

**THE EVOLUTION OF  
VICARIOUS LIABILITY IN TORT IN RESPECT  
OF DELIBERATE WRONGDOING**

**By Paul T Rose QC<sup>1</sup>**

1. **Introduction.**

2. In the law of tort there is no statutory definition of vicarious liability. It is a paradigm of the common law evolving to meet changing needs and trends in society. Over recent years there have been a number of decisions from initially, Courts in the Commonwealth, and more recently the House of Lords and the Court of Appeal which have evolved the law of vicarious liability so as to broaden the class of acts for which the master or principal may be liable. This is of particular importance in the context of cases involving deliberate wrongdoing or criminal activity on the part of the tortfeasor, who will usually be without funds, and unless an insured defendant can be found and made liable, a victim will be left without a remedy.

3. In Lister v Hesley Hall Ltd [2002] 1 AC 215 at para 65 Lord Millet said:

*A Vicarious Liability is a species of strict liability. It is not premised on any culpable act or omission on the part of the employer; an employer who is not personally at fault is made legally answerable for the fault of the of his employee. It is best understood as a loss distribution device.≡*

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<sup>1</sup> Paul Rose QC practice from Old Square Chambers, 10- 11 Bedford Row London WC1R 4BU. He was counsel for the claimant in the case of Mattis v Pollock (trading as Flamingos Nightclub) [2003] 1WLR 2158 which is discussed in this paper.

4. This paper attempts to trace the development of this area since ground breaking decision of the Canadian Supreme Court in Bazley v Curry in 1999.

5. **The Original Formulation**

6. The classic statement of the law until the recent cases was the formulation in *Salmond, Law of Torts* : a wrongful act is deemed to be done in the course of the employment:

*Alf it is either(1) a wrongful act authorised by the master, or (2) a wrongful and unauthorised mode of doing some act authorised by the master.≡* However, frequently when citing the principle of vicarious of liability practitioners stop there. Whereas, the whole statement by Salmond needs to be considered: he continued:

*Alf it is clear that the master is responsible for acts actually authorised by him: for liability would exist in this case, even if the relation between the parties was merely one of agency and not one of service at all. But a master, as opposed to the employer of an independent contractor is liable even for acts which he has not authorised, provided they are so closely connected with the acts which he has authorised that they may rightly be regarded as modes - although improper modes - of doing them.≡*

7. As observed by Lord Steyn in the Privy Council decision of Bernard v Attorney General of Jamaica [2004] UKPC 47 the classic formulation without reference to the additional words presented difficulties for victims of the deliberate wrong doing or criminal act on the part of the tortfeasor - how could it be said to be an unauthorised mode of doing an authorised act? Consideration of some earlier cases illustrate the difficulties encountered

Warren v Henlys Ltd [1948] 2 All ER 935:

A Petrol pump attendant erroneously believed that the plaintiff had tried to drive away without paying and was verbally aggressive to the plaintiff. The plaintiff paid

for the petrol and told the attendant he would inform his manager. The attendant assaulted the plaintiff. It was held that the defendants were not liable for the wrongful act of the attendant as it was an act of personal vengeance and was not done in the course of his employment, it not being an act of a class which the employee was authorised to do or a mode of doing an act within that class.<sup>2</sup>

**Daniels v Whetstone Entertainment** [1962] 2 LLR 1

The Plaintiff was visiting a dance hall in St Helens<sup>3</sup>. There was an altercation on the dance floor, the doorman ( Mr Allender) became involved, as to what follows I defer to the descriptive powers of the judge: *AIn the course of this fracas an unfortunate thing happened. Somebody grabbed the private parts of Allender. This unquestionably put him in a towering rage, as it might well do. Apart from the pain which such an assault caused him, he thought - to summarise what he himself said- that an act of this kind was not in accordance with the established standards of fair play in St Helens.*≡ This led to an assault on the plaintiff. The plaintiff was evicted. The manager instructed Allender to return in doors. He refused and after a short while came across the plaintiff outside the premises on the pavement minding his own business. Allender came up to him and struck him causing him to fall and fracture his skull. Club liable for first assault but not the second.

