ACCOUNTABILITY OF PUBLIC AUTHORITIES THROUGH CONTEXTUALIZED DETERMINATIONS OF VICARIOUS LIABILITY AND NON-DELEGABLE DUTIES

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INTRODUCTION

This paper focuses on those persons who suffer injuries from another's performance of contracted government services and whom may not have access to effective remedies because of narrow and de-contextualized constructions of when vicarious liability and breach of non-delegable duties arise. The need to protect such victims is becoming increasingly desperate given the growing reliance on non-standard (outsourced) employees to fulfil governmental functions. Non-standard workers are not classified as employees. Hence, the employer is not vicariously liable for the torts of non-standard workers unless the delegated work entails non-delegable duties. Yet, many of the non-standard workers are not truly independent contractors – they are in no different situations than employees in relation to their ability to internalize costs associated with their work and compensate those injured in the course of its performance.

Constructions of (a) who qualifies as an employee for purposes of vicarious liability, and (b) when a non-delegable duty arises have not kept up with this new social reality. Unless courts adopt contextualized constructions of who qualifies as an employee for purposes of vicarious liability and when non-delegable duties arise, public authorities can effectively insulate themselves from liability through outsourcing. This will likely leave many of those injured in the course of the provision of government services without remedy. Not only would this undermine the purposes of vicarious liability and non-delegable duties but more importantly, it also indirectly creates immunity for public authorities in their engagement with members of the public.

Crown or government immunity, at least in relation to torts committed by its employees in the course of their employment, is a thing of the past.[1] As Cory J.

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[1] See Peter W. Hogg & Patrick J. Monahan, *Liability of the Crown*, 3rd ed. (Toronto: Carswell, 2000) at 110. A limited exception in relation to good faith true policy decisions remains. However, the Supreme Court of Canada has cautioned that immunity from tort liability must be narrowly construed to avoid indirectly restoring Crown immunity by characterizing every government decision as policy. *Just v. British Columbia*, [1989] 2 S.C.R. 1228, 64 D.L.R. (4th) 689 at 706 [*Just*, cited to D.L.R.]; *Kamloops v. Nielsen*, [1984] 2 S.C.R. 2, 10 D.L.R. (4th) 641. See also Allen M. Linden & Bruce Feldthusen, *Canadian Tort Law*, 8th ed. (Toronto: Butterworths, 2006) at 673-75; Peter Hogg,

notes: "The early governmental immunity from tortious liability became intolerable. This led to enactment of legislation which imposed liability on the government for its acts as though it were a private person or entity."[2] Today, governments are vicariously liable for torts committed by their employees in the course of their employment in the same way as private individuals and corporate entities.[3] Thus, victims of tortious conduct committed by public officials can seek redress against the government as a right either on the basis of direct or vicarious liability.[4] Hogg and Monahan describe this change in the law as carrying a significant impact for victims of tortious conduct caused by government employees.[5] The ability of private citizens to sue public authorities provides an opportunity to review government actions, promotes accountability of government agencies and their employees and avoids unnecessarily disadvantaging those who become victims of governmental activities.[6] Government agencies and their employees are now engaged in a wide range of activities that involve direct and indirect contact with members of the public. In fact, government agencies may be in a better position to protect the public from the myriad and difficult situations often involved in providing public services.[7] However, there is also an increased risk of injury to members of the public from the activities of public authorities.

Treating all tort victims in the same manner, regardless of the identity of the wrongdoers or the entity on whose behalf wrongdoers were acting, is an important equality principle and consistent with Dicey's idea that governments (and its officials) should be subject to the same law as private citizens.[8] Even prior to abolition of Crown immunity,[9] vicarious liability of the government was achieved through the practice of the Crown standing behind its servants who incurred tort

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"Government Liability: Assimilating Crown and Subject" (1994) 16 Adv. Q. 366 at 373; David Cohen & J.C. Smith, "Entitlement and the Body Politic: Rethinking Negligence in Public Law" (1986) 64(1) Can. Bar Rev. 1 at 2 & 4.

2 *Just, ibid*, at 704, per Cory J.

3 See G.H.L. Fridman, *The Law of Torts in Canada*, 2nd ed. (Toronto: Carswell, 2002) at 284-85.

4 *Quebec v. R.* (1894) 24 S.C.R. 420 at 449. See also *R. v. Armstrong* (1908), 40 S.C.R. 229; *R. v. Desrosiers* (1908), 41 S.C.R. 71.

5 Hogg & Monahan, *supra* note 1 at 127.

6 See Hogg, *supra* note 1 at 366-67.

7 See *Just, supra* note 1 at 704 (per Cory J.) See also Stephen Todd, "Liability in Tort of Public Bodies" in Nicholas J. Mullaney & Allen M. Linden, eds., *Torts Tomorrow: A Tribute to John Fleming* (Sydney: LBC Information Services, 1998) at 36.

