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VICARIOUS/EMPLOYER'S LIABILITY IN COMMON LAW AND IN CIVIL LAW IN CANADA

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TABLE OF CONTENTS:

I. INTRODUCTION

Vicarious liability in common law (responsabilité du fait d'autrui in french) is defined as the liability that imputes responsibility of one person for the acts of another; it occurs when the law holds one person responsible for the misconduct of another, although he is himself free from personal blameworthiness or fault[1]. Vicarious liability is well-recognized in tort law (common law) where it is used as a means to transfer liability to an employer for the fault of employee[2]. In extracontractual civil liability[3] in Québec (civil law), the expression 'responsabilité du fait des autres' refers to different liability regimes (parents' liability, educators' liability)[4]. This includes the employers' liability (responsabilité des commettants ou employeurs in French)[5].

Vicarious liability is defined by precedent in torts whereas in Québec the employer's liability is defined by article 1463 Q.c.C (Québec Civil Code) and case law accompanying it[6]. They both are strict liability regimes[7]. Strict liability means that the employer's liability can be engaged even in the absence of fault on the part of the employer[8] and that the absence of fault is not a defense for the employer[9].

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[1] Government of Canada, *Termius Plus* (2022) <https://www.btb.termiumplus.gc.ca/tpv2alpha/alpha-eng.html?lang=eng&i=&index=alt&srchtxt=RESPONSABILITE%20FAIT%20AUTRUI>. In Canada, torts are governed by common law in all provinces except Québec that follows civil law principles in this area.

[2] Lee Stuesser, "Convicting the Innocent Owner: Vicarious Liability under Highway Traffic Legislation Criminal Reports" (1989) 67 C.R. (3d) 316.

[3] This is the Québec equivalent of the common law liability in tort. Government of Canada, *Bijural Terminology Records* (2022) <https://www.justice.gc.ca/eng/csj-sjc/harmonization/bijurilex/terminolog/not176.html>.

[4] Réseau du Québec, *La Responsabilité Civile : Vos droit et vos obligations* (2022) <https://www.avocat.qc.ca/public/iirespextrac.htm>.

[5] Baudouin, Jean-Louis & Deslauriers, Patrice & Moore, Benoît, *La responsabilité civile* Vol 1 (Yvon Blais, 8th ed. 2014) 809.

[6] Article 1463 Q.c.C. provides: *The principal is bound to make reparation for injury caused by the fault of his subordinates in the performance of their duties; nevertheless, he retains his remedies against them*. This corresponds to article 1054 of the Civil Code of Lower Canada (the predecessor of the Q.c.C.).

[7] Common law: Government of Canada, *supra* note 1. Common law and civil law: Nikolas De Stefano, "A Comparative Look at Vicarious Liability for Intentional Wrongs and Abuses of Power in Canadian Law" (2020) 2020 CanLIIDocs 1869, 3. For different theories (risk, guarantee) underpinning this liability regime in civil law see Baudouin, Deslauriers, Moore, *supra* note 5, 816s.

[8] Common law: Government of Canada, *supra* note 1. Civil law: Baudouin, Deslauriers, Moore, *supra* note 5, 812.

[9] Common law: J.W. Neyers, "The Theory of Vicarious Liability" (2005) 43 (2) Alberta Law Review 287, 294. In civil law, the employer can be exonerated in proving absence of the conditions to establish liability under this regime, force majeure or the victim's or third party's fault. Vincent Karim, *Les Obligations* 4th ed. Vol. 1 (Wilson & Lafleur, 2015) pp.1308-1309 citing case law and H.J. Alicia Soldevila, *La responsabilité pour le fait ou la*

In order to establish vicarious or employer's liability in both legal traditions the plaintiff needs to prove10: 1) a fault (civil law) or the tort of the employee (common law); 2) an employer-employee relationship and; 3) that the tort or fault was committed in the employee's scope of employment. As we are going to see, a lot of similarities but also differences denote the details of these three conditions.

The policies underlying the liability regimes in both legal traditions are the need to provide compensation to victims for their harm and the deterrence of future harm[11]. At the same time, when vicarious/employer's liability is not closely and materially related to a risk introduced or enhanced by the employer but is only coincidentally linked to it, it serves no deterrent purpose and relegates the employer to the status of an involuntary insurer or guarantor[12]. Fairness, therefore, to both the victim and the employer has to be taken into account regarding policy considerations underlying vicarious/employer's liability in both legal systems. In both legal cultures, tort and extracontractual liability lead to *restitutio in integrum*: the victim must be placed in the situation in which he/she would have been had it not been for the tort/fault[13].

The present study will examine the conditions of application of the vicarious (common law) and the employer's (civil law) liability regimes in Canada. It will identify the similarities and differences of the basic rules present in the two Canadian legal systems (Part II). The study will also critically analyze the recent adoption by some Québec cases of common law principles regarding the condition that the employee's tort should be committed within the scope of his/her employment (Part III).

II. CONDITIONS OF APPLICATION

(a) 1st condition: a fault (civil law) or a tort of the employee (usually negligence or an intentional tort, common law)[14].

In civil law, the employee's fault[15] is an express condition in article 1463 Q.c.C.[16] and, therefore, not based on precedent as is the case in common law. Further, the employer cannot avoid liability simply because the damage caused is the consequence of a crime or a

faute d'autrui et pour le fait des biens, Collection de droit 2020-2021, École du Barreau du Québec, vol. 5, *Responsabilité*, Montréal, Éditions Yvon Blais, 2020, EYB2020CDD89 (La Référence). For a comparative analysis of the civil law force majeure and the common law equivalent concept see M.Katsivela, "Canadian Contract and Tort Law: The Concept of Force Majeure in Quebec and Its Common Law Equivalent" (2011) 70 Rev. du Barreau Canadien, 69.

10 Common law: The Late Allen M. Linden, Lewis N. Klar, Bruce Feldthusen, *Canadian Tort Law* (Lexis Nexis, 16th ed. 2022) p. 551-552. Civil law: 1463 Q.c.C. *supra* note 6.

11 Common law: *Bazley infra* note 42 paras 29s. Civil law: *Borduas infra* note 92 para 146, 160 noting that this was the intent of the legislator, *Axa infra* note 86, para 59 for both legal traditions.

12 Civil law: *Havre infra* note 63. Common law: *Bazley*, *ibid* para 36.

13 *Laferrière c. Lawson*, [1991] 1 RCS 541, 1991 CanLII 87 (CSC) a case cited both in civil law and in common law.

14 Hereinafter we will refer to the employee's fault (civil law) or negligence-intentional tort (common law) as wrong or wrongdoing.

15 The notion of fault in civil law comprises intentional, non-intentional faults and other types of faults (regulatory, gross negligence etc). An intentional fault in civil law denotes an intent to cause damage. Baudouin & Deslauriers & Moore, *supra* note 5, 180. *La Royale du Canada* c. *Curateur public,* C.A., 2000 CanLII 10597 (QC CA) para 17 citing Baudouin.