It was held that although Allender was authorised to evict people from the club, there was a complete break between the authorised part of the operation and the second

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<sup>2</sup>The law report contains within the Judgement of Hilbery J. this rather quaint account by the petrol pump attendant as recorded by the police officer who attended the scene: ABeaumont (petrol pump attendant) said: AI asked Warren if he was going to report me to the firm and he said >yes=, so I gave him one on the chin to get on with. I hope he is not hurt too much.≡

<sup>3</sup>Davies LJ in his judgement when dealing with the plaintiff said: *AI t is right that I say at once that the learned judge went out of his way to say that these were four respectable well behaved young men, not thugs or >Teddy Boys=or anything of that kind, as perhaps one might expect on such an occasion at this place*≡!!! Had Davies LJ been there??.

assault. Allender had repudiated the managers orders and his assault was an act of personal vengeance. The outcome in this case is to be contrasted with how the Court of Appeal dealt with a not dissimilar case in 2003 in Mattis v Pollock [2003] 1WLR 2158 see Judge L.J's comments at paragraph 28: "*We need not analyses whether the decision in the Daniels case would survive the clarification of principle in the Dubai Aluminium case [2003] 2 AC 366, that vicarious liability could be established even when an employee was "acting contrary to express instructions."*"

8. **The New Approach.**

9. The new approach emanated from Canada. In Bazley v Curry 174 DLR 45. A children=s foundation, non profit making, operated two residential care facilities for the treatment of emotionally disturbed children. The foundation acted like parents to the children. Unknowingly the foundation hired a paedophile, notwithstanding having undertaken checks which suggested he was a suitable employee. He sexually abused one of the children.
10. A clear theme in the judgment of the court, delivered by McLachlin J, was that the underpinning rationale is policy and loss adjustment - who should carry the loss?
11. The headnote states: *ATwo fundamental policy concerns underlie the imposition of vicarious liability: the provision of a just and practical remedy for the harm, and deterrence of future harm. With respect to the first concern, the employer puts into the community an enterprise which carries with it certain risks. When those risks materialise and cause injury to a member of the public despite the employer=s reasonable efforts, it is fair that the person who creates a risk bear the loss when the risk ripens into harm. With respect to the second policy concern, fixing the employer with responsibility for the employee=s wrongful act, even when the employer is not negligent, may have a deterrent effect.....Considering the policy issues involved the courts should be guided by the following principles in determining whether an employer is vicariously liable for an employee=s unauthorised, intentional wrong in*

*cases where precedent is inconclusive:*

- (1) *They should openly confront the question whether liability should lie against the employer, rather than obscuring the decision beneath semantic discussions of >scope of employment= and >mode of conduct=*
  
- (2) *The fundamental question is whether the wrongful act is sufficiently related to conduct authorised by the employer to justify the imposition of vicarious liability. Vicarious liability is generally appropriate where there is a significant connection between the creation or enhancement of a risk and the wrong that accrues therefrom, even if unrelated to the employers desires. Where this is so, vicarious liability will serve the policy considerations of provision of an adequate and just remedy and deterrence. Incidental connections to the employment enterprise, like time and place( without more) will not suffice. Once engaged in a particular business it is fair that an employer be made to pay the generally foreseeable costs of that business. In contrast to impose liability for costs unrelated to the risk would effectively make the employer an involuntary insurer.*
  