8 See Hogg & Monahan, *supra* note 1 at 1-4.

9 The *Crown Proceedings Act 1947* (United Kingdom) abolished Crown immunity and thereby made it possible for tortious liability to be imposed on the government for direct and vicarious liability. The United Kingdom example spurred similar legislation in Canada and other Commonwealth countries such as Australia and New Zealand. See Hogg & Monahan, *supra* note 1 at 110-14.

liability in the course of their work.[10] In Canada, the *Exchequer Court Act 1887*,[11] as amended in 1938,[12] imposed vicarious liability on the federal Crown for negligence of its servants in the course of their work. Vicarious liability of the government is an important equality principle and legislative developments that purposely or effectively immunize governments from liability for its employees are considered contrary to public policy and indefensible because they deny innocent victims redress. The practice has been to preserve vicarious liability even where government employees are specifically immune from liability for torts committed in the course of their employment.[13]

The emerging phenomenon of privatization and outsourcing of governmental functions to persons typically characterized as independent contractors undermines access to effective compensation. Persons working under privatized regimes, though legally characterized as independent contractors, do not fit that categorization as it has traditionally been understood. Many of the so-called independent contractors may be individuals providing services and not necessarily carrying out business ventures with opportunities for cost internalization and loss spreading. These individuals are not often in a position to satisfy tort judgments against them. The increasing use of these workers to provide public services also raises a more fundamental issue: Is it fair to make liability arising from inherent risks associated with the provision of certain public services fall on the shoulders of these so called independent contractors?

Liability on the basis of a breach of non-delegable duty provides a further basis of compensation; liability of government agencies remains unaffected where the activity contracted out is characterized as entailing a non-delegable duty of care. Courts, however, have been reluctant to recognize statutory non-delegable duty absent specific legislative provisions to that effect. Courts have also foreclosed the possibility of recognizing a non-delegable duty where a claim for vicarious liability has failed. Care must be taken not to unnecessarily limit the scope of vicarious liability, and when non-delegable duties arise so as not to unnecessarily frustrate access to effective remedies for tort victims.

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[10] This practice ensured that tort victims of wrongs committed by public servants obtained a remedy in many cases (although the action was brought against the employee who committed the tort, the Crown defended the action and paid damages awarded against the employee). Hogg & Monahan, *supra* note 1 at 7, 110.

[11] S.C. 1887, c. 16, s. 16(c).

[12] S.C. 1938, c. 28, s. 1.

[13] This may be achieved through express legislative provisions, judicial interpretations that recognize vicarious liability of governments notwithstanding immunity of public servants or narrow interpretations of immunity provisions. See Hogg & Monahan, *supra* note 1 at 120-21; *Hill v. British Columbia* (1997), 148 D.L.R. (4th) 337 (B.C.C.A.); *Chaput v. Romain*, [1953] S.C.R. 834, 1 D.L.R. (2d) 241; *Lang v. Burch et al.* (1982) 140 D.L.R. (3d) 325 (Sask. C.A.).

This paper considers the current law with regards to employee tortfeasors and the triggering of vicarious liability. Reference will be made to recent contextual constructions of what constitutes torts committed "in the course of one's employment" sufficient to trigger vicarious liability for intentional and often criminal wrongdoing. The enlightened constructions have been motivated by instrumentalist concerns of justice to victims; to ensure that they receive effective compensation. I argue that similar considerations ought to apply in relation to the construction of who qualifies as an employee or when a person should be considered as an independent contractor. A contextualized understanding of when a worker should be considered an employee or independent contractor in ways that protect the interests of vulnerable victims is consistent with changing social realities.

Part I explores the persistence of vicarious liability, a form of strict liability, in the predominantly fault-based modern tort law. In Part II, the the paper discusses employers' liability for the torts of independent contractors and the rationale for this exception. Part III explores the relationship between non-delegable duties and vicarious liability. In Part IV, the paper considers when workers are characterized as employees to trigger vicarious liability, and when non-delegable duties arise. Part V discusses the changing patterns of employment in both private and public sectors, how that could effectively privatize liability for foreseeable risks associated with the provision of public services and how that could also undermine liability of public authorities. Part VI explores the importance of contextualizing the status of workers. In part VII, the non-availability of vicarious liability for the torts of foster parents is used to highlight potential risks of privatizing governmental services. The conclusion, emphasizes the need for contextual analysis consistent with the goals of vicarious liability, non-delegable duties and governmental liability.

I. SURVIVAL OF VICARIOUS LIABILITY IN MODERN TORT LAW

Modern tort law is fault-based. This is premised on the individualistic basis of classical liberalism which emphasizes personal responsibility and agency. The notion that there should be no liability without fault became entrenched in the common law by the 19th century; which reflected the necessities of a rapidly expanding society and the need to encourage private enterprise and risk taking. Grounding tort liability in personal fault also reflected opposition to the system of strict liability that had hitherto constituted the basis of tort law and served as an attempt to bring the basis of tort liability in line with moral principles.[14] Therefore, the fault principle provides a moral foundation for tort law and grounds tort liability in corrective justice; it provides a reason why one party, the tortfeasor, should be singled out to bear responsibility for another's losses.

