond the environment or the assigned duties and powers of the employment. While Huddart J.A. meets this objective by raising the threshold by which the employee’s job-related authority may be deemed to satisfy the test of enterprise causation, Newbury J.A. suggests that further bases of connection between the specific tortious act and employment context must be established to warrant employer liability.

\(^{193}\) Ibid. at 40.
For Newbury J.A., a better way to proceed would be an expanded form of proximity test, establishing the degree of connectedness between the employee’s duties and wrongdoing through attention to a variety of criteria: temporal, spatial, as well as formal (i.e. closeness of employer and employee objectives, though this is “perhaps least useful”).\textsuperscript{194} The specific requirements in order to establish a connection, Newbury J.A. suggests, may be impossible to precisely or exhaustively define, but much like the concepts of proximity and duty of care in negligence, must be gauged according to the facts of each case. Thus while Huddart J.A. suggests that the sole or primary concern in assessing vicarious liability for sexual assault is the degree and type of authority conferred on the employee, Newbury J.A. suggests that while the issue of authority is important (indeed, she bases her finding in \textit{B. (P.A.)} particularly on the “high degree of trust” inherent in Curry’s duties),\textsuperscript{195} the test for scope of employment must additionally consider the nexus of all the other elements which she has suggested may imply a sufficient connection between the employment and tort.

Here it might be suggested that the test of Newbury J.A., with its emphasis on a broad contextual analysis of the act of sexual assault and its relationship to the employment environment, might be more rather than less adequate to the principle of enterprise causation than the test of Huddart J.A.. That is, the test as Sykes sets it out might well require examination of more than the degree of the employee’s authority. Rather, a constellation of related factors might suggest that the enterprise has increased the probability of the tort in fostering an environment of risk which was, though not as such constitutive of negligence liability, nonetheless conducive to employee acts of sexual assault. For instance, while Huddart J.A. mentions in \textit{B. (P.A.)}, with some suggestion of significance, the fact that Curry was able to commit his assaults in the plaintiff’s room in the absence of any other employee, such a circumstance could be brought more directly to bear on the issue of scope of employment in the test of Newbury J.A.. That is, even where Huddart J.A.’s requirement of total intervention or fiduciary authority is not met, the test of Newbury

\textsuperscript{194} \textit{Ibid.}

\textsuperscript{195} \textit{Ibid.} at 40-41.
J.A. might still assign key significance to such a circumstance as employment-related access to the plaintiff in intimate quarters, through analysis of spatial or functional connections between the circumstances of the tort and employment duties. Still, whereas the emphasis in Huddart J.A.’s conferral of authority test is causation, or increased probability of risk, the emphasis in Newbury J.A.’s test remains one of identification or likeness between the tort and the employment, though it lacks the Salmond test’s requirement of identifying the tort as a mode of performing an authorised act.

In the more brief reasons of Finch J.A., the conferral of authority principle seems to be reduced to the more traditional issue of foreseeability, with the accompanying implication of employer fault. This, Finch J.A. suggests, may be a useful way to approach the issue of vicarious liability, as the question of which of two “innocents” should bear a loss might then be resolved by “the fact that one may be seen as slightly less innocent than the other.”

This suggestion invokes the deep tension between the principles of direct and indirect fault underlying vicarious liability doctrine. But it would seem that where direct fault is at issue, this should be addressed separately and on its own terms. This is what Newbury J.A. strongly suggests, arguing that if B. (P.A.) had not come to the court as a vicarious liability issue, it would have been most appropriate to address the liability of The Children’s Foundation in terms of its proper duty to the children in its care.

Both Finch and Hollinrake J.J.A. suggest in B. (P.A.) that the tests of Huddart and Newbury J.J.A. may be reconciled. Hollinrake J.A. suggests that the analysis of conferred authority might, in cases of sexual assault, be principally relied upon in determining whether there is “sufficient nexus between the duties of the employee as such and his misconduct.” Yet such an approach seems not to achieve the effective fulfilment of both tests, in that the two tests continue to suggest differing degrees of emphasis upon conferred authority, and upon other circumstances indicative of the requisite nexus. In Griffiths, the potential for the tests to come into overt conflict is more evident.

196 Ibid. at 43.
197 Ibid. at 41.
v. Application of the Two New Tests in Griffiths

In *Griffiths*, the differing implications of the two new tests for scope of employment developed in *B. (P.A.)* are further explored. In particular, Huddart J.A.'s conferral of authority test (here, the test of the majority) is shown to set a high threshold for employee authority under the standard of enterprise causation. Moreover, despite Newbury J.A.'s concerns in *B. (P.A.)* that the conferral of authority test casts its net too widely, here her test admits employer liability in one instance where the majority's test would not.

According to Huddart J.A., the employee Griffiths, as Program Director of the Boys' and Girls' Club, did not possess such job-created authority as might render his employer liable for his abusive conduct. In this, Huddart J.A. applied her test from *B. (P.A.)*, requiring the court to "examine the nature of the power conferred on the employee and the likelihood that the conferral of that power will increase the probability of a wrong occurring." She found no evidence that the powers bestowed upon Griffiths by the Club satisfied the latter part of this test. Importantly, this analysis rested particularly on the fact that the Club itself had no powers or authority over children: "It was not their parent. Nor did it stand in loco parentis." Thus while the Club encouraged Griffiths to form friendships with the children who opted to attend Club activities, no formal authority over the children flowed from Griffith's employment role.