16 The employee's mental disability may not allow the presence of a fault and cannot, therefore, justify the employer's liability. Baudouin, Deslauriers, Moore, *supra* note 5, 820.

criminal act of the employee[17]. On this point and regarding state employees, Q.c.C. article 1464 specifically states: "A subordinate of the State or of a legal person established in the public interest does not cease to act in the performance of his duties by the mere fact that he performs an act that is illegal, beyond his authority or unauthorized, or by the fact that he is acting as a peace officer."[18].

On the contrary, in common law, there are no equivalent legislative provisions to C.c.Q. article 1464. Apart from the fact that the Crown or other public authorities will not be vicariously liable under common law for torts committed by employees exercising independent discretion or independent authority conferred by statutory law or common law (for example, unlawful acts by police officers, torts of naval ship commanders, customs collectors), common law courts have traditionally been reluctant to hold the employer liable for the employees intentional rather than negligent wrongs[19]. However, these trends may be more nuanced today considering that provincial legislation may hold government entities liable for the torts committed by representatives and that recent case law has imposed vicarious liability on employers in general in the case of an employee's intentional wrongdoings including sexual assaults and theft[20]. For example, in *Evans v The Bank of Nova Scotia*21 the court held a bank may be liable for the unauthorized disclosure of customers' information by an employee. Also, in *Thiessen v. Clarica Life Insurance Co.*[22] the court of appeal confirmed the trial judge conclusion, holding the life insurance company liable and therefore bearing the risk of a defalcating life insurance representative who misappropriated clients' funds.

(b) 2nd condition: an employer-employee relationship. As stated, in both legal systems this condition denotes that there must be a close link between the person who commits the tort or fault and the person whom we seek to hold liable.

In both legal systems the presence of a salary is not determinative of the presence of this close link. A volunteer can hold the employer liable23. In civil law, a key criterion that has

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17 Baudouin, Deslauriers, Moore, *supra* note 5, 848.

18 See also *Guité c Québec, infra* note 71. De Stefano, *supra* note 7 p. 23, 24 for the *raison d'être* of this article.

19 For the vicarious liability of public authorities see Andrew Botterell, et al, *Fridman's The Law of Tort in Canada* 4th ed. (Carswell 2020) p. 318-319. *For the common law stance see Jacobi v. Griffiths*, [1999] 2 S.C.R. 570 (S.C.C.), at para. 44. See also *Plains Engineering Ltd. v. Barnes Security Services Ltd.* 1987 CarswellAlta 270 para 9.

20 On the presence of legislation in common law provinces see Andrew Botterell, et al, *Fridman's The Law of Tort in Canada* 4th ed. (Carswell 2020) p. 319-320. On recent case law: *Infra* notes 21-22, 42 and accompanying text for cases on theft and sexual assault.

21 2014 ONSC 2135. According to the court, even if the employee did not serve the employer's aim of generating profits on good loans, the other factors of *Bazley* (*infra* note 42s and accompanying text) were present (para 22). It has also been noted that the employee who steals a fur in a shop that cleans and repairs furs may hold the employer liable. As mentioned by *Alberta U Drive Ltd. v. Jack Carter Ltd. et al.*, 1972 CanLII 1092, 120-121.

22 2002 BCCA 501 that followed *Bazley*, holding the employer liable even if its representative was an independent contractor. Also, in *The Queen v. Levy Brothers Co. Ltd. and The Western Assurance Co.*, [1961] SCR 189 the Crown was found liable for the diamonds' theft by its employees (customs officers) who had access to them. Compare these cases with equivalent civil law cases, *infra* notes 66, 67 and accompanying text where the employer was not found liable. On the contrary, in *Royal Bank of Canada v. Intercon Security Ltd.,* 2005 CanLII 40376 (ON SC) the theft of bank funds committed by an employee of the bank's security company was not found sufficiently related to his employment based on *Bazley*, partly because the security company did not authorize the employee to be on the bank's premises when he was not responding to an alarm or was off duty and it did not authorize him to be in possession of any key to the bank's premises or any radio equipment when he was off duty.

23 Common law: Lauren Chalaturnyk and Jenna Chamberlain, "*Can I Be Liable for the Actions of My Volunteer?: Vicarious liability and volunteers*" in Thomas Kannanayakal et al, LawNow Magazine, 2020 44-5, 2020 CanLIIDocs 2545, 19. Civil law: Baudouin, Deslauriers, Moore, *supra* note 5, 838-838.

been used to determine an employer-employee relationship is the level of control that the employer may have over the employee[24]. This is evaluated based on the whole context of the relationship with an emphasis put on: the control of the employer over the performance of the employee's work (performance of the employee's work), the ownership of the work tools, the risk of loss or chance of profit, the obligation of personal performance and the integration into the company[25].

Under common law, although the control test (essentially the right to give orders and instructions to the employee regarding the manner in which to carry out his work) was the test traditionally applied to determine an employer-employee relationship, today, other tests (for example, the organization test, the enterprise test) may also apply; as a result, there is no universal test applied in this area26. In the leading case *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*(*Sagaz*)[27] the court stated that a central question in this area is whether the person who has been engaged to perform the services is performing them as a person in business on his own account (as is the case of an independent contractor) or an employee. In making this determination, although the level of control the employer has over the worker's activities is a factor to consider, other factors include – although not limited to - whether the worker provides his or her own equipment; whether the worker hires his or her own helpers; the degree of financial risk taken by the worker; the degree of responsibility for investment and management held by the worker, and the worker's opportunity for profit in the performance of his or her tasks[28].

These criteria are similar to the above-mentioned ones followed by civil law[29]. The similar criteria justify similar judicial conclusions. It has, therefore, been held in both legal traditions that a person who organizes and performs its work freely (for example, by determining specific tasks, working hours, hiring personnel) is not an employee but an independent contractor and cannot engage the liability of the employer[30]. On the contrary, an employer-employee relationship has been found to exist between a priest and a congregation or diocese employing the priest despite the less typical employee-employer relationship in this case[31].

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[24] Civil law: Baudouin, Deslauriers, Moore, *supra* note 5**.** 823.

[25] *Essor Assurances Placements-conseils inc. c Taillon*, citing other cases. *Gaulin c. Roy*, 2003 CarswellQue 2587 (CSQ) para 16s, Baudouin, Deslauriers, Moore, *supra* note 5, 830-831 for some of these criteria.

[26] *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.* 2001 SCC 59 paras 36-48. Andrew Botterell, et al, *Fridman's The Law of Tort in Canada* 4th ed. (Carswell 2020) 306-308.