Notwithstanding the centrality of the fault principle in assigning liability in modern tort law, liability is not always premised on fault. According to the doctrine

[14] See James Ames Barr, "Law and Morals" (1908) 22 Harv. L. Rev. 97 at 98-99; Richard Epstein, *A Theory of Strict Liability* (San Francisco, Calif.: Cato Institute, 1980) at 5.

of vicarious liability, legal liability may be imposed on one party (an employer), for the wrongs that another person (an employee), committed in the course of their employment. Liability, in this context, is strict and based not on the personal fault of employers, but rather on their relationship with the primary wrongdoer. Thus, vicarious liability can arise even where the employer has taken all the necessary precautions to avoid the outcome in question.[15] Given the philosophical basis of modern tort law as grounded in the fault principle and corrective justice, the basis and persistence of vicarious liability in modern tort law appears anomalous.[16] However, the reason for the continued presence of the concept of vicarious liability in tort law becomes less mysterious when we realize that corrective justice is only one of the foundational concepts underlying modern tort law.

Corrective justice does not adequately explain modern tort law; for instance, issues of causation, breach and assignments of responsibility involve considerations of distributive justice. In fact, even essentialists concede that it is necessary to look beyond the confines of corrective justice to provide practical solutions in particular cases.[17] Thus, a conceptual basis, other than corrective justice, might be required to justify compensation for personal injuries.[18] Modern tort law is equally grounded in distributive justice – the idea that tort law exists to serve utilitarian goals.[19] Thus, the goals of modern tort law include redistribution of resources, usually through the mechanism of loss spreading. Vicarious liability is one such aspect of modern tort law that is premised on distributional considerations; it is aimed at providing a just and practical remedy to victims of tortious conduct committed by employees in the course of their work.[20] Departure from the fault principle is justified on grounds of

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[15] See John G. Fleming, *The Law of Torts*, 9th ed. (Sydney, Australia: LBC Information Services, 1998) at 412; Linden & Feldthusen, *supra* note 1 at 552-53; Bruce Feldthusen, "Vicarious Liability for Sexual Torts" in Nicholas J. Mullanay & Allen M. Linden eds. *Torts Tomorrow: A Tribute to John Fleming* (Sydney, Australia: LBC Information Services, 1998) 221 at 222; Fridman, *supra* note 3 at 276-77; *Sweeney v. Boylan Nominees Pty*, [2006] HCA 19 at para. 35, Kirby J., dissenting [*Sweeney*]. Robert Flannigan, "Enterprise Control: The Servant – Independent Contractor Distinction" (1987) 37 Univ. of Toronto L.J. 25 at 26-31. Employers remain personally liable if they fail to exercise due care in pursuing their activities. However, as Flannigan notes, it is often difficult if not impossible to prove lack of due care on the part of employers to support findings of liability in negligence for torts of their employees. In this sense, vicarious liability exists as a mechanism to regulate employers' risk-taking.

[16] Vicarious liability predates the fault principle but it has survived despite the prevalence of the fault principle. There does not appear to be any indication that it is going to be abolished anytime soon. See Jason Neyers, "A Theory of Vicarious Liability" (2005) 43 Alberta L. Rev. 287 at 288; see also references *supra* note 4.

[17] Izhak Englard, *The Philosophy of Tort Law* (Dartmouth Publishing, 1994) at 11, 14-15.

[18] Ken Cooper-Stephenson, *Personal Injury Damages in Canada*, 2nd ed. (Toronto: Carswell, 1996) at 31.

[19] Cooper-Stephenson, *ibid* at 29-32.

[20] *Bazley v. Curry*, [1999] 2 S.C.R. 534, 174 D.L.R. (4th) 45 at para. 30 [*Bazley*, cited to D.L.R.] The principle of indemnification by the employee seems to undermine the distributional goals of vicarious liability because for the most part the employee would not be in a different situation from the plaintiff. This is precisely why applicability of the indemnification principle is questionable and hardly enforced in many jurisdictions. See Neyers, *supra* note 16 at 305-10.

public policy,[21] but deployment of public policy is not intended to undermine the importance of legal principles.[22]

The historical origins and philosophical bases of vicarious liability remain unclear. There is, however, a general agreement regarding the importance of the social goals served by the principle of vicarious liability – namely, to provide effective compensation to those who become casualties in the provision of goods and services and to provide effective loss distribution.[23] The importance of vicarious liability is underscored by the reality that most tortfeasors are judgment-proof, leaving many plaintiffs without remedy if their only source of compensation is the primary tortfeasor. As Fleming notes, "without vicarious liability many claims would go uncompensated as tortfeasors who are neither insured...nor command financial resources...are not worth suing. Thus vicarious liability also lends reality to what would otherwise be empty claims."[24] In addition, vicarious liability ensures that the true costs of an activity are borne by those who benefit from that activity as opposed to the individual who "caused" the plaintiff's injuries or the individual who suffered an injury.[25]

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[21] See Barr, *supra* note 14 at 109; Fleming, *supra* note 15 at 410; *London Drugs Ltd. v. Kuehne & Nagel International Ltd.*, [1992] 3 S.C.R. 299, 97 D.L.R. (4th) 261 at 281, La Forest J., concurring, dissenting in part [*London Drugs*, cited to D.L.R.].; *James Street Hardware & Furniture Co. v. Spizziri* (1985), 51 O.R. (2d) 641 at 650 (HC), varied on appeal on other grounds (1987), 62 O.R. (2d) 385 (C.A.). See also *Hollis v. Vabu Pty Ltd.* (2001) 207 C.L.R. 21 at 35 (para. 35) (H.C.A.) [*Hollis*].