Here, Huddart J.A. attempted to distinguish employee positions which require the exercise of common law or statutory authority, and/or which involve duties akin to parental authority, from those positions which involve only the inherent potential for the development of relationships of trust in the course of job related duties. Therefore, despite the fact that one of the plaintiffs in *Griffiths* had viewed Griffiths as "god-like," the position of trust which he occupied was deemed not to flow from the employer's conferral of authority, but merely from his taking the opportunity provided by his role to develop relationships with the children he later abused.

Again, we may ask whether this is a defensible analysis under the enterprise causation test. Huddart J.A. suggested that there was

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199 *Griffiths, supra* note 15 at 209.
nothing in Griffiths’ employment which increased the probability of a wrong “beyond the risk ordinarily occurring in our community when adults and children come together to participate in common activities.” Yet might the fact that the Boys’ and Girls’ Club coordinated and structured such activities, and set its employee in a position of at least informal authority over children in the context of those activities, indicate a potentially significant increased probability of risk? Further, would such a denial of vicarious liability as that applied under the conferred authority test in Griffiths, in light of the employee’s lack of parental authority, also apply to a diocese and its priest? Again one might consider the position of the priest Mombourquette in McDonald and his “god-like” status in the social and cultural milieu of devotees. In such a context, it might be argued that a priest is invested by the Church with more authority than is passed to a Boys’ and Girls’ Club director, perhaps satisfying Huddart J.A.’s test despite the lack of any formal parental authority. But it is not clear that such an argument would succeed in showing a significant form of conferred authority, at least where that authority is exercised outside a residential setting.

As to the test of Newbury J.A., in Griffiths the potential for an expansion of employer liability under this test, beyond that imposed under the test of Huddart J.A., is suggested. Again, while the test of Huddart J.A. functioned to deny liability for all the incidents of Griffiths’ sexual misconduct, Newbury J.A.’s test would have assigned vicarious liability to the Club for the one incident occurring in the course of Club-related activities (the bus trip). It is apparent in Griffiths then that where misconduct in the course of performing duties is shown, Newbury J.A.’s more flexible analysis encompassing not only the type or degree of authority, but also other points of connection between the employee’s authorised duties and the tortious acts, may allow employer liability despite a lack of significant job-related authority.

Does Newbury J.A.’s test cast its nets too widely? Or, does such a test allow too much flexibility of analysis? On its face, this test may assign liability where the only connection between the employment and tort is spatial or temporal. At the other extreme, Newbury J.A. suggests in her brief account of relevant factors that a

200 Ibid. at 210.
formal connection showing the identity of employer and employee objectives may in some instances be required. But in what instances? Newbury J.A. has indicated that as in findings of proximity and duty of care, a judgment is required in making such assessments for which no formulaic test may be devised; each case demands its own contextual analysis. Yet this gives little guidance on the specific requirements for analysis of vicarious liability for sexual assault. Again, such a position might be most reconcilable with the “enterprise causation” principle, insofar as it admits of a variety of criteria establishing the employment as significantly increasing the probability of risk.

In Huddart J.A.’s analysis, it is primarily and perhaps solely the nature and extent of the employee’s authority, and risks consequent to it, that is relevant in connecting the employment role to the act of sexual assault. But in light of Griffiths, it might further be asked: what of cases involving special employee access, for example sexual assaults committed by apartment superintendents or deliverymen? While such cases may give rise to employer liability under the test of Newbury J.A., in its regard for a spatial and temporal nexus between the employment and the tort, could such a power of access be sufficient to give rise to employer liability under Huddart J.A.’s test, despite there being no wide ranging parental or other authority over those who reside in the places to which employment-related access may be granted? Again, Huddart J.A. might direct attention to the hallmarks of the fiduciary relationship—and perhaps the analysis of the two types of cases here mentioned would differ, insofar as the superintendent may unilaterally exercise his powers of access, while the deliveryman is one whom recipients of deliveries may or may not admit. But it is not clear that Huddart J.A.’s conferral of authority test, with its emphasis on parental authority, would be satisfied in either case.

Before turning to some final questions regarding the justifiability and proper scope of vicarious liability for sexual assault, a few further cases on point may be useful to deliberations on the proper scope of any new scope of employment test.

3. Vicarious Liability for Sexual Assault and the Principle of Conferred Authority: Further Caselaw

Apart from B.(P.A.), Griffiths, and McDonald at trial and B.(P.A.) at the B.C. Court of Appeal, certain other Canadian cases have
invoked the notion of conferred authority in imposing vicarious liability for an employee’s sexual assault. These include *K. (W.) v. Pornbacher*¹⁰¹ and *A. (C.) v. Critchley.*²⁰²