[27] 2001 SCC 59 para 47 for what follows. This decision has been often cited by civil law courts in general and specifically on the criteria it related in this context (i.e. *Papaeconomou c. 177930 Canada inc.*, 2009 QCCQ 13039 para 50s).

[28] *Ibid* (Sagaz) para 47. See also *Fridman's The Law of Tort in Canada ibid* p. 308-309 detailing other factors that subsequent case law has taken into account such as who pays professional fees, liability insurance, continuing education, the method of remuneration (payment of a salary rather than a percentage of the billings), the presence of non-compete clauses.

[29] *Supra* note 25 and accompanying text.

[30] Common law: Sagaz *supra* note 26-27 para 49s. Civil law: Article 2099 Q.c.C. which provides: "The contractor or the provider of services is free to choose the means of performing the contract and, with respect to such performance, no relationship of subordination exists between the contractor or the provider of services and the client." See also *Lambert v. Blanchette*, 1925 CarswellQue 126 (Q.C.K.B.), *Quebec Asbestos Corporation v. Couture*, [1929] S.C.R. 166 (SCC); the latter has been cited in common law on other grounds.

[31] Common law: *Untel infra* note 54 (cited by common law and civil law case law and doctrine). Civil law: *Tremblay*, *infra* note 90.

Further, following both legal traditions two employers may both be held liable for their employee's negligence. In *Blackwater v Plint*[32], a common law case cited by Québec case law, both the Church and the Canadian Government have been held liable for the sexual assaults committed by an employee against aboriginal children at a residential school.

(c) 3rd condition: scope of employment: Both in common law and in civil law, the employee's wrongdoing must be committed in the scope of employment[33]. This third condition of the vicarious or employer's liability has been a focal point of debate in both legal traditions.

(c)(i): The scope of employment at common law

In the field of the employee's intentional wrongdoing and vicarious liability, the leading case is *Bazley v. Curry* (*Bazley*)[34]. In this case, a boy had been sexually abused by an employee of a non-profit organization that operated residential care facilities where children were treated for emotional disorders. The abuse took place in the organisation during the employee's work. The duties of the employee included attending to the intimate needs of the children.

In deciding this case, the supreme court of Canada did cite with approval the Salmond test according to which[35]: a master is not responsible for a wrongful act done by his servant unless it is done in the course of his employment. It is deemed to be so done if it is either (1) a wrongful act authorized by the master, or (2) unauthorized acts so connected with authorized acts that they may be regarded as modes (albeit improper modes) of doing an authorized act. Following Canadian case law, negligent performance of authorized acts fits under the first head of the Salmond test36. Tests that formerly applied (whether the employee was acting for his own benefit or for the benefit of the employer or whether the employer forbade the employee from doing something) do not have today the weight or materiality they once did[37]. It has, therefore, been held that the damage caused by employees who burn garbage while cleaning and cause a fire out of control damaging the building of the plaintiff render the defendant employer liable for the employees' negligence[38]. Likewise, a railway company was found vicariously liable for the negligence of its employee who did not keep proper look out leading to two persons' serious injuries when the train collided with a car at a railway crossing[39]. The court found that the employee was in the course of his employment[40]. Finally, the employer of a waitress who accidentally caused scalding injuries to the head and left hand of the infant plaintiff when a pot of boiling water or tea fell from a table in the restaurant into the bassinette occupied by the infant plaintiff, then aged 17 days, was held liable[41]. The court held that the waitress was in the course of her employment for the corporate defendant.

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[32] *Blackwater Plint*, [2005] 2 R.C.S. 3 for what follows. Civil law: *Tremblay infra* note 90 citing this case on this point. Baudouin, Deslauriers Moore *supra* note 5 p. 839-840 for civil law.

[33] *Supra* note 10 and accompanying text.

[34] *Bazley v. Curry*, [1999] 2 SCR 534 cited by civil law and common law cases.

[35] R F V Heuston; R S Chambers; John W Salmond, Sir, *Salmond and Heuston on the Law of Torts* 18th Ed. (Sweet & Maxwell 1981) 437, 438 for what follows.

[36] *Sickel v. Gordy*, 2008 SKCA 100 para 28 citée en common law mais pas au Québec.

[37] G.H.L. Fridman *The Law of Torts in Canada* 2nd Ed. (Carswell, 2002) 293. It has also been noted that the course of employment cannot be limited to the time or place of the specified work which the person is employed to do. *Alberta U Drive Ltd. v. Jack Carter Ltd. et al.*, 1972 CanLII 1092, 121.

[38] *Edmonton (City) v. W. W. Sales Ltd.* [1942] SCR 467 citing the Salmond test. See also *Fenn v. City of Peterborough* (1979), 1979 CanLII 77 (ON CA), aff'd [1981] 2 S.C.R. 613.

[39] *Chand v. Martin* (2017), 2017 BCSC 660 (B.C. S.C.) citing the Salmond test; affirmed 2018 BCCA 41 (B.C. C.A.)

[40] *Ibid* para 79 mentioning the Salmond test and *Bazley* (*infra* note 42).

[41] *Aubertin v. Sandy's Pancake House Ltd.* (1980), 22 B.C.L.R. 315 (B.C. S.C.) for what follows.

However, in *Bazley* the focus was on the employee's intentional wrongdoing and not on his negligence. The court decided in this case that rather than obscuring the decision beneath semantic discussions on the "scope of employment" and the "mode of conduct", the fundamental question is whether the employee's wrongful act was sufficiently related to conduct authorized by the employer[42]. In other words, vicarious liability will be present where there is a significant connection between the creation or enhancement of a risk and the wrong that accrues therefrom - incidental connections to the employment like time and place (without more), will not suffice[43]. According to the court, factors materially increasing the risk of harm include but are not limited to the following[44]:

(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) [45];
(c) the extent to which the wrongful act was related to friction, confrontation or intimacy inherent in the employer's enterprise; [46]
(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.

Bazley's risk enhancing factors underlie precedent and policy considerations (deterrence, compensation, fairness), – two elements that should also be examined in establishing vicarious liability[47]. In effect, according to *Bazley,* a court should determine if there is precedent that unambiguously establishes whether the facts in the specific case give rise to vicarious liability. If no precedent exists, the court must then determine whether vicarious liability should be imposed in light of the broader policy rationales of this regime. The risk of wrongdoing that the employer creates or exacerbates underlie both policy considerations and precedent[48]. According to the court it is difficult to imagine a job with a greater risk for child sexual abuse[49]. Further, fairness and the need for deterrence in this critical area of human conduct suggest that as between the non-profit organization that created and managed the risk and the innocent victim, the non-profit organization should bear the loss. According to Bazley the policy considerations that justify imposition of vicarious liability for an employee's sexual misconduct are unlikely to be satisfied by incidental considerations of time and place[50]. For example, an incidental or random attack by an employee that merely happens to take place on the employer's premises during working hours will scarcely justify holding the employer liable. Such an attack is unlikely to be related to the business the

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42 *Bazley, supra* note 34 para 41. See also *B.(P.A.) v. Children's Foundation*, *supra* note 36 referring to the Salmond test. See also *Sickel Estate v. Gordy*, 2008 SKCA 100 para 28.