- (3) *In determining the sufficiency of the connection between the employers creation of risk and the wrong complained of, subsidiary factors may be considered. These may vary with the nature of the case. When related to intentional torts, the relevant factors may include but are not limited to the following:*
  - a) *the opportunity the enterprise afforded the employee to abuse his or her power.*
  - b) *the extent to which the wrongful act may have furthered the employer's aims ( and hence be more likely to have been committed by the employee)*
  - c) *the extent to which the wrongful act was related to friction, confrontation or intimacy inherent in the employer's enterprise;*
  - d) *the extent of the power conferred on the employee in relation to*

*the victim;*

- e) *the vulnerability of the potential victims to wrongful exercise of the employee's power.....*

*....Trial Judges are required investigate the employee's specific duties and determine whether they gave rise to special opportunities for wrongdoing.*

12. The ground breaking nature of this decision was highlighted by virtue of the fact that there had been an English Court of Appeal decision on very similar facts- **S.T. v North Yorkshire County Council** [1999]IRLR 98 where the court declined to find vicarious liability. Indeed when **Lister v Hesley Hall** was before the Court of Appeal the Court held that it was bound by the **North Yorkshire County Council** decision and therefore declined to find vicarious liability. However, McLachlin J robustly criticised the decision and declined to follow it see p.57 of the report. She then reviewed the policy arguments for determining whether vicarious liability should be found. She emphasised the creation of risk/ripening to harm argument. The court then enunciated the test set out in italics above.
13. **Bazley** was decided in June 1999. It was not reported when **Lister** was before the Court of Appeal. However, it was prominent in the arguments for the appellants in the House of Lords. Lord Steyn said in his speech: *>My Lords, I have been greatly assisted by the luminous and illuminating judgments of the Canadian Supreme Court in **Bazley v Curry** ....and **Jacobi v Griffiths** 174 (DLR) 71. Wherever such problems are considered in future in the common law world these judgments will be the starting point. On the other hand it is unnecessary to express views on the full range of policy considerations examined in those decisions.≡*
14. **Lister** was another case involving abuse of children by a warden of a boarding house attached to a school. The school was held not to be vicariously liable at first instance and in the Court of Appeal. The earlier appellate level decision binding the court was **Trotman v North Yorkshire County Council** in which Butler Sloss L.J. stated: *ABut in the field of serious sexual misconduct, I find it difficult to visualise circumstances in*

*which an act of the teacher can be an unauthorised mode of carrying out an authorised act...≅ thereby until House of Lords authority shutting the door for vicarious liability in cases of that nature.*

15. In arriving at its decision in Lister the House of Lords held that Trotman was wrongly decided which opened the way to review this type of case Lord Steyn concluded his speech:

*A Employing the traditional methodology of English law, I am satisfied that in the case of the appeals under consideration the evidence shows that the employers entrusted the care of the children in Axenholme House to the warden. The question is whether the warden's torts were so closely connected with his employment that it would be fair and just to hold the employers vicariously liable. On the facts of the case I would say the answer is yes After all, the sexual abuse was inextricably interwoven with the carrying out by the warden of his duties in Axenholme House. Matters of degree arise. But the present cases clearly fall on the side of vicarious liability.≅ Thus the test of >close connection= which was advocated by McLachlin J in Bazely was adopted by Lord Steyn. And whilst it is right to acknowledge it had existed in the full citation of Salmond's statement going back over nearly a 100 years – the test was undoubtedly given new prominence by the Canadian Supreme Court decision. Lord Clyde came to a similar conclusion endorsing the test of 'close connection' and finding such to exist on the facts, see paragraph 50:*

*It appears that the care and safekeeping of the boys had been entrusted to the respondents and they in turn had entrusted their care and safekeeping so far as the running of the boarding house was concerned to the warden. That gave him access to the premises, but the opportunity to be at the premises would not in itself constitute a sufficient connection between his wrongful actings and his employment. In addition to the opportunity which access gave him, his position as warden and the close contact with the boys which the work involved created a sufficient connection between the acts of abuse and the work which he had been employed to do.≅*

Although finding the school liable Lord Hobhouse was not prepared to follow the

policy based reasoning in **Bazley** and the reasoning in his speech is distinct and separate from Lord Steyn=s Lord Clyde=s Lord Hutton’s and Lord Millet’s.