*Pornbacher* was a B.C. Supreme Court judgment rendered before *B. (P.A.)* and *Griffiths* reached the B.C. Court of Appeal. In it, a finding of negligence as well as vicarious liability was made against the Bishop of Nelson, Corporation Sole, for sexual assaults committed by a priest upon a student at a Catholic school in 1975. The defendants had raised the argument that the priest did not have duties specifically involving children, and further, that because the sexual acts were contrary to his vow of celibacy, they could not be deemed within the scope of his employment. Yet Quijano J., in rejecting the reasoning of the Nova Scotia Court of Appeal in *McDonald* and following that of the B.C. Supreme Court in *B. (P.A.)*, suggested that the *McDonald* judgment had not considered “the question of vicarious liability in the context of the role of the church and its clergy in relation to its congregation, especially children.”²⁰³ In this decision, Quijano J. proposed that the inquiry into vicarious liability in that case had to examine whether, in practice, the defendant priest “was to be involved in the care or nurturing of children in the course of his employment.”²⁰⁴ This was found to be so. Notably, though, much of the analysis centred upon the direct liability-based notion of the defendants’ (both the priest’s and diocese’s) duty—emphasizing that where a person or

¹⁰² [1997] B.C.J. No. 1020 (Q.L.) (S.C.). Also of note is the case *J.B. v. Jacob* [1997] N.B.J. No. 351 (Q.L.) (QB.). There, a male nurse’s sexual touching of a sleeping male patient was deemed to bear no relationship to the nurse’s duties; thus the hospital’s vicarious liability was rejected. While Creaghan J. found no vicarious liability, he did acknowledge the potential for such a finding if a closer nexus with authorised employment acts were established. Thus he stated:

I am also of the view that the second branch of the Salmond test is sufficiently flexible to permit a reasoned application of vicarious liability even in cases of sexual assault. An employer is responsible not merely for what he authorizes his employee to do but also for the way in which he does it. In the context of the case before me, should a nurse sexually assault a patient in the course of performing his duties as a nurse, then the argument remains open that the employer could be held vicariously liable.

²⁰³ Supra note 201 at 378.
²⁰⁴ Ibid. at 380.
institution is placed in authority over children, it has a high duty of care—rather than vicarious liability principles as such.

A. (C.) v. Critchley is another B.C. Supreme Court case on vicarious liability for sexual assault, decided after the B.C. Court of Appeal decisions in B. (P.A.) and Griffiths. There, the four plaintiffs had been wards of the Superintendent of Child Welfare of B.C. and placed at a community-based facility run by Critchley (a foster parent). Along with its finding that Critchley had sexually abused the minors, the court held the Crown vicariously liable under the headings of negligence, breach of fiduciary duty and vicarious liability.

One key issue in Critchley was whether the actions of a foster parent, not as such a Crown employee, may give rise to vicarious liability. Allan J. concluded, with reference both to an “organization” and “control” test: that the relationship between the Superintendent of Child Welfare and Critchley was one which would admit of vicarious liability.205 Further, Allan J. reviewed the decisions in B. (P.A.) and Griffiths, for the principle that vicarious liability may be justified even for criminal conduct where the court is able to identify “the employer’s conferral on an employee of the very authority that the employee abused.”206 On such a test, and in light of the fact that here, as in B. (P.A.), the assailant had parental authority and a wide scope of intervention in all areas of the youths’ lives, Allan J. concluded that the Crown was vicariously liable for Critchley’s acts of sexual assault.

Finally, it is worth mentioning that notable among the U.S. cases invoked by Huddart J.A. in B. (P.A.)—particularly in its tempering the suggestion that only parental authority may support vicarious liability for sexual assault—is Mary M. v. City of Los Angeles.207 There, the California Supreme Court invoked the principle of conferred authority to hold the City vicariously liable for the acts of a police officer who, after pulling over the plaintiff for drinking and driving, took her to her house and sexually assaulted her.208

205 Critchley, supra note 202 at paras. 216-30.
206 Ibid. at para. 241.
208 The California Supreme Court distinguished Mary M. in Lisa M. v. Henry Mayo Newhall Memorial Hospital 907 P.2d 358 (Cal. 1995) (discussed in B. (P.A.), supra note 14 at 30-31). There, a hospital was not vicariously liable for the sexual assault of a patient by an ultrasound technician. Though the technician had used the
Apart from *Mary M.*, the majority of the U.S. cases cited by Huddart J.A.—involving teachers, priests, and health professionals—go toward the denial of employer liability for sexual assault. But there are a growing number of such cases in which vicarious liability has been found.\(^{209}\) The principles applied have varied widely across the different U.S. jurisdictions, with some courts (and some states) still attending to the “motivation to serve” test or the foreseeability test in order to deny liability for shocking or outrageous conduct, and others assigning liability on principles akin to *Mary M.* In the cases assigning employer liability, considerations of policy have been at the forefront, most particularly a commitment to the distributive justice goals of deterrence and risk and loss-spreading, as well as the notion of the equitable assignment of benefits and losses.

V. VICARIOUS LIABILITY FOR SEXUAL ASSAULT: FINAL ISSUES FOR CONSIDERATION

We have seen that in *B. (P.A.*)* and *Griffiths*, the B.C. Court of Appeal has made an important departure from the traditional Salmond test for scope of employment in order to address the issue of vicarious liability for sexual assault. The reasons of both Huddart and Newbury J.J.A. in *B. (P.A.*)* set out compelling critiques of rigid adherence to the Salmond test, particularly in cases involving intentional torts. But in detaching the analysis from the Salmond test’s classification of the tortious act as a mode of performing authorized acts, the challenge has been to construct a new test which

cover of the examination procedure to assault the plaintiff, it was held that the test required that the tort be engendered by the work, or that the work predictably create the risk that such torts would be committed. That the job involved physical contact was not a close enough connection. This employee’s abuse of a position of trust was deemed to differ significantly from a police officer’s abuse of his authority, where the latter could be analyzed specifically in terms of the unique legal and coercive nature of that authority.