[22] See *Bazley, supra* note 20 at paras. 26-27.

[23] See *Imperial Chemical Industries v. Shatwell*, [1964] 2 All E.R. 999 at 1011-12, per Lord Pearce; *Bazley, supra* note 20 at 58-61; P.S. Atiyah, *Vicarious Liability in the Law of Torts* (London: Butterworths, 1967) at 12; Fleming, *supra* note 15 at 410; Fridman, *supra* note 3 at 278; Linden & Feldthusen, *supra* note 1 at 553; Ewan McKendrick, "Vicarious Liability and Independent Contractors" (1990), 53 Mod. L. Rev. 770 at 784. A distinction must be made between the rationale/justification for and effect of vicarious liability. The victim compensation and loss distribution rationales for vicarious liability have been criticized as unsatisfactory, among other things, because they fail to explain why the choice of the employer as the source of compensation is preferable when that purpose could equally be achieved through other means such as publicly funded general accident compensation schemes. As well, there does not appear to be any reason why liability should be limited to torts committed in the course of employment nor that the choice of the employers as a source of compensation is more efficient than other sources of compensation. See Flannigan, *supra* note 15 at 28-29; Neyers, *supra* note 16 at 292-93, 296-97. Notwithstanding these critiques, vicarious liability would often be a practical mechanism for accessing effective compensation from a victim's perspective regardless of whether the same outcome could have been achieved from other sources that may even be more cost efficient, including social security schemes. For now, there is no universal accident compensation scheme and many victims may go uncompensated in the absence of vicarious liability.

[24] Fleming, *supra* note 15 at 411.

[25] Though not explicitly stated, the purpose of vicarious liability appears to be to relieve employees from the risk of personal liability while at the same time ensuring that victims are adequately compensated for injuries arising in the course of the employee's employment. Theoretically, the wrongdoing employee is a joint tortfeasor with the employer held vicariously liable for their torts and the latter retains a right of indemnification against the former at common law: *Lister v. Romford Ice & Cold Storage Co.*, [1957] 1 All E.R. 125 (H.L.); *McFee v. Joss*, [1925] 2 D.L.R. 1059 (Ont. C.A.); Lewis Klar, *Tort Law*, 3rd ed. (Toronto: Thomson Carswell, 2003) at 581. However, this principle is rarely enforced and its correctness has been doubted. Legislation has been enacted in some jurisdictions to

Although the various rationales for vicarious liability – compensation, deterrence, loss spreading and enterprise liability – have not been found to be entirely satisfactory, the doctrine can still be justified as a matter of personal and social responsibility and is consistent with the instrumentalist view of tort law.[26] Vicarious liability is therefore consistent with distributive justice and supports the view of tort law as a mechanism for loss spreading and compensation. Courts have been creative in expanding the scope of liability in cases where plaintiffs would have otherwise not had a practical remedy because the wrongdoer was judgment-proof or even dead. Vicarious liability for intentional and criminal conduct, including physical and sexual abuse committed by employees on vulnerable children entrusted to their care, has tested the limits of the doctrine in recent times. Such conduct is not authorized by employers and is usually contrary to the employers' enterprise. Faced with the possibility of a finding of no vicarious liability against an organization for an employee's sexual abuse of children, the Supreme Court of Canada acknowledged the limitations of the *Salmond* test in light of the new social reality of institutional care and abuses. The Court held that when precedent was inconclusive in determining the issue of liability, an alternative test based on public policy should be applied.[27] Specifically, the question of whether there should be vicarious liability is based on an assessment of the level of risk entailed in the employer's enterprise using the close connection test. Vicarious liability will generally be warranted "where there is a significant connection between the creation or enhancement of a risk" and the resulting abuse so as to make it fair and just to impose vicarious liability on the employer in the circumstances.[28] In support of the social justice goals served by the close connection test, Cane notes:

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bar actions for indemnification against employees for whose tort an employer has been held vicariously liable. See *London Drugs, supra* note 21 at 283-84; Atiyah, *supra* note 23 at 426; Fleming, *supra* note 15 at 299-300; Francis Trindade & Peter Cane, *The Law of Torts in Australia*, 3rd ed. (Melbourne: Oxford University Press, 2002) at 744; Neyers, *supra* note 16 at 305-07; *Employees Liability Act 1991* (N.S.W.), section 3.

[26] See Feldthusen, *supra* note 15 at 225-28. See also Peter Cane, "Vicarious Liability for Sexual Assault" (2000), 116 L.Q.R. 21 at 25, who sees the close connection test for vicarious liability as consistent with "the model of tort law as a set of ethical principles of personal responsibility..."