16. Whilst it is clear that **Lister** enunciated unequivocally that in cases involving deliberate wrongdoing the ‘close connection’ test applied in conjunction with whether that closeness made it fair and just to hold the employer liable, it did perhaps raise another question - namely what type or degree of connection will be regarded as sufficiently close. That point was made by Lord Nicholls in his speech in **Dubai Aluminium Co Ltd v Salaam** [2003] AC 366
  
17. The question of vicarious liability for the acts of a solicitor fell to be determined under the Partnership Act 1890. The party seeking to avoid paying an indemnity argued that the fraudulent acts of the individual were no part of the business of a solicitor and accordingly no liability had in fact rested with the firm. The House of Lords disagreed.
  
18. Lord Nicholls said this at para 21:  
*Whether an act or omission was done in the ordinary course of a firm=s business cannot be decided simply by considering whether the partner was authorised by his co partners to do the very act he did. The reason for this lies in the legal policy underlying vicarious liability . The underlying legal policy is based on the recognition that carrying on a business enterprise necessarily involves risks to others. It involves the risk that others will be harmed by wrongful acts committed by the agents through whom the business is carried on. When those risks ripen into loss, it is just that business should be responsible for compensating the person who has been wronged.≡*  
This of course is the analysis postulated put by McLachlin J in **Bazley**. He continued :  *Aif then authority is not the touchstone what is? Lord Denning once said that on this question the cases are baffling... Perhaps the best general answer is that the wrongful conduct must be so closely connected with acts the partner or employee was authorised to do that, for the purposes of the liability of the firm or employer to*

third parties the wrongful act may fairly and properly be regarded as done by the partner while acting in the ordinary course of the firm's business.....McLachlin J said in *Bazley v Curry*: **A... the policy purposes underlying the imposition of vicarious liability on employer are served only where the wrong is so connected with the employment that it can be said that the employer introduced the risk of the wrong ( and is thereby fairly and usefully charged with its management and minimisation).** This represents a clear endorsement of the policy arguments expounded in *Bazley*. Lord Nicholls added at paragraph 25: “This “close connection” test focuses attention in the right direction. But it affords no guidance on the type or degree of connection which will normally be regarded as sufficiently close to prompt the legal conclusion that the risk of the wrongful act occurring, and the wrongful act, should fall on the firm or the employer rather than the third party who was wronged .....26. This lack of precision is inevitable given the infinite range of circumstances where the issue arises.....Essentially the court makes an evaluative judgment in each case, having regard to all the circumstances and, importantly, having regard also to the assistance provided by previous court decisions.” Lord Slynn and Lord Hutton agreed with Lord Nicholl's reasoning. Lord Millett also gave a speech of substance and he reiterated that vicarious liability is a loss adjustment device based on social and economic policy. At para 123 he said: *In Lister .... several of your Lordships observed that the traditional Salmond test for determining whether an employee's act was in the course of his employment is not happily expressed when applied to the case of intentional or fraudulent wrongdoing. Sexually assaulting a boy is not an improper mode of looking after him. It is an independent act in itself, not an improper mode of doing something else... But these differences are immaterial . If regard is paid to the closeness of connection between the employee's wrongdoing and the class of acts which he was employed to perform, or to the underlying rationale of vicarious liability there is no relevant distinction to be made between performing an act in an improper manner and performing it for an improper purpose or by an improper means.≡*

Finally quoting from Lord Millett's speech: at para 129:

*But the circumstances in which an employer may be vicariously liable for his*

*employee ⇒ intentional misconduct are not closed. All depends on the closeness of the connection between the duties which, in broad terms, the employee was engaged to perform and his wrongdoing ⇐*

22. The two House of Lords= cases have it is submitted:
  1. Adopted the test of “close connection” in respect of vicarious liability involving deliberate wrongdoing.
  2. Adopted the underlying policy rationale that he who creates risk should pay when risk ripens.
  