\(^{209}\) See Weber *supra* note 29, for a comprehensive review of the American case law on vicarious liability for sexual assault. In particular, at 1520–22 footnote 33, she surveys the cases denying employer liability because of the personal nature of sexual assaults; footnote 34 surveys cases focusing on foreseeability and ‘shocking’ or ‘outrageous’ conduct; and footnote 35 reviews the more recent lines of cases focussing on the issue of job-related authority.
does justice both to victims of sexual assault and to employers. Thus Huddart and Newbury J.J.A. have formulated tests seeking to invite a contextual analysis of the specific circumstances linking sexual assaults to particular employment roles. Both have suggested that an important measure of the adequacy of any new test is its ability to address both the secrecy and the aspect of betrayal of trust inherent in many job-related sexual assaults. And yet, both suggest that such a test must avoid making employers liable for all employee acts of sexual assault, no matter how tenuous the connection to the employment role.

Apart from the issues raised in Part IV above regarding the limits of employer liability under the two new tests suggested by the B.C. Court of Appeal, some final questions may now be raised with respect to the justificatory bases of these tests. Following this, a proposal will be made regarding defensible limits to a scope of employment test in the context of sexual assault, which seeks to address some of the differing concerns raised by Huddart and Newbury J.J.A. In closing, some consideration will be given to whether alternative forms of analysis of employer responsibility or liability for employee acts of sexual assault might be more adequate, either to concerns of fairness generally or to a feminist concern to identify and transform the social determinants of sexual assault or abuse.

1. Justifications of Vicarious Liability for Sexual Assault: Reconsidered

As noted above, in her assessment of the justificatory bases of vicarious liability for sexual assault, Huddart J.A. overtly rejects the distributive justice based reasons of deterrence and loss and risk-spreading, deeming these to be at odds with the purposes of tort law.\(^2\) In this, she indicates an adherence to the corrective justice approach, citing Weinrib, who argues that tort law is concerned with redressing tortious wrongs, and not with spreading or deterring losses which arise from injuries generally. Yet it would nonetheless seem that the justificatory principle, which is most significant in the reasons of Huddart J.A., is based not in the

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\(^2\) B.(P.A.), supra note 14 at 19.
corrective justice orientation to fault—an orientation which, we have seen, is elaborated in vicarious liability as a concern to derive a form of composite identity between the employer and employee with respect to the tortious act—but upon the fairness of assigning responsibility for the costs of enterprise or institutional activities to those who benefit from those activities. This is essentially the principle of commutative justice. Notably, this principle, along with the enterprise causation test which Huddart J.A. adopts (with its origins in the economic principle of cost internalization), manifests in \textit{B. (P.A.)} as a hybrid of efficiency and fairness concerns.

Under the corrective justice analysis, we have seen that in order to ground the fiction of the employer-acting-through-the-employee the principle of enterprise causation or responsibility for characteristic risks might arguably stand in place of the Salmond test's emphasis on identity of acts, or on classifying the tortious act as a mode of performing a wider class of authorised acts. Yet it might also be argued that in light of the corrective justice model's primary concern for fault, the difficulty with the Salmond test, which the B.C. Court of Appeal has encountered, is not solved by altering the test to more easily admit employer liability for sexual assault; rather, it might be protested that the intentional tort of sexual assault simply does not support vicarious liability. Such a position might rest on the assertion that the employee's act of sexual assault is, in its physical as well as moral aspects, qualitatively or categorically different from the employer's enterprise activities.

Yet such a position runs up against the arguments regarding the determination of categorically identical or different acts as based in mere semantics, as well as the case precedents on fraud and conversion, where employees have similarly acted against common mores as well as against the law, yet vicarious liability has been assigned. While the agency-based principle of ostensible authority might be invoked to support a distinction between those cases and cases involving sexual assault, still the distinction is a fine one, and one difficult to maintain in the courts, as it effectively suggests that employer liability may arise out of an employee's theft of a coat which was entrusted to him in the course of duties, but not for an employee's sexual assault of a child or other vulnerable party so entrusted. Thus while the corrective justice emphasis upon an extension of fault to the employer may lead to a second guessing of the application of vicarious liability to intentional torts which depart
in a shocking or extreme manner from the duties assigned, the issue is taken in *B. (P.A.)* to turn instead upon a notion of fairness involving an analysis of characteristic risks, and an ensuing alignment of enterprise benefits and harms, rather than on the classification or identification of authorized and tortious acts.