43 *Bazley*, *ibid* para 41.

44 *Bazley, ibid.*

45 The fact that the employee's wrongful conduct does not benefit the employer is not, any longer, dispositive of the issue *British Columbia Ferry Corp. v. Invicta Security Service Corp.*, 1998 CanLII 15029 (BCCA) para 48-49.

46 Following precedent, a bank employee stealing a client's money cannot be put in a situation of friction (unless one believes that any money-handling operation generates an inexorable temptation to steal) and cannot be said to further the bank's aims. Nevertheless, courts considering this type of case have increasingly held employers vicariously liable even when the employee's conduct is antithetical to the employer's business. *Bazley*, *ibid* para 20 reasoning on cases prior to *Bazley*.

47 *Bazley, ibid* para 37, 15.

48 *Bazley, ibid* para 37.

49 *Bazley, ibid* para 58 for what follows.

50 *Bazley, ibid* para 42 for what follows.

employer is conducting or what the employee was asked to do and vicarious liability in this case would not have a significant deterrent effect - short of closing the premises or discharging all employees, little can be done to avoid the random wrong.

Such an incident occurred in *Jacobi v. Griffiths*[51] which was decided in the same year as Bazley. In this case, a boys and girls club employee, Griffiths was employed to supervise volunteer staff and organize recreational activities and outings. Griffiths sexually abused the Jacobi brother and, in another incident, he did the same with the Jacobi sister after work hours at Griffiths' home following several lesser incidents, including one incident of sexual touching in the Club's van. Jacobi's sued the club on the basis of vicarious liability.

The SCC did not hold the club vicariously liable. According to the court the club's enterprise was to offer group recreational activities for children. The opportunity that the Club afforded Griffiths to abuse whatever power he may have had was slight. The sexual abuse only became possible when Griffiths managed to subvert the public nature of the activities. It is not enough to postulate a series of steps each of which might not have happened "but for" the previous steps". Citing *Bazley*, the court stated that mere opportunity to commit a tort did not suffice to impose no-fault liability[52]. Regarding Bazley's policy considerations of compensation and deterrence the court noted that in the presence of non-profit organizations such as the defendant, it was unlikely for them to be able to offset litigation losses. If held liable, such organizations would simply stop recreational activities that benefit children.

Likewise, in *E.B. v. Order of the Oblates of Mary Immaculate in the Province of British Columbia*[53] the plaintiff was sexually abused for many years as a child by a residential school's maintenance man. The residential school was run by the Order of the Oblates of Mary Immaculate that was not found vicariously liable by the court of appeal and the supreme court of Canada. Following *Bazley*, the supreme court held that the employee was assigned no supervisory duties or power over the students. Intimacy with students was prohibited. As a result, there was no 'sufficient connection' between his duties and his wrongful conduct to

[51] [1999] 2 SCR 570 for what follows. This case is cited by common law and Québec cases (such as *Axa*, *Borduas infra* notes 86, 92).

[52] *Jacobi,* para 45 citing other Supreme court cases. It has also been held that the taxi company which has a system to dispatch taxis (not owned by it) to clients is not vicariously liable to a victim of a sexual assault committed by a taxi driver. *Ivic v. Lakovic,* 2016 ONSC 5750 para 32-36 affirmed on appeal, leave for appeal refused (SCC). Likewise, in *E.D.G. v. Hammer*, [1998] B.C.J. No. 992 (QL) (S.C.), Vickers J. found there was no vicarious liability of a school board for the sexual assault committed by a janitor. Regarding policy considerations the court stated that if school boards are to become insurers for all of the actions of their employees, then that is a policy choice that must be made by Members of the Legislative Assembly. Also attempts to hold school boards vicarious liability for sexual abuse of students by teachers have not always worked. In *A.B. v. C.D.,* 2011 BCSC 775 the Commission was not held liable following *Bazley*'s risk enhancing factors: among them appears the modest opportunity offered by the school board for a teacher to engage in sexual intercourse with a student. Also, in *H. (S.G.) v. Gorsline* 2001 ABQB 163, 2001 CarswellAlta 277 the school board was not held vicariously liable for the sexual assault of the physical education teacher towards the student. However, a contrary conclusion was reached in *Langstaff v. Marson*, 2013 ONSC 1448: the school board was held vicariously liable for the sexual assault of a teacher towards a student because it allowed the presence of a mini-zoo in the teacher's classroom which allowed the teacher the opportunity to be alone with at least the plaintiff in the classroom during recess, after hours and on weekends -.

[53] 2005 SCC 60 a leading case in common law cited with approval by civil law cases including *Axa, infra* note 86.

impose vicarious liability. This case required, therefore, that the increased risk must derive from the specific task assigned by the employer[54].

(c)(ii): The scope of employment at civil law – comparative aspects.

At civil law, and contrary to the two previous conditions underlying the employer's liability and the similarities they present with their common law equivalents, the third condition of article 1463 CcQ (the employee's fault must be committed within the scope of employment) is based on criteria that are at times similar and at times different from common law. The following two considerations underline this condition of the employer's liability[55]: a) the employee must remain within the general framework of his/her duties and; (b) the fault must benefit, at least partially the employer.

a) the general framework of the employee's duties: if the employee does not perform well his/her duties (for example, a trucker drives intoxicate[56] or an educator makes discriminatory comments towards a student in the cafeteria[57]) the liability of the employer may be engaged. Even when an employee does not perform his/her duties well before or after hours (for example, if a police officer causes an accident while off duty but while performing police related activities[58]) or disobeys the employer's instructions (for example, the driver of an oil truck is intoxicated and causes an accident after a call for an emergency delivery)[59], the employer's liability may be engaged. In other words, disobeying orders or not performing well duties outside work hours are not determinative factors excluding the employer's liability. This approach resembles the one present at common law. As stated earlier, the place or time of the employee's wrongdoing, his-her disobedience of orders or the negligent performance of a task are not determinative factors excluding vicarious liability at common law[60].