23. A third part of the analysis in **Bazley** was acknowledged by the English Courts as being of assistance in determining issues of vicarious liability in decision of **Mattis v Pollock (trading as Flamingos Nightclub) [2003] IWL R 2158** a decision of the Court of Appeal.
  
24. The facts were as follows: the claimant and a friend visited a nightclub run by the defendant. For no good reason they were refused entry by a doorman C, who acted at the behest of the owner. C was the eventual assailant of the claimant. C was aggressive and the court found that there had been an earlier serious incident involving C when he threw a customer across the floor. C was specifically employed to intimidate - he was 6' 8" and weighed 20 stone. He was unlicensed. On the day of the assault the claimant attended the club again. After he had arrived his friend from the earlier visit also visited the club. C on seeing the friend told him he was not allowed in the club and put his arm around him and pulled him towards C. A scuffle broke out, C was himself struck by a bottle. The claimant had at one point attempted to pull C away from attacking one of his friends. Because C was outnumbered he fled the club. He returned to his flat which was about 500ms from the club and armed himself with 2 knives. About 15 to 20 minutes after C had fled the club he reappeared about a 100 ms away from the club where he saw the claimant and others. He ran up to the claimant and stabbed him in the back, severing his spinal chord - saying >I=ll

teach you to fuck with me.=. C was sentenced to 8 years.

25. The judge dismissed the claim against the club owner holding that the time elapsing between C leaving the club and the incident meant that the events were not one incident and there was an insufficiently close connection between C=s employment and the assault.
26. The Court of Appeal overturned the decision. The reasoning is of interest. At para 20 Judge LJ said: having posed the close connection test: *AIn answering this question we have borne in mind the further clarification of several important features of the principles relating to vicarious liability conveniently summarised by Lord Millet in the **Dubai Aluminium** case [2002] 3WLR 1913, 1941 -1942 para 12. It is **Ano answer to claim against the employer to say that the employee was guilty of intentional wrongdoing, or that his act was not merely tortious but criminal. Or that he was acting exclusively for his own benefit, that he was acting contrary to instructions, or that his conduct was the very negation of his employers duty... vicarious liability is not necessarily defeated if the employee acted for his own benefit.***≡

At the claimant's invitation in that case the Court, in answering the close connection question, was invited to consider the list of relevant considerations referred to by McLachlin J in the case of **Bazley**. Judge LJ observed at paragraph 21:

*"Mr Rose, for the claimant, drew attention to the decision of the Supreme Court of Canada in **Bazley v Curry** (1999) 174 DLR (4th) 45. When considering a claim against an employer based on a tort deliberately committed by an employee, a number of distinct factors may be relevant. These include, at p 65:*

*"(a) the opportunity that the enterprise afforded the employee to abuse his or her power; (b) the extent to which the wrongful act may have furthered the employer's aims (and hence be more likely to have been committed by the employee); (c) the extent to which the wrongful act was related to friction, confrontation or intimacy inherent in the employer's enterprise; (d) the extent of power conferred on the employee in relation to*

*the victim; (e) the vulnerability of potential victims to wrongful exercise of the employee's power."*

*While we acknowledge the value of this guidance, and in the present context paragraphs (b) and (c) in particular, the list is not and is expressly stated not to be either complete or conclusive. Mr Browne, for the defendant, formulated a different, forensically attractive list of considerations, which, if complete, and answered as he submitted they should be, would have led to the dismissal of the appeal. Again, however, although his list too was valuable, it was incomplete and in any event we should not have agreed with all his suggested answers to the questions he had formulated."*