Turning to distributive justice, while Huddart J.A. in *B. (P.A.)* expressly rejects the standard efficiency-based rationales for vicarious liability, other cases have suggested that the justification for assigning such liability in cases of sexual assault is that the employer, and not the employee, is the least-cost insurer and most effective taker of preventive measures. Indeed, in *Griffiths* at trial, Wilkinson J. appealed to these notions, while simultaneously invoking the fault-based notions of the special duty or standard of care to which institutions charged with the care of children must be held, yet recognized the difficulty of establishing employer negligence where an employee has committed sexual assault:

Institutions engaged in the care of children are able to protect themselves with insurance and, more importantly, are in a better position than the children to prevent sexual misconduct. If the scourge of sexual predation is to be stamped out, or at least controlled, there must be powerful motivation acting upon those who control institutions engaged in the care, protection and nurturing of children. That motivation will not in my view be sufficiently supplied by the likelihood of liability in negligence. In many cases evidence will be lacking or have long since disappeared. The proof of appropriate standards is a difficult and uneven matter.\(^{211}\)

The tension expressed here between principles of fault and of vicarious liability is reflected in the reasons of Huddart J.A in *B. (P.A.)*. Despite her express rejection of the deterrence rationale, in certain passages Huddart J.A. appears to endorse just this rationale as of key importance to her findings. She states:

It is implicit in this approach [the conferral of authority test] that the imposition of vicarious liability on those who undertake the protection of neglected and abused children is necessary to control the abuse of job-created authority. This need justifies the strict liability of an

\(^{211}\) *Griffiths* (B.C.S.C.), *supra* note 15 at para. 69.
employer, whether its imposition is seen as a return to first principles or an extension of existing principles.\(^\text{212}\)

In another passage, as part of an argument in defense of the application of the cost internalization approach to institutions charged with the care of children, Huddart J.A. holds: "[i]f the risk of misconduct is reduced by the imposition of vicarious liability, then the total social cost is reduced. Reduction in the total social cost of a necessary enterprise can be seen as the root of the cost internalization argument."\(^\text{213}\)

In these passages, it is suggested that findings of vicarious liability may function as an incentive for employers to institute preventive measures and so reduce incidents of employee misconduct. Yet this suggestion seems to overlook Huddart J.A.'s own earlier remark in \(B. (P.A.\)) that "[v]icarious liability may cause employers to overcorrect by exercising undue care. A rule that makes employers liable only where employee torts are caused or facilitated by employer negligence would suffice to create an incentive for care."\(^\text{214}\) It might be asked whether it is possible to overcorrect or take undue care where the protection of children and other vulnerable charges is at issue. The answer would seem to be yes, at least under the cost internalization argument, whereby overcorrection will result in a contraction of services. Thus Huddart J.A.'s apparent reliance on the deterrence argument in imposing vicarious liability seems misplaced.

On the other hand, Huddart J.A.'s point may be that the argument on deterrence is in these circumstances in need of supplementation by a further and more fundamental argument regarding the application of principles of cost-internalization to essential social services, or to institutions—generally either government or non-profit charitable organizations—charged with the care and protection of children. Indeed, it must be kept in mind that the new scope of employment tests put forward in \(B. (P.A.\)\) and Griffiths are most specifically aimed at organizations which confer parental authority on employees. On the one hand,

\(^{212}\) \(B. (P.A.\), supra note 14 at 32.

\(^{213}\) \textit{Ibid.} at 21.

\(^{214}\) \textit{Ibid.} at 19. Further, as noted above in the discussion of Sykes's efficiency analysis, the employer's actual means of deterrence—persuasion, coercion, or surveillance—with regard to employee acts of sexual assault may be limited.
Huddart J.A. acknowledges that cost internalization principles do not hold in all respects outside the context of free market enterprises. Thus while these principles operate on assumptions of enterprise expansion or contraction in accordance with the total cost of providing a good or service, this is not true of necessary public services, such as teaching, policing, and providing care and protection to children in need. Huddart J.A. affirms: “A community’s moral obligation to children cannot be ignored.” But she nonetheless draws from the cost internalization argument a principle which may be imported into her analysis of the vicarious liability of government and charitable institutions: “that the increased costs arising from the conferral of authority must be borne by someone.”

In this though, particular issues regarding the economic effects of imposing vicarious liability upon government and upon private charities should be noted. On the one hand, government is both a monopolist with respect to the assumption of parental authority outside the family setting (though it can delegate this authority), and a self-insurer, such that the costs of liability are meted out to taxpayers and/or reflected in reduced services. As such, while the point should not be overstated (particularly with regard to legal responsibilities to the most vulnerable members of society), the government’s ability to cover liability costs is not limitless, constrained by budgetary concerns and by the threat of taxpayer revolt and loss of office. In this respect it is notable that the potential financial impact of an employer liability rule for sexual assault by government employees charged with the care of children—and further, following Critchley, also for the sexual misconduct of foster parents—promises to be not inconsiderable.