[27] *Bazley, supra* note 20 at para. 41. See also Fridman, *supra* note 3 at 297. In *Lister v. Hesley Hall Ltd.*, [2001] UKHL 22, 2 All E.R. 769 [*Lister*], the House of Lords adopted the close connection test enunciated in *Bazley* to impose vicarious liability on an employer in respect of intentional wrongdoing of its employee. But the High Court of Australia rejected this approach in *New South Wales v. Lepore; Samin v. Queensland; Rich v. Queensland* (2003), 195 A.L.R. 412 (H.C.A.) [*Lepore*]. Among other things, the Court found the distinction between the job-related opportunity to commit a tort (which does not attract vicarious liability) and the employer's creation or enhancement of the risk that an employee will commit a tort of the kind complained of (which attracts vicarious liability) was not convincing (per Gaudron J. and Gummow and Hayne JJ.) There were also concerns that the close connection test would create uncertainty in the law (per Callinnan J.). See also Nicholas McBride,"Vicarious Liability in England and Australia" (2003), 62 Camb. L.J. 255 at 260, who echoes this criticism.

[28] *Bazley, supra* note 20 at para 41. McLachlin C.J.C., echoed those sentiments in her dissenting judgment in *Jacobi v. Griffiths* [1999] 2 S.C.R. 570, 174 D.L.R. (4th) 71 at para. 24 [*Jacobi*]. The progressive position in *Bazley* regarding when abuse will be considered to have occurred in the course of the wrongdoer's employment to justify vicarious liability may be blunted by emphasis on formal terms of the tortfeasor's employment contract. Courts have declined to consider abuse as a

> Whatever the 'policy rationales' for vicarious liability, the close connection test defines those circumstances in which it is fair to hold an employer liable for the tort of an employee. Even though the employer may not have been 'at fault', it may still be 'fair' in certain circumstances that the employer should bear financial responsibility for harm caused by tortious conduct of its employees. Such responsibility is not fairly imposed simply because the plaintiff has been harmed; and its fairness does not depend on the ability or inability of the employer or tortfeasor respectively to compensate for the harm... Rather it depends on a balancing of interests of the injured person on the one hand and the employer on the other against the background of wider social concerns...liability depends on who they [employers] are and what they have done not on what they can afford.[29]

The scope of vicarious liability has been signifigantly expanded with the courts finding liablity for the intentional and criminal wrongdoing of employees (often undertaken for their own personal and selfish gratification), especially regarding the sexual abuse of vulnerable children. This has been applauded as a socially desirable outcome and supported on the basis of social justice.[30] Consistent with the underlying policy for vicarious liability, the expanded scope of liability has been influenced and justified by practical considerations to provide effective compensation for innocent victims who are often the least able to protect themselves.[31]

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materialization of risks introduced or enhanced by the employers' enterprise to warrant vicarious liability where the pepertrators' assigned duties or formal job descriptions do not put them in direct and/or unsupervised contact with the victims. See *E.B. v. Order of the Oblates of Mary Immaculate in the Province of British Columbia*, [2005] 3 S.C.R. 45, 258 D.L.R. (4th) 385. This is overly formalistic and could undermine the purpose of vicarious liability especially where vulnerable children are placed in the same environment with adults who the children perceive as part of the institution that wields power and authority over them. Children in those circumstances do not know, and probably do not care, about the assigned duties of individual staff members so long as they see them as part of the power structure at the institution. Where the nature of an institution or a situation created by an employer puts vulnerable persons at risk of abuse, determination of whether the enterprise liability risk test has been satisfied should not hinge too closely on the tortfeasor's formally assigned duties and responsibilities. Emphasis must equally be on the de facto power and control exercised by the employee over the victim.

[29] Cane, *supra* note 26 at 25-26. See also Greg M. Dickenson, "Precedent or Policy? Supreme Court Divided on Rules of Vicarious Liability for Sexual Abuse by Employees of Non-Profit Organizations" (1999-2000), 10 Education & Law Journal, 137 at 148.

[30] For example, see Paula Giliker, "Rough Justice in an Unjust World" (2002), 65 Mod. L. Rev. 269 at 278. In fact, many if not all of the institutional abuse cases that have recently come to light and for which victims are currently seeking compensation would not be possible in the absence of such a principled basis of vicarious liability. The institutions that employed the wrongdoers are often the effective defendants in these cases, either because the actual tortfeasors are dead, in prison or simply impecunious.

[31] See *Kooragang Investments Pty. Ltd. v. Richardson & Wrench Ltd.*, [1981] 3 All E.R. 65 at 68 (P.C.), where Lord Wilberforce notes that the courts have adopted a progressive and liberal approach towards vicarious liability of employers with the goal of protecting innocent victims.

II. EMPLOYERS' LIABILITY FOR THE TORTS OF INDEPENDENT CONTRACTORS

Generally, employers are not held vicariously liabile for torts committed by independent contractors.[32] Independent contractors manage their own business and assume financial risks; employees, on the other hand, do not assume such risks because they receive a salary or wages for their services. A worker is considered an independent contractor where the employer has no control over how the work is done and hence no ability to manage the risks entailed therein. Given the rationales of deterrence, and accident prevention (better risk management) that underlie the principle of vicarious liability, the imposition of vicarious liability is justified where the employer controls not only *what* is done but also *how* it is done. In such situations, both the risk-taking and management/reduction occur within the employer's enterprise and they must accordingly bear all tort liability arising from their activity.[33] Since employers benefit from services provided by independent contractors they are also expected to bear some of the costs associated with that activity; this is often reflected in the price of the contractor's services.[34] In this way, the social goals served by vicarious liability – effective compensation, deterrence/accident prevention and efficient loss spreading – are equally met by employers regarding the torts of their employees and independent contractors.