27. On the facts of the case the Court of Appeal concluded: *A This incident certainly developed in stages, at each of which it might have petered out... The stabbing of Mr Mattis represented the unfortunate and virtual culmination of the unpleasant incident which had started within the club, and could not fairly and justly be treated in isolation from earlier events, or as a separate and distinct incident. Even allowing that Cranston's behaviour included an important element of personal revenge, approaching the matter broadly, at the moment that when Mr Mattis was stabbed, the responsibility of Mr Pollock for the actions of his aggressive doorman was not extinguished. Vicarious Liability was therefore established.*≡
28. A point which was emphasized in front of the Court of Appeal was that this was a classic 'risk ripening' case. Doormen are employed to intimidate, there is a perennial risk of friction. The simmering risk of violence was identified by Ward LJ in another doorman case **Vasey v Surrey Free Inns Plc** [1996] PIQR 373 at 378: *"The caricature of the bouncer at the disco door would show a gentleman of intimidating physical presence and menacing mien. Like all caricatures, it is revealing of an underlying reality which is that there is an expectation of violent confrontation with which the doorman is expected to cope."* I consider that the decision in **Mattis** is a product of the jurisprudence developed from the **Bazley** case and would likely have been decided differently but for that case and the line of authority which it propagated. One only

has to consider the outcome in the case of Daniels referred to above to detect the change in direction.

28. A further example of the application of the close connection test again in the context of extreme violence is the Privy Council case of Bernard v Attorney General of Jamaica [2005] IRLR 398. the claimant whilst making a call from a public phone was confronted by a man identifying himself as a police officer who demanded to use the phone. An altercation followed in which the police officer tried to grab the phone during the course of which he pulled out his service revolver and shot the claimant in the head. When the claimant awoke in casualty he was placed under arrest and handcuffed to the bed. The trial judge held that the defendant was vicariously liable for the actions of the police officer, however this was over turned by the Court of Appeal of Jamaica. The case came before the Privy Council where Lord Steyn articulating the reasons of the Board held that the defendant should be held vicariously liable. The fact that it was unclear whether the police officer was on duty at the time was held not to be material as a police officer may exercise his powers outside normal duty. Further the Privy Council – absent a finding by the court – assumed that the police officer was simply using his status as a police officer to queue jump and his call was not on police business. In allowing the appeal the Privy Council applied the principles set out above and explained the policy behind the close connection test. See the speech of Lord Steyn at paragraph 23: “*For example, in Lister the warden was acting exclusively in his own perverted interests. On the other hand, the Board is firmly of the view that the policy rationale on which vicarious liability is founded is not a vague notion of justice between man and man. It has clear limits. This perspective was well expressed in Bazley v Curry (1999) 174 DLR (4th) where McLachlin J observed (at 62):*

*'The policy purposes underlying the imposition of vicarious liability on employers are served only where the wrong is so connected with the employment that it can be said that the employer has introduced the risk of the wrong (and is thereby fairly and usefully charged with its management and minimisation). The question is whether there is a connection or nexus between the employment*

*enterprise and that wrong that justifies imposition of vicarious liability on the employer for the wrong, in terms of fair allocation of the consequences of the risk and/or deterrence.'*

*The principle of vicarious liability is not infinitely extendable.”* On the facts the Board held that permitting police officers off duty to carry loaded service revolvers created risks of the kind which materialised, linking that with the fact that the assailant at all times purported to act as a police officer justified the finding of vicarious liability