On the other hand, private charitable organizations would generally require private insurance in order to cover the costs of vicarious liability. Here, a further consideration may be raised with particular relevance to the commutative justice model. Again, it is this model, with its emphasis upon the alignment of benefits and

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215 Ibid. at 20.
216 Ibid.
harm where enterprises or institutions impose systemic risks upon individuals in undertaking large-scale activities, which appears to be of most significance to the B.C. Court of Appeal in B. (P.A.). Susan Vella has posited this form of justification for vicarious liability for employee acts of sexual assault:

[W]here an institution seeks to derive the benefits of fostering a relationship or culture based on trust or power, it must assume the companion responsibilities which arise when that relationship or position is abused by an individual actor which it placed there in the first place. 218

In Keating's analysis of liability under the model of commutative justice, the institution of insurance, understood as the means of connecting the costs of employee torts to an enterprise's characteristic risks, is vital. Indeed, Keating argues that the institution of insurance affects the enterprise's moral responsibility with regard to injuries arising from characteristic risks (here, expressed in terms not of intentional torts but accidental harms):

[T]he institution of insurance affects the extent of injurer's moral responsibility for the harms that they accidentally inflict. Morally oriented tort theorists have long assumed that, if responsibility for accidental harm must be predicated on what people do, not on who they are, the institution of liability insurance must be essentially irrelevant to responsibility for accidental injury. Just as this principle should forbid holding people responsible for harm simply because their pockets are deep enough to pay for it, so too it should forbid holding them responsible just because they have enough insurance to cover it.... [T]hat conviction is too sweeping. Whether or not it is fair to leave the financial costs of non-negligent accidents concentrated on a few unlucky victims depends greatly on whether the costs of those accidents can be distributed across those who benefit by creating the risks that harm those unlucky few. The institution of insurance is intimately involved in answering that question. 219

218 Vella, supra note 92 at 13.
219 Keating, supra note 35 at 1338.
Thus in Keating's theory of enterprise liability as premised upon commutative justice, the analysis must focus both upon the justifiability of framing a particular wrong as a characteristic risk of the enterprise, and then further on, whether such a risk is systematic and common enough to give rise to a homogeneous risk pool for insurance purposes, such that the loss may be spread across those who impose and presumably benefit from imposing the risk. If the latter condition is not met, and the loss cannot be spread across those who benefit, then it seems vicarious liability may not be justified.

A question arises as to how this reasoning might pertain to an enterprise’s or employer’s moral and legal responsibility for an employee’s act of sexual assault. In this regard, it is notable that insurance coverage may in such circumstances be a problem for employers. This is not to suggest that it would be impossible to establish a working system of liability insurance for employee acts of sexual assault. As such, any further questions of specific coverage may be irrelevant under Keating’s commutative justice analysis. But still, even apart from the issue of whether charitable organizations in particular have the funds to purchase liability insurance, it seems more attention might be given under a fairness analysis to the relevance of the general practice of insurance companies to exclude (or seek to exclude) coverage for “bodily injury, sickness or disease,” as well as for intentional harm under comprehensive general liability policies. 220

220 See, for instance, Wellington Guarantee v. Evangelical Lutheran Church in Canada (1996), 35 C.C.L.I. (2d) 164 (B.C.C.A.). There, the plaintiffs alleged that psychological injuries had followed upon sexual assaults by their adoptive father (an employee of the Church). Coverage under the Church’s Comprehensive General Liability policy was denied, under an exclusion clause as to “bodily injury, sickness or disease”. See also Victoria General Hospital v. General Accident Assurance Co. of Canada (1995), 32 C.C.L.I. (2d) 243 (Man. Q.B.), where it was found that one of the hospital’s insurers was not obligated to cover damages for a patient’s “severe emotional trauma” following from alleged sexual abuse by a guidance counsellor. The policy in question excluded coverage for “bodily injury”, including “mental anguish, injury, shock, humiliation, disease or disability.” Regarding denial of coverage to perpetrators of sexual assault (as well as, in this case, to a third party who had failed in her duty to protect the victim) under the exclusion of coverage for intentional harm by the insured, see Wilkieson-Valiente v. Wilkieson, [1996] I.L.R. 1-3551 (Ont. Ct., General Div.).
Such concerns regarding insurance might be invoked to argue that the principle of commutative justice or of spreading enterprise losses across the beneficiaries of enterprise activities is inapplicable, or at least restricted in application, in cases of employee sexual assault. Yet here we must return to the emphasis placed by Huddart J.A. upon the notion of the responsibility of institutions premised upon the establishment of relationships of trust or authority to bear the costs of abuses of that authority. Such a responsibility, she suggests, applies as much to government or charitable organizations as to private enterprise. And where charitable organizations or organizations to whom government has delegated responsibility cannot cover the costs of abuse of such authority, Huddart J.A.’s reasoning implies, they are unsuitable in their role, in forcing the children in need of protection “to bear the costs of injuries done them by persons in whose control they are placed.”\(^221\) In such circumstances, it would seem, the services at issue should be undertaken directly by government—that is, by the community at large, which is under a moral obligation to provide services to children in need of care and protection. Thus Huddart J.A.’s analysis rests not so much on a principle of economic efficiency as one of civic obligation, whereby she suggests that as there is a civic responsibility to protect neglected and abused children, and as the assumption and conferral of parental authority by the state is necessary to that obligation, the accompanying risk and cost of abuse “is simply part of the price to be paid by the community to obtain the service it needs.... If the community does not bear the cost,” Huddart J.A. notes, “the innocent victim must.”\(^222\)

2. Conclusions/Alternative Bases of Liability

The fairness-based approach to vicarious liability for sexual assault put forward in \(B. (P.A.)\) and examined here is an approach grounded in the principle of commutative justice and in the specific assessment of enterprise causation—combined with, at least in Huddart J.A.’s conferral of authority test, a considerable dose of fiduciary theory. While any attempt to draw a definite conclusion from the many propositions and problems raised by the B.C. Court of Appeal in \(B. (P.A.)\) and Griffiths risks oversimplification, this will

\(^{221}\)\(B. (P.A.)\), supra note 14 at 33.