1. The Non-Delegable Duty Exception

The common law rule that an employer is not liable for the torts of independent contractors is not absolute. Employers can incur personal liability for negligence in selecting, instructing or supervising independent contractors; particularly where they instruct the independent contractor to do an unlawful act. The common law also recognised another exception in the 19th century, namely the liability of employers for harms resulting from breach of non-delegable duties. Although the court did not establish the term "non-delegable duty", the principle is said to have originated from *Pickard v. Smith*,[35] where the court held the defendant liable for injuries to the plaintiff arising from the negligence of a delivery man who had left a trap door

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[32] See *St. John (City) v. Donald*, [1926] S.C.R. 371 at 383 [*St. John (City)*]; *Gilbert Plains (Rural Municipality) v. Rohl Construction Ltd.* (1999), 140 Man. R. (2d) 102 at para. 38 (C.A.), affirmed (2000), 153 Man R. (2d) 128 (C.A.) [*Gilbert Plains*]; Atiyah, *supra* note 23 at 327.

[33] See *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.* [2001] 2 S.C.R. 983, 204 D.L.R. (4th) 542 at 553-54 [*Sagaz*, cited to D.L.R.]; Flannigan, *supra* note 15 at 31-35.

[34] This is perceived to be preferable to vicarious liability because it is more efficient for the contractor (who is most familiar with the risks associated with their activity) to obtain liability insurance, which makes the contractor the most able to offer effective compensation to victims. The goals of accident prevention and loss spreading are also satisfied because independent contractors, being on the frontline of the activity, are in the best position to adopt mechanisms and strategies to minimize accidents and are also able to spread the losses through prices for their goods and services. See Fleming, *supra* note 15 at 433.

[35] *Pickard v. Smith* (1861) 10 C.B. (N.S.) 470, 142 E.R. 535 [*Pickard*].

unattended. Subsequently, in *Dalton v. Angus*,[36] Lord Blackburn, relying in part on *Pickard*, stated the principle as follows:

> a person causing something to be done, the doing of which casts on him a duty, cannot escape from the responsibility attaching on him of seeing that duty performed by delegating it to a contractor. He may bargain with the contractor that he shall perform the duty and stipulate for an indemnity from him if it is not performed, but he cannot thereby relieve himself from liability to those injured by the failure to perform it.[37]

A non-delegable duty arises where the law imposes on one person a duty not only to take care but also to ensure that care is taken in executing a particular task or in relation to certain persons. Although there is no closed category of duties characterized as non-delegable, such a duty has been recognized in relation to public authorities where the power or duty in question is imposed by statute.[38] Non-delegable duties may also arise at common law.[39] The basis of non-delegable duties is that responsibility for the activity, which caused the plaintiff's injury, rests with the employer. Persons charged with personal responsibility for specified acts may delegate the work to others – such as their own employees or independent contractors – but they remain personally liable for tortious injuries arising from negligence or non-performance by the person delegated to carry out the task.[40] Thus, in some circumstances, employers cannot avoid liability by delegating work to an independent contractor. Similarly, in such circumstances the exercise of reasonable care in the selection and instruction of independent contractors does not relieve employers of liability for the tortious conduct of independent contractors.[41]

Non-delegable duties give rise to strict liability because courts may impose liability in spite of absence of personal fault on the part of the employer. Justification for this principle is doubted by some, and has been described as

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[36] *Dalton v. Angus & Co.* (1881) 6 App. Cas. 740, [1881-85] ALL E.R. 1 [*Dalton*, cited to App. Cas.]. An employer contracted out some construction work in a residential area. The work was done negligently, resulting in loss of support to a neighbour's property. The employer argued that he was not liable for collateral negligence, since there was no relationship of master and servant. He was still found liable for the worker's negligence.

[37] *Dalton, ibid* at 829. This principle has been restated in many subsequent cases. For examples, see *Wilsons & Clyde Coal Company, Limited v. English* [1938] A.C. 57 (H.L) [*Wilsons*]; *Cassidy v. Ministry of Health*, [1951] 2 K.B. 343 at 363, [1951] 1 All E.R. 574 at 586 (C.A.), Denning L.J., [*Cassidy*, cited to All E.R.].

[38] See Hogg & Monahan, *supra* note 1 at 118.

[39] *Stevens v. Brodribb Sawmilling*, [1986] H.C.A. 1, 160 C.L.R. 16 at para. 26 [*Brodribb Sawmilling*]; Fridman, *supra* note 3 at 310-11.

[40] See *Cassidy, supra* note 37 at 586, Denning L.J.