However, the second consideration taken into account in civil law in order to establish that the fault was committed within the scope of the employment, the benefit test, is only in part similar in both legal cultures as we are going to see from the analysis that follows.

b) The benefit test: this test seeks to determine if the employee's wrongdoing (intentional or negligent) sought to benefit his/her employer at least in part. The question to ask in applying this test is if one of the primary objectives that the employee targeted by his/her fault was the satisfaction of a dominant interest or direct benefit to the employer[61]. After *Havre* that we are going to examine as follows, this question usually relies on the subjective motives of the wrongdoer rather than any objective risk factors linked to the employer's enterprise.[62]

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[54] Linden, Klar, Feldthusen, *supra* note 10 p. 565. On the contrary, in *John Doe v Bennett*, [2004] 1 SCR 436 (in French *Untel v Bennett* (2004) 1 RCS 436), Father Kevin Bennett, a Roman Catholic priest in the Diocese of St. George's, sexually assaulted boys in his parishes. Following *Bazley*, the SCC of Canada held the diocese liable due to the opportunity the work afforded to commit these acts. As we are going to see later, this case has been cited by common law and civil law cases.

[55] *Havre des Femmes inc. c. Dubé*, (1998) CanLII 13167 (QC CA).

[56] *Lambert v. Canadian Import Co.*,1961 CarswellQue 111 (CS).

[57] *Gallardo c. Bergeron*, 2012 QCCA 908.

[58] *Guité c Québec*, 2006 QCCA 354.

[59] *Lambert v Canadian Import Co.*,:1961 CarswellQue 111, *supra* note 56. See also Baudouin, Deslauriers, Moore, *supra* note 5 p. 852 s.

[60] *Supra* note 37, 43 and accompanying text.

[61] Baudouin, Deslauriers, Moore, *supra* note 5, 859.

[62] De Stefano *supra* note 7 p. 18.

The important case in this area is *Havre des Femmes c Dubé* (*Havre*)[63] which involved an employee's intentional wrongdoing. In this case, Denis, an employee at a shelter for vulnerable women, convinced Laurette, a patient of *Havre* suffering from alcoholism to come to her house and live with her. At the shelter Denis had a telephone conversation with the daughter of Laurette following which she started inquiring Laurette about the value of her house, car and financials. Denis learnt about an amount of money Laurette had received as a result of a divorce settlement. During the stay of Laurette at Denis house, she was served alcohol and was convinced to make her substantial transfers of money. When Laurette regained control of her acts and tried to be reimbursed her money, she sued Denis and Havre for the money she had lost. The Court found that in taking advantage of the victim at her home Denis was acting in her own interest and not in the interest or benefit of the employer. Denis also disobeyed the orders of Havre that did not allow employees to house patients. The court also noted that holding the employer liable for the employee's personality disorders[64] could transform institutions such as Havre to guarantors of their employees[65]. The employer was therefore, not held liable in this case based on the benefit test.

Following *Havre*, it has also been held that the employer is not liable for the employee who facilitated the entry of thieves into the employer's premises leading to vehicle theft[66]. According to the court, the employee was pursuing, by his acts, a personal benefit and not a benefit to the employer. In another case, UPS was also not held liable for a package that an employee stole on the basis that this act did not benefit the employer[67].

Havre has not been mentioned by common law cases. However, it has been argued that if *Bazley* was applied to *Havre*, the center would have been found liable for increasing the risk of harm, in part because 'but for' the employee's work at the center the employee would not have met the victim (opportunity afforded by the employer)[68]. We respectfully disagree with this opinion. Following *Bazley* and as previously mentioned "mere opportunity" to commit a tort, in the common "but-for" understanding of this phrase, does not suffice to establish vicarious liability following *Bazley*'s risk enhancing factors[69]. The employment must not only provide the locale or the bare opportunity for the employee to commit his or her wrong, it must materially enhance the risk, in the sense of significantly contributing to it, before it is fair to hold the employer vicariously liable[70]. In this regard, it is questionable if Havre had

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[63] (1998) CanLII 13167 (QC CA) not cited by common law cases. In *Curley v Latreille* (1919) 28 BR 388, to which the current state of the law in Québec can be traced back following *Havre*, the employee used the employer's vehicle without authorization and for his personal benefit and caused an accident. The court did not hold the employer liable: the act occurred outside the scope of employment.

[64] According to a judicial trend, a damage caused due to the personality traits of the employee (*vices de personnalité*) may engage the employer's liability. This judicial trend favors victims mostly in cases of sexual harassment, discrimination or racist comments. Karim, *supra* note 9, 1315, Baudouin, Deslauriers, Moore, *supra* note 5, 849.

[65] This statement shows that Québec courts do take into account policy considerations (this particular one favoring the employer) while commenting on legislative provisions.

[66] *Zurich Canada inc c Services Transport André Marcoux ltée*, 2016 QCCS 2566 paras 122-131. The case also distinguished *Axa*, *infra* note 86 and accompanying text because in this case there was a benefit to the employer. See also *Patenaude c Caisse Populaire Desjardins de Ville-Émard*, 2011 QCCS 6086 along the same lines.

[67] *Murphy v United Parcel Service China*, 2016 QCCQ 5550 para 64. See similar theft cases at common law that have held the employer liable, *supra* notes 21, 22 and accompanying text.

[68] Louise Langevin, *Acte criminel de l'employé et responsabilité objective de l'employeur : pour une redéfi- nition du critère de rattachement* (2013) 47 RJTUM 31, 61-62 < https://ssl.editionsthemis.com/uploaded/revue/article/10419_Langevin.pdf> 61s.

[69] *Supra* note 52 and accompanying text and Andrew Botterell, et al, *Fridman's The Law of Tort in Canada* 4th ed. (Carswell 2020) p. 344 citing relevant case law.

[70] *Bazley supra* note 42 para 40.

created a significant link between the employment and the fault in question. The organization employed Denis and her tasks included being in contact with vulnerable victims. However, when Denis committed the fraud, she was not performing her work duties. She was at her home and she committed the fraud for her personal benefit and against the employer's instruction not to house patients. Due to these facts, the significant link present between the wrongdoing and the employer's liability based on the risk enhancing factors is diluted and probably insufficient to hold the shelter liable following *Bazley*.

On the contrary, in the Québec case *Guité c Québec* (Procureur général)[71] where a police officer attacked and injured a person outside work hours but while performing police duties the court held the employer liable[72]. In reiterating that illegal acts can engage the employer's liability, the court found that the police officer was within the scope of his employment based on the benefit test. Along the same lines, in *Gauthier v Beaumont* (*Gauthier*)[73] the employer's liability was engaged in the case of police officers beating, torturing and threatening victims during the exercise of their duties (conducting an interrogation in the course of a criminal investigation). As the court stated: …

If, as the respondent municipality suggests, the employer's liability was only engaged where it is shown that a delict was committed by its employees in the public interest, in the fight against crime or for the protection of the municipality's citizens, but was not engaged where the alleged acts are excessive, para. 7 of art. 1054 C.C.L.[74]. would be totally meaningless. The employer would have no incentive to exercise control over the conduct of its police officer employees.