\(^{222}\)Ibid. at 21.
soon be the task of the Supreme Court, and so it may be useful here to offer up some possibilities. To start, I would suggest that the critiques raised in these cases regarding the Salmond test's inadequacy in assessing vicarious liability for sexual assault should be affirmed. The B.C. Court of Appeal, and in particular Huddart and Newbury JJ.A., have identified as that test's fundamental flaw its reliance upon semantics over any clear principle, a feature which may in negligence cases have allowed courts flexibility in making policy-based decisions, but which offers no similar flexibility in cases of sexual assault. Instead, I would argue, following the suggestions of Huddart J.A., the principle of enterprise causation or characteristic risks more adequately describes a form of close association between the employment and the employee tort which bears relevance to employer liability.

Yet as we have seen, questions remain with regard to the proper limits of vicarious liability for sexual assault under a new scope of employment test, particularly in light of the differing analyses of Huddart and Newbury JJ.A. In this respect, I would suggest that an attempt be made to incorporate some of the more pressing concerns of both judges regarding the proper limits and scope of employer liability in such cases, without merely leaving the test open to judicial discretion in analyzing conferred authority along with any of a number of other factors. One possibility would be to extend liability under the test beyond Huddart J.A.'s threshold of conferred fiduciary authority (at some points in her reasoning, seemingly requiring the higher threshold of all-encompassing parental authority), to more explicitly admit forms of fiduciary authority beyond that of parental status, where contextual analysis establishes that the fiduciary's authority functioned to significantly increase the likelihood of sexual assault beyond background risks. Further, the test may be expanded to admit employer liability in instances where the employer has conferred to the employee extraordinary privileges of access to domestic or other intimate settings.

Thus some element of the spatial and temporal nexus proposed by Newbury J.A. might inform the new test, so as to identify employer liability for employee abuses not only of positions involving a high degree of authority over others (understood through what is essentially a duplication of the analysis of fiduciary duty), but also positions of trust which involve unusual access to
others in private domains. Further, access to intimate areas of the body—even in the absence of formal authority over others—might be deemed to give rise to significantly increased risks of sexual assault over background risks. Such a test might call into question the appropriateness of Newbury J.A.’s finding of liability for the sexual misconduct of the Program Director on the bus trip in Griffiths (arguably fulfilling neither the requirement for fiduciary authority nor that of an extraordinary privilege of access to the child in an intimate setting). On the other hand, the U.S. case of Lisa M. v. Henry Mayo Newhall Memorial Hospital,223 where a hospital was found not to be vicariously liable on scope of employment arguments after a patient was sexually assaulted by an ultrasound technician (who arguably had been conferred an extraordinary privilege of access to the patient, both in terms of spatial seclusion and physical intimacy), may be taken as an example where vicarious liability should have been imposed.

Still, these suggestions are not made without some deep reservations. We have seen, apart from concerns regarding the proper limits of a new scope of employment test which would admit of vicarious liability for sexual assault, further concerns which reflect a corrective justice based regard for fault, and accompanying perception of injustice (along with, according to the Weinrib critique, suggestions of incoherence or of foregoing the principled limits of tort law) in assigning liability based solely in a standard of increased probability of risk. Such concerns may focus in particular on the fact that the characteristic risks at issue in cases of employee acts of sexual assault involve the decisions and criminal actions of an independent moral agent. Moreover, we have noted with reference to the commutative justice model that practical concerns regarding insurance may in some instances call the fairness of vicarious liability into question.

In view of these concerns, there is a strong argument that the analysis of direct employer liability, or duty, is the preferable means of proceeding in such cases. That is, it may be argued that the proper limits upon and extention of employer liability for employee sexual assault is more adequately addressed not through attention to the employee’s proper role but to the employer’s proper duty, posed either under an analysis of the standard of care in negligence,

223 Supra note 208.
or in terms of a fiduciary or statute-based non-delegable duty (which could not be foregone through conferral of authority). Such an analysis might satisfy the policy as well as fairness concerns raised in *B. (P.A.)*, potentially assigning liability to those employers or enterprises which possess such parental or other significant authority over vulnerable parties as may be conferred onto employees, while setting the limits of employer liability more clearly than the emerging scope of employment or characteristic risks test.

This is suggested by Newbury J.A. in *B. (P.A.)*, in prefacing her new approach to the scope of employment by indicating that a less circuitous route to establishing employer liability may have been to assess The Children's Foundation's position in terms of a statutorily-derived non-delegable or fiduciary duty. As such, a strict standard of adherence to the vulnerable party's best interests, and a duty which could not be shed by the conferring of power upon an employee, may have been established. Freya Kristjanson, in a recent paper, suggests too that justice may be better served in cases involving employee acts of sexual assault by reorienting the focus once again from the criteria for establishing vicarious liability to the criteria for direct liability or fault. In this, she urges lawyers and judges to work toward a more scrupulous and sensitive approach to the standard of care in negligence, informed by feminist analysis and thereby cognizant of the power relationships and discriminatory practices within institutions which may contribute to employee acts of sexual assault. On application of

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224 B. (P.A.), supra note 14 at 35.