[41] See *Lewis (Guardian ad Litem) v. British Columbia* (1997), 153 D.L.R. (4th) 594 at 603 (S.C.C.) [*Lewis*].

irrational, especially in its application to situations involving use of ordinary care.[42] The principle has also been criticized as a "logical fraud",[43] a "disguised form of vicarious liability,"[44] and its justification as "highly questionable".[45] Notwithstanding the vociferous criticisms and absence of clear policy justification, liability for the torts of independent contractors on the basis of non-delegable duties is still part of modern tort law.[46] The persistence of the principle of non-delegable duty can be logically explained by its unique pragmatic approach in response to the special vulnerability of potential victims; it ensures the availability of effective compensation for liability arising from tortious conduct of those hired to provide services or undertake tasks that employers (specifically, public authorities) are expected to provide or perform.[47] Responsibility for those services is considered so important to the beneficiaries that employers are not permitted to transfer it to those who actually carry out the services. Liability attaches to the employer despite absence of any control over how the independent contractor actually performs the tasks aside from broad instructions of what needs to be done. To do otherwise would offend the public's sense of fairness and justice.[48]

The basis of non-delegable duty is the existence of a special protective relationship between the employer and the victims of the independent contractor's tort, making it appropriate to impose a duty on the former to safeguard the interests of latter.[49] This special relationship may be grounded in the defendant's assumption of control and responsibility (whether assumed or imputed) for the plaintiff's safety in the circumstances because of an inherent risk of harm to plaintiff from the activity in question due to her/his vulnerability or dependence on the defendant.[50] The

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[42] See Fleming, *supra* note 15 at 435; Glanville Williams, "Liability for Independent Contractors" 1956 Cambridge L.J. 180 at 186, 192.

[43] Williams, *ibid* at 193.

[44] Fleming, *supra* note 15 at 434.

[45] Glanville Williams, "Some Reforms in the Law of Torts" (1961) 24 Mod. L.R. 101 at 112-15.

[46] Swanton, an advocate of non-delegable duty has urged that the concept should not be dismissed as anomalous or unjust. He asserts that rather, it deserves more attention and respect and goes on to commend the judges who introduced the concept into the common law for being courageous enough to recognise higher tort duties to ensure that care is taken in appropriate circumstances. J.P. Swanton, "Non-Delegable Duties: Liability for the Negligence of Independent Contractors" Pt. II (1991), 4 Journal of Contract Law 26 at 46 [Swanton, Pt. II]; Jane Wangmann, "Liability for Institutional Child Sexual Assault: Where does Lepore Leave Australia?" (2004), 28 Melb. U. L. Rev. 169 at 198-99.

[47] See Swanton, Pt. II, *ibid* at 35; In support of liability on the basis of non-delegable duties, Atiyah, *supra* note 23 at 335, complements the common law for taking such a position because it strikes a reasonable balance in this area. See also Swanton, "Non-Delegable Duties: Liability for the Negligence of Independent Contractors" Pt. I (1991) Journal of Contract Law 183 at 184 [Swanton, Pt. I].

[48] See *Lepore*, *supra* note 27 at 475, Gummow and Hayne JJ.

[49] See *Klondis v. State Transport Authority* (1984) 154 C.L.R. 672 at para. 33 [*Kondis*].

[50] See *St. John (City)*, *supra* note 32 at 383; *Gilbert Plains*, *supra* note 32 at para. 39. See also *Lepore*, *supra* note 27 at 449, McHugh J.; *Ibid* at 687, per Mason J.; *Burnie Port Authority v. General Jones Pty Ltd* (1994), 120 A.L.R. 42 at 62, Mason C.J.C., Deane, Dawson, Toohey and Gaudron JJ (H.C.A.).

employer's creation, introduction or enhancement of a foreseeable risk of injury to vulnerable persons who may be engaged with the activity in question give rise to an assumption of responsibility for the welfare of those placed in harm's way, and hence an affirmative duty to ensure that the risk does not materialize or if it does, to provide redress to victims.[51]

Imposition of this heightened responsibility on the defendant is justified on public policy grounds and as a matter of fairness.[52] Such liability would also often be consistent with the expectation that the employer safeguard the interests of those who are likely to be injured by the activity in question and hence the duty to ensure that those hired to do the work do so with due care. This is particularly the case in the provision of government or public services. Although work may be contracted out to independent agencies, it may not be possible for the intended beneficiaries of the service to know the status of workers who provide the service; whether they are government employees or independent contractors. As well, since members of the public see the provision of particular services as being within the jurisdiction of specific government departments and agencies, it is reasonable to expect some government oversight in how the work is actually done. Further, the initial reaction of many victims who have been injured by the activity in question would be to seek redress from the government who they understand to be responsible for providing the service in issue. This would often provide a timely and effective remedy for victims who do not have to worry about the identity of the contractor, whether they are still in business or whether they are solvent.[53]

The above-mentioned factors would seem to support a broad scope for non-delegable duties, especially where public authorities contract out services, and not necessarily limited to situations where a public authority has a legislative duty or power to provide a particular service or undertake a particular activity. Employers (public authorities that hire independent contractors) are often the only source of practical compensation. Hence, plaintiffs unable to establish vicarious liability often seek to hold employers liable on the alternative ground of non-delegable duties owed directly to the claimant. Plaintiffs seeking to anchor liability on breach of non-delegable duties have not fared well where courts have rejected their claims for vicarious liability.