The situation is more nuanced in common law. As previously noted[75], public authorities are not vicariously liable under common law for torts committed by employees exercising independent discretion or independent authority conferred by statutory law or common law. Further, common law courts have traditionally been reluctant to hold the employer liable for the employees intentional rather than negligent wrongs. Recently however, statutory enactments and case law have allowed actions against employers in some of these cases. This renders the traditional common law stance less rigid and seems to reduce the distance present between civil law and common law in this area.

The benefit test under Québec civil law has also been applied to cases involving employee's negligence. For example, a company's executive who, in trying to boost the company's sales, takes a client golfing and injures him during the return trip may engage the employer's liability: the accident is deemed to take place within a context favoring the employer's business[76]. Likewise, an employee of an automobile sales company who could use a vehicle for work purposes but also for personal use and by doing so causes an accident may engage the employer's liability[77]. The benefit to the employer in using this vehicle is obvious. Overall,

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71 2006 QCCA 354. This case has not been cited at common law.

72 *Ibid.*

73 [1998] 2 SCR 3. See also paragraph 93 for the excerpt that follows This case is cited with approval by common law cases on other grounds and was distinguished by *Blackwater Plint* (*supra* note 32 and accompanying text). Courts in Québec have also held that a doorman who proceeds to unjustifiable acts of violence against clients may hold the employer liable. *Ménard c. Disco-spec Dagobert inc.*, 2009 QCCS 185, *Chantal c. 9022-1672 Québec inc.* 2009 QCCA 70.

74 This article is the equivalent of Q.c.C. art. 1463 under the CcLC.

75 *Supra* notes 19-20 and accompanying text for what follows in this paragraph.

76 *Clement* vs *Edgington,* (1953) CS 325.

77 *Garage Touchette v Casavant* 1944 BR 117 Baudouin, Deslaurier, Moore, *supra* note 5 p. 862. For common law and the employee's negligence see *supra* note 36-41 and accompanying text.

the benefit test applies in Québec to the employee's wrongs (intentional or negligent) in order to hold the employer liable. This will occur if the employee's wrongs are not for the exclusive or clearly principal benefit of the employee[78].

III. SCOPE OF EMPLOYMENT: THE SHIFT OF RECENT CIVIL LAW CASES TOWARDS *BAZLEY* (COMMON LAW): A CRITICAL ANALYSIS.

It has been argued that the benefit test in Québec creates a significant blind spot since in cases of an employee's self-serving theft or sexual assault it is hard to argue even in part an employer's benefit[79]. In effect, civil law cases have suggested that following the benefit test, the facts in *Bazley* would not have led to the employer's liability[80]. The reason for this is that the shelter employee's acts were performed purely for a personal benefit as it was argued in *Havre*[81] and as the court concluded in this case excluding the employer's liability[82]. For similar reasons, employee theft cases committed for purely personal benefit may not hold the employer liable in Québec but may do so in common law following *Bazley*[83].

It has, therefore, been proposed that the narrow benefit test could be replaced by the *Bazley* risk-based approach regarding an employee's intentional or criminal wrongdoing[84]. This approach shows how the employer benefitted from a situation which allowed for the wrongdoing to occur[85]. Such a position is based on a more nuanced criterion regarding the risk created by the employer compared to the civil law benefit test.

It is probably following this reasoning that recently, Québec cases in the field of the employer's liability regarding an employee's intentional wrongdoing have followed common law principles. For example, in *Axa Assurances inc. c. Groupe de sécurité Garda inc.*[86] the court followed the *Bazley* risk enhancing factors in a case of an employee of a security company (Garda) who intentionally set fire to the building he was supposed to watch in order to impress his employer about his team's capabilities in dealing with the fire which finally caused damages. The insurer succeeded in holding Garda liable for the employee's intentional fault. In citing the common law cases *Bazley* and *Untel* the court opined that the guard had full access to the building and could ensure that no one, even other guards, would interrupt him because of the nature of his duties since he was supervising the other security guards on the evening of the fire. The buildings he was guarding were, therefore, in a vulnerable position[87]. Even if the guard's wrongful act did not contribute to the achievement of Garda's objectives, the fact that the guard set fire in order to shine and impress in the performance of his duties was work related. The court did not follow *Havre* and stated that Q.c.C. article 1463 scope of employment may be subject to different interpretations[88]. It also added that *Bazley*'s risk

78 Beaudouin, Deslauriers, Moore, *supra* note 5, 862-863.
79 De Stefano, *supra* note 7, 20, 19. Louise Langevin, *supra* note 68, 61.
80 *Axa*, *infra* note 86 para 92.
81 *Supra* notes 63s and accompanying text, *Axa, ibid.*
82 *Havre, ibid.*
83 Civil law: *Zurich* and *Murphy, supra* note 66, 67 and accompanying text. Common law: *Supra* note 21, 22 and accompanying test for cases where the employer was held liable despite the employee's personal benefit in the theft.
84 De Stefano, *supra* note 7, 30. Louise Langevin, *supra* note 68.
85 De Stefano, *supra* note 7, 30.
86 2008 QCCS 6087.
87 *Ibid* para 104-112 for what follows.
88 *Ibid* para 103.

enhancing factors as well as the policies of fair compensation and deterrence are the applicable law underlying the employer's liability in civil law and in common law[89].

Likewise, in *Tremblay c. Lavoie*[90] a priest sexually abused students in a school setting. In holding the congregation liable, the court followed the list of *Bazley* risk enhancing factors. It specifically mentioned that the Redemptorist Fathers assigned to the College had great power over their students in a religious context where the father already enjoys a status representing moral authority in the face of students who come from religious backgrounds and who aspire to religious vocations[91]. Also, the students were young and were living at the school at night and often on weekends, a factor that increased their vulnerability. Finally, the constant presence of the priests with the students (in sports, dormitory, education or in hard times when the students would confide to the priest) increased the risk of reprehensible behavior[92].

In the 2021 *Lachance c. Institut Séculier Pie X*[93] case, the plaintiff was sexually abused for many years as a child by his uncle at his uncle's residence during visits that the family made. The uncle's house was located on the defendant's premises, a religious institution for which the uncle was working – doing landscaping, maintenance, snow removal, housework, shopping, working in the printing service. The question in this case was whether the defendant institution was liable for the uncle's sexual abuse. In excluding the employer's liability, the court reasoned on both *Havre* (civil law) and *Bazley* (common law)[94]. Based on the Québec's benefit test the court held that the family's visits to the plaintiff's uncle and the sexual abuse that followed were based on the family link present between the plaintiff and his uncle rather than the defendant's work activities[95]. As a result, these acts did not benefit the employer. Further, following *Bazley*'s risk enhancing factors the defendant institute did not give the plaintiff the opportunity to abuse his power by letting him and his family live in the defendant's rooms located close to one another. The sexual abuse arose because of the family link between the employee and the victim[96]. For the rest, in committing the sexual abuse the employee did not serve the employer's benefit and the employer had not created any relation of conflict or intimacy or power between the employee and the victim. Although the victim was a vulnerable person this factor alone could not engage the employer's liability[97]. The court also distinguished this case from the above-mentioned *Tremblay* holding where the priests had tasks allowing them to get really close to children during the exercise of their duties[98]. This was not so in the case at bar.