225 On the principle of the non-delegable duty, see supra note 22. Also see the recent judgment of the Supreme Court in Lewis (Guardian ad item of) v. British Columbia (1997) S.C.J. No. 109 (11 Dec. 1997), which is based upon a finding of a non-delegable duty arising from statutory authority. That case involved an analysis of the relationship between the Crown and independent contractors in the context of highways maintenance. While the concept of the non-delegable duty is generally applied as an alternative to vicarious liability where the relevant tortfeasor is not as such an employee, still the concept might apply, as Newbury J.A. suggests, to establish direct liability of the Crown or a children's aid society invested with a statutory duty to care for and protect the children in relation to whom *in loco parentis* authority is assumed.

such an analysis, organizations found to place children, women, or any groups or individuals in jeopardy of sexual abuse or assault might then be more likely to be held accountable, and as such overtly at fault, for employee acts of sexual assault. Yet those organizations which have implemented policies and practices which contribute to equitable and respectful relationships between the sexes, for instance, or a nurturing, safe environment for children, may be less likely to be found liable for an employee’s sexual misconduct.

It is unfortunate that *B.(P.A.)* and *Griffiths*, as cases addressing employer liability for sexual assault only under the heading of vicarious liability, do not present for the Supreme Court’s consideration the full range of arguments concerning alternative headings of employer liability. Still, some response may be raised here to the feminist-inspired call for a more scrupulous context-based approach to direct employer liability in such cases, as an alternative to analysis of vicarious liability. In this regard, it is noteworthy that while neither Huddart J.A. nor any other member of the B.C. Court of Appeal invoked feminist principles overtly in *B.(P.A.)*, the sustained emphasis in both her and Newbury J.A.’s judgments upon contextual analysis and analysis of power relations contributing to the likelihood of sexual assault may be seen to correspond in many respects with a feminist analysis.

In broadest terms, sexual assault may be understood as enabled by a whole complex of relationships of power and vulnerability conferred upon men, women, and children in a patriarchal society. Yet in *B.(P.A.)* and *Griffiths*, the judiciary has sought to identify within that broad power structure particular instances of assumption and conferal of power which may occasion legal liability for another’s act of sexual assault. As such, liability may attach to an employer through analysis not of the general social constructedness of the perpetrator’s role, but the employment-related constructedness of that role. Under this analysis, it must be established that liability rightly lies in the particular corporate or institutional entity under which the relevant employee’s duties and authority have been assigned, insofar as those duties and authority, viewed within the context of the enterprise as a whole, significantly enabled the employee to commit the sexual assault, or significantly increased the probability of the assault’s occurring.
The issue which commentators such as Kristjanson raise is whether the aims of a feminist analysis, or more particularly, an analysis of power and its abuses in the form of sexual assault, might be better served by focusing upon employer duty and fault, and so not sweeping into the same category of liability organizations fostering relationships of inequality or neglecting safety and those dedicated to helping the vulnerable and making practical efforts at instituting an ethic of equality and care. Yet the point of Huddart J.A., in her emphasis upon commutative rather than corrective or distributive justice, is that regardless of bona fide preventive or ameliorative measures, those enterprises or institutions which impose (and, under this analysis, thereby benefit from) certain power relationships—or privileges, as argued here with regard to special powers of access—must accept responsibility for compensating those who are harmed by abuses of the power or privilege assumed and conferred. Institutions directed at helping the vulnerable constitute no exception. It may be that the move from a corrective justice orientation to fault (applying between individuals) to a commutative justice orientation to alignment of benefits and harms (applying between a corporate body and an individual)—and then under the second model, the interpretation of an organization’s assumption of powers to assist the vulnerable as its receiving a benefit—may seem counterintuitive. But the core of the argument and its justificatory basis must be kept in mind: that is, the notion of the interrelatedness of the assumption and conferral of power on the part of a corporate body or institution, and that organizations’s responsibility for compensation when individuals are harmed through the abuse of such power.

It is now for the Supreme Court of Canada to determine whether or to what extent the doctrine of vicarious liability may be applied with some degree of context-sensitivity in the assessment of employer liability for employee acts of sexual assault. The response of that Court to the B.C. Court of Appeal’s new tests for scope of employment will clearly have important implications for employers—most particularly government and non-government organizations serving vulnerable populations. And it will have important implications for those claimants seeking to extend liability for sexual assault to those employers or enterprises they regard as in part responsible for the wrongs done them. Perhaps, as some suggest, justice would be better served in an analysis of the
duty and direct fault of the employer or institution at issue. Yet the B.C. Court of Appeal in its analysis of vicarious liability has nonetheless raised an important and compelling set of arguments regarding where responsibility may be found to lie for compensation following abuses of employee power in the form of sexual assault. Ultimately, the point of Huddart J.A. is a strong one: When such abuses occur within relationships of power that are mandated in order to serve the public good or to serve the interests of society’s most vulnerable, all members of the community bear some responsibility to ensure the compensation of the victim.