29. Another police case illustrates a point made in the final sentence of the quote above that the principle cannot be extended infinitely. In the case a **N v Chief Constable of Merseyside Police** [2006] EWHC 3041 (QB), the Chief Constable was held not to be vicariously liable in the following circumstances. A Police officer in full uniform, warrant card showing was sitting in the early hours of the morning in his own car outside a night club. The claimant was worse the wear for drink and a first aider from the club expressed his concern about the claimant to the police officer. He said he would ‘sort it’ and said to the claimant “I am the Police” He told her to get in the car and told the first aider he would take the claimant to the nearest Police station. In fact he drove her home, passing 3 police stations and raped and indecently assaulted her. Nelson J referred to the leading cases: **Bazley**, **Lister**, **Dubai Aluminium Bernard** and **Mattis**. He explained his reasoning in paragraph 35 of his judgment: *“When all the facts are taken into account it is my judgment that PC Tolmaer was merely using his uniform and position as a police officer as the opportunity to commit the assaults on the Claimant. That in truth is the nature of the connection between his employment and what he did. Unlike the warden in Lister he did not have a specific duty to care for the plaintiff entrusted to him by an employer who had such a duty. Nor was he purporting to perform a police function such as arrest, or enforcing police authority, as the officers were doing in Weir and Bernard respectively. The defendant owed no specific duty to the Claimant.”*

30. The final decision I refer to in this paper is the Court of Appeal decision in **Gravill v**

**Redruth Rugby Club** [2008] ICR 1222. In that case the claimant was a semi professional rugby player contracted to Halifax RFC and his assailant a second row forward with Redruth RFC and also a semi professional player. An altercation developed following a scrum involving the claimant and two Redruth Players one of whom backed away at which point the assailant threw a punch which caused a blow – out fracture of the right orbit. There was a contract of employment between Redruth RFC and the player involved. The case made its way to the Court of Appeal where Sir Anthony Clark MR gave the judgment of the Court. Having reviewed the authorities he stated at para 21: “As we see it, the authorities show that the essential question is that posed in **Lister's** case [2001] ICR 665 and adopted in **Mattis v Pollock** [2003] ICR 1335, namely whether the tort is so closely connected with the employment, that is with what was authorised or expected of the employee, that it would be fair and just to hold the employer vicariously responsible. In answering that question the court must take account of all the circumstances of the case, as Lord Steyn put it, looking at the matter in the round. The authorities show that it will ordinarily be fair and just to hold the employer liable where the wrongful conduct may fairly and properly be regarded as done while acting in the ordinary course of the employee's employment (per Lord Nicholls). This is because an employer ought to be liable for a tort which can fairly be regarded as a reasonably incidental risk to the type of business being carried on (per Lord Steyn). Further and in my view significantly he cited a short passage from **Bazely** spelling out the policy behind that decision and endorsing it in the instant case. See paragraph 28: “In the course of her judgment in **Bazley v Curry** (1999) 174 DLR (4th) 45, para 41, McClachlin J said that vicarious liability is generally appropriate where there is a significant connection between the creation or enhancement of a risk and the wrong that accrues therefrom, even if unrelated to the employer's desires. She added: “**Where this is so, vicarious liability will serve the policy considerations of provision of an adequate and just remedy and deterrence.**” We respectfully agree with her that those are indeed the relevant considerations. In our opinion both are in play here. Both the desirability of an adequate and just remedy for the claimant on the one hand and deterrence of the club by bringing home this liability on the other, so as to prevent or minimise the risk of foul play in the future, lead to the conclusion that it would be fair

*and just to hold that the club is vicariously liable on the facts of this case. Clubs are no doubt better placed than individual players to obtain insurance against liability of this kind, although we recognise that some insurers exclude liability for criminal acts.” This passage emphasises a point made by McLachlin J when she said : “If the choice is between which of two faultless parties should bear the loss it is fairer to place the loss on the party that introduced the risk and had the better opportunity to control it than on the victim of the wrongdoing.”*

28. **Conclusion**

29. I have no doubt that the decisions analysed above have led to a widening of the scope of vicarious liability and the creation of a new method of analysis. The law has not yet reached the point that any act by an employee in his employer=s time or on his employer=s premises will give rise to liability, however the class of cases where liability will be established has certainly increased. I think the non exhaustive list of relevant circumstances in applying the close connection test in Bazley is an invaluable tool in any future borderline cases.

Paul T Rose QC

February 2009

Old Square Chambers