These trial court cases demonstrate that in the presence of an employee's intentional wrongdoing there is a judicial trend in Québec that follows *Bazley*'s risk enhancing factors at

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[89] *Ibid* paras 100 - 102.

[90] 2014 QCCS 3185 cited in general by one common law case. This case did not mention *Havre* but noted its similarity to the common law *Untel* case *supra* note 54 which followed *Bazley*.

[91] *Ibid* (Tremblay) paras 159s for what follows.

[92] Similar cases that cite with approval *Bazley* and/or *Untel*: *J.J. c. Oratoire Saint-Joseph du Mont-Royal*, 2017 QCCA 1460; *A c. Frères du Sacré-Coeur*, 2017 QCCS 5394. *A.B. c. Religieux de St-Vincent-de-Paul Canada*, 2021 QCCS 2045. *Borduas c Catudal*, 2004 CanLII 18292 (QC CS).

[93] 2021 QCCS 1064.

[94] *Ibid* at para 200-204. The court cites the judge Alicia Soldevila, *supra* note 9. In her commentary, the judge talks about a dynamic interpretation of the Q.c.C. article 1463 following *Bazley*.

[95] *Ibid* (*Lachance*) at para 300, 301.

[96] *Ibid* para 309.

[97] *Ibid* paras 301-316.

[98] *Ibid* at para 325.

common law. It is not, however, the dominant judicial trend[99]. One needs to wait and see whether the Québec higher courts sanction or not this case law trend.

It is true that following the recent Québec case law trend the common law risk-enhancing factors propose a well-rounded and more nuanced approach to the employer's liability than the civil law benefit test. They evaluate the risk created by the employer regarding the employee's wrongdoing rather than simply insist on whether the primary objective that the employee targeted by his/her fault was the satisfaction of a dominant interest or direct benefit to the employer. As stated, case law has noted that the facts of *Bazley* would probably not justify holding the employer liable under the benefit test because of the employee's personal benefit in engaging in wrongful acts[100] whereas *Bazley*'s risk enhancing factors have retained vicarious liability in this case. Likewise, in employee's theft cases where theft is committed for a personal benefit, Québec case law is reluctant to retain the employer's liability compared to corresponding common law cases[101]. As a result, following *Bazley,* vicarious liability may be engaged in cases where the personal benefit test would exclude its application in Québec.

As appealing as adopting *Bazley* and *Bazley*'s risk enhancing factors appear in Québec following case law and doctrine (De Stefano, Langevin as noted) its consequences need to be reflected further. Adopting *Bazley's* risk enhancing factors in Québec to establish the employer's liability in the case of an employee's intentional wrongdoing would mean that the benefit test would still apply in Québec in cases involving an employee's negligent acts. The application of different tests to establish the employer's liability under Q.c.C. article 1463 for an employee's intentional and non-intentional faults would not necessarily conform with this article that does not distinguish between the nature of the employee's faults to retain the employer's liability. Nor would it conform with case law implementing this article that has applied the benefit test to both employee's intentional and negligent acts[102]. Further, applying different tests to the employee's intentional and negligent wrongs in Québec does not conform with the general approach of the Québec civil code. In effect, the code applies, in principle, a single liability regime to both negligent and intentional wrongdoing[103]. On the contrary, common law adopts different rules depending on the nature of the tort (for example intentional torts or the tort of negligence)[104].

To avoid the fragmentation of applicable tests under Q.c.C. article 1463 CcQ we could apply *Bazley*'s risk enhancing factors to both the employee's negligent and intentional wrongdoing. This would result in avoiding the application of different tests under this article depending on whether the wrongdoing of the employee is intentional or negligent. Following this reasoning, in the case of an employee's negligence and following *Bazley*'s risk enhancing factors, the risk that the employer's activities would promote the employee's wrongdoing would be easier to establish since the employee is generally performing – albeit negligently - the employer's duties. More specifically, the opportunity afforded to the employee to proceed to the wrongdoing and the furtherance of the employer's objectives (*Bazley's* risk enhancing factors) would be more easily established based on the employee's negligent acts. The power

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99 De Stefano, *supra* note 7 p.20.

100 Axa,*supra* note 86 (para 92) and accompanying text.

101 *Supra* note 83 and accompanying text.

102 *Supra* notes 63-78 and accompanying text regarding the benefit test.

103 Baudouin, Deslauriers, Moore, *supra* note 5, 175s, 180. Marel Katsivela, *Responsabilité délictuelle et responsabilité extracontractuelle au Canada* (Éditions Thémis, 2021) Chapitre VI (civil law and comparative study sections).

104 Katsivela *ibid.*

conferred on the employee by the employer, the vulnerability of the victim and whether the employee's wrongdoing related to a relationship of conflict, friction or intimacy created by the employer's enterprise could also be relevant factors that may be considered in the case of an employee's negligence based on the facts of each case. Whatever the solution adopted by civil law courts, it is important to reflect on the effect the adoption of *Bazley* will have on the application of Q.c.C. article 1463 with respect to the nature of the employee's wrongdoing. It is equally important to clarify and justify the position the courts will adopt in this area paving the way forward.

Another question raised by the adoption of *Bazley* is whether Québec courts should also adopt *Bazley*'s reference to precedent and policy considerations in establishing the employer's liability.

It is often said that the Québec civil law rejects the doctrine of precedent[105]. Civil law considers that written laws (in our case Q.c.C. article 1463) are the primary source of law that judges merely apply[106]. On the contrary, common law judges not only apply laws but also create the rule of law. These considerations do not favor the application of *Bazley* in Québec due to the different perception of the value of precedent in both legal cultures. The question arises: in adopting *Bazley*, should civil law courts adopt its reference to precedent as it is understood by common law courts?

The answer to this question is that civil law courts should not necessarily adopt *Bazley's* reference to precedent as it is understood by common law courts. Even though civil law rejects the doctrine of precedent, in practice, precedent (for example *Havre* regarding the employer's liability) is often cited by courts. Authors have talked about 'une autorité de fait incontestable' regarding the value of precedent in Québec civil law[107]. This appears to diminish in practice the distance between the common law adherence to precedent and the civil law formal rejection of it. One could, therefore, suggest that *Bazley*'s reference to precedent could be followed by Québec courts based on the way precedent is currently treated in practice in this province. This would clarify how *Bazley*'s reference to precedent would apply in Québec and would explain the difference in perception of the doctrine of precedent in the two legal traditions. If this is the case, in adopting *Bazley,* it would be preferable for courts to clarify this point.

Regarding the express reference of *Bazley* to policy as a condition of application of the vicarious liability regime and its adoption in Québec, one should first note that, in common law, it is not uncommon to use policy considerations as an explicit condition underlying liability[108]. In civil law, however, policy is taken into account by legislators in establishing legal rules. Consequently, in applying the law, civil law judges do not need to reference policy. As judge Baudouin has stated, civil law courts do not need to have recourse to policy considerations to restrict or establish liability since these are implicitly present in the legal

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[105] Silvio Normand, "An Introduction to Québec Civil Law" in Aline Grenon, Louise Bélamger-Hardy, *Elements of Québec Civil Law: A Comparison with the Common Law of Canada,* Toronto, Thompson Carswell, 2008 p. 78.

[106] Like Montesquieu noted: "…les juges de la nation ne sont […] que la bouche qui prononce les paroles de la loi ». Charles de Secondat Montesquieu, *L'Esprit des Lois*, vol. 1 livre XI, c. VI, 1768, p. 327.

[107] Jean Louis Baudouin, « L'interprétation du Code Civil Québécois par la Cour Suprême du Canada » (1975) LIII Can. Bar Rev. 716 p.724.

[108] This is the case of the vicarious liability regime as previously mentioned (*supra* note 47s and accompanying text) but also of the duty of care element of the tort of negligence. *Cooper v Hobart,* 2001 SCC 79.

analysis judges make of the elements of liability[109]. It is probably for this reason that even in the area of vicarious or employer's liability where, as mentioned, the same policies of compensation, deterrence and fairness underlie both legal cultures, the explicit and analytical reference to policy considerations are more apparent in common law than in civil law[110].

In adopting *Bazley*, civil law courts need to reflect on whether policy considerations underlying the employer's liability should become an explicit element conditioning its engagement as is the case in common law. It could be that in adopting *Bazley* civil law judges will also adopt its explicit reference to policy as a condition of application of the employer's liability regime since these policies are also present in civil law and, as stated by civil law courts, Q.c.C. article 1463 'scope of employment' may be subject to many interpretations[111]. Or, it could be that the difference in approach in the two legal cultures regarding policy considerations would continue to exist even after the adoption of *Bazley* in Québec if, for example, civil law courts merely adopt *Bazley's* risk enhancing factors and not its reference to precedent and/or policy. In citing *Bazley* civil law courts need to clarify the extent to which policy considerations will be taken into account in order to establish the employer's liability and in order to avoid confusion as to the applicable law in this area.

One last but not least consideration in determining the extent to which Québec should adopt *Bazley* in order to engage the employer's liability, is determining how other jurisdictions have treated *Bazley*. In the United Kingdom, three years after *Bazley* was decided in Canada, the House of Lords reasoned on a similar case, *Lister v Hesley Hall*[112], where the warden of a children's home committed a number of sexual assaults on children who were in his care without the employer knowing about them. In holding the employer vicariously liable, the House of Lords opted for a test of 'sufficient connection' concentrating on the relative closeness of the connection between the nature of the employment and the particular tort. The test adopted the essence of the Canadian *Bazley* approach but phrased the governing rules in more general terms[113]. Lord Hobhouse, however, rejected *Bazley* averring that '[l]egal rules have to have a greater degree of clarity and definition than is provided by simply explaining the reasons for the existence of the rule and the social need for it'[114].

In this regard, in Australia, another country governed by common law principles, the High Court of Australia *New South Wales v. Lepore*[115] case is instrumental. The case focused on the vicarious liability of a school authority due to a teacher's sexual assault towards a student in a school setting. In refusing to hold the school authority vicariously liable, the court majority

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[109] Jean Louis Baudouin, "La responsabilité civil comparée : droit civil et common law » (2014) 48-2 R.J.T. 683, 692.

[110] Compare the short reference to policy in *The Havre* (if liability is imposed, the employer would the guarantor of the employee's wrongs, *supra* note 65 and accompanying test) to *Bazley*'s detailed reference to policy considerations (*supra* notes 47-49 and accompanying text).

[111] *Supra* note 88 and accompanying text.

[112] [2001] 2 AC 215.

[113] Robert M. Salomon et al. *Cases and Materials on the Law of Torts* 8th ed. (Carswell, Canada, 2011) 938. Some authors find some differences in the approaches adopted in Canada and the United Kingdom stating that the tests conditioning vicarious liability in *Lister* and *Bazley* are not the same. According to one author, the Canadian Supreme Court talked about the role of policy in vicarious liability and adopted an approach that spoke in terms of the enhancement of risk while the English approach is more closely aligned with the Salmond test, focusing on the close connection between the wrong and the employee's scope of employment. Jane Wangmann, "Liability for Institutional Child Sexual Assault: Where Does Lepore Leave Australia?" (2004) 28 MELULR 169, 186-187.

[114] *Supra* note 112 para 60.

[115] [2003] HCA 4 (2003)

rejected the Canadian *Bazley* risk approach on the basis that it does not provide certainty in allocating liability and that such can extent too widely with respect to risks not in furtherance of the employer's venture but directly antithetical to those aims[116]. In a later Australian case, *Prince Alfred College Inc v ADC*[117] the High Court of Australia also stated with respect to *Bazley* that policy considerations based on risk allocation "have found no real support in Australia…".

Considering the different approaches regarding *Bazley* at the international level as well as other considerations herein examined, in importing *Bazley* in Québec civil law courts need to examine this case as a whole. The different elements of this case, such as its reference to policy, precedent and the possible application of *Bazley* to the employee's intentional and non-intentional wrongs need to be reflected upon by civil law courts. The international standing of *Bazley,* including its criticism in some common law jurisdictions, should also be examined in considering adopting this case in Québec. Avoiding examination of these elements risks to create further confusion regarding the governing principles of the employer's liability in this province.

IV. Conclusion

Based on the foregoing, it is evident that the conditions that underlie the vicarious and employer's liability in common law and in civil law in Canada present great similarities but also differences. Although the general conditions that underlie both doctrines are phrased similarly, the specific elements of the employee's scope of employment are not viewed in the same way in both legal cultures. Recently, some Québec cases have adopted *Bazley* in the area of the employee's intentional wrongs. This shift may be justified from the point of view that *Bazley*'s risk enhancing factors provide a well-rounded approach in establishing the employer's liability. However, this move is not without consequences in civil law. *Bazley*'s various elements, its international standing and the civil law approach are all factors that need to be considered when importing *Bazley* in Québec. Avoiding this discussion would leave doubt as to the extent of the application of *Bazley* in civil law. This will lead, in turn, to further confusion as to the applicable law in this area

[116] *Ibid* paras 217, 222.
[117] (2016) 258 CLR 134, para 59. See also Pauline Bomball, « Vicarious Liability, Entrepreneurship and the Concept of Employment at Common Law » (2021) 43 SYDLR 83, 98.