Recent case law suggests that the wording of legislative provisions under which public authorities operate or that governs the relationship between a victim and the government body sought to be held liable is determinative of whether a non-

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[51] See *Lepore, supra* note 27 at 439-40, Gaudron J.; *A D & S M McLean Pty Ltd v. Meech & Anor*, [2005] VSCA 305 at paras. 9, 11 (Supreme Court of Victoria, Australia, Court of Appeal). See also John Murphy, "Juridical Foundations of Common Law Non-Delegable Duties" in Jason Neyers, Erika Chamberlain & Stephen Pitel (eds.), *Emerging Issues in Tort Law* (Oxford, U.K.: Hart Publishing, 2007) at 369.

[52] See *Lewis, supra* note 41 at 609-11.

[53] See *ibid.* at para. 35. See also Atiyah, *supra* note 23 at 335.

delegable duty exists in the particular circumstances. In the 2003 trilogy on liability of public authorities (*K.L.B.*; *Hammer*; and *M.B.*)[54] the plaintiffs' claims for breach of non-delegable duties failed, among other things, because the governing statutes did not *unequivocally* impose general non-delegable duties on the public authorities in question for the general well-being of children in the defendants' care. Such non-delegable duties would have included reasonable efforts to prevent the harms alleged by the plaintiffs. The Court's conclusion of an absence of non-delegable duties in the circumstances occurred notwithstanding that the Court had recognized a statutory non-delegable duty to ensure the safety and welfare of the children while in the defendants' care.

In both *K.L.B* and *M.B.*, the governing statute, the *Protection of Children Act*,[55] imposed specific non-delegable duties on the Superintendent of Child Welfare to ensure that the placement of a child in its custody or care meets the needs of the child and a duty to report to the Minister when it appears that the placement is not in the child's best interests. Yet, the Court concluded that the Superintendent was not under a duty to prevent foster children from being abused by their foster parents or others because the legislation does not specifically imposes a general non-delegable duty to ensure that no harm befalls children in care through the negligence or abuse of foster parents.[56] In *Hammer*, the plaintiff pupil was sexually assaulted by a janitor at a public school. The Court found that although the *Public School Act*[57] imposed various powers and duties on school boards, including the power to hire and dismiss support staff, and children are statutorily required to attend school, the Board is not subject to a non-delegable duty to ensure the safety of children while at school. The High Court of Australia came to the opposite conclusion when it held that a school authority has a non-delegable duty to ensure the safety of children while in school.[58]

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[54] *K.L.B. et al v. British Columbia*, [2003] 2 S.C.R. 403, 2003 SCC 51 [*K.L.B*]; *E.D.G. v. Hammer*, [2003] 2 S.C.R. 459 [*Hammer*]; *M.B. v. British Columbia*, [2003] 2 S.C.R. 477, 2003 SCC 53 [*M.B.*].

[55] *Protection of Children Act*, R.S.B.C. 1960, c. 303.

[56] *M.B.*, *supra* note 54 at para. 17.

[57] *Public School Act*, R.S.B.C. 1979, c. 375, now R.S.B.C. 1996, c. 412

[58] *Commonwealth v. Introvigne* (1982), 150 C.L.R. 258 (H.C.A.). However, in the *Lepore* trilogy, *supra* note 27, the majority of the High Court confined non-delegable duty to negligent conduct of employees. Hence there was no breach of non-delegable duties for the sexual assault of students at school by teachers. Although the Australian position appears progressive and consistent with the public expectations regarding the safety of children placed in the care of authority figures hired by the school board, the exclusion of intentional acts by employees from the scope of the non-delegable duties undermines its effectiveness in the area where children are most vulnerable. As well, it does not further the general compensatory goals of tort law and specifically, the recognition of non-delegable duties. For a criticism of the distinction between negligent and intentional wrongdoing in relation to when a breach of non-delegable duty will be triggered, see McBride, *supra* note 27 at 258. Vicarious liability of the employer remains an option and hence a possible source of compensation (*Lepore* was remitted back for consideration of whether the employer could be held vicariously liable in the circumstances). But this may not necessarily yield favourable outcomes, especially in relation to intentional wrongdoing, among other things, because there was no agreement regarding the use of the liberal and policy-based close connection test adopted by the Supreme Court of Canada in *Bazley*.

Regardless of courts' conclusions on the issue of vicarious liability, the personal liability of the tortfeasor remains unaffected.[59] However, plaintiffs are unlikely to fare any better by suing the primary tortfeasor directly because they are likely to be judgment-proof. Even if the tortfeasor has personal liability insurance, the intentional injury exclusion prohibits indemnification in respect of deliberate and criminal conduct. Thus, it is unlikely that the tortfeasor will be able to satisfy judgment against them from non-insured assets. These factors increase the likelihood that the victimization of vulnerable children by employees of public authorities will go uncompensated; this defect could have been easily cured by recognition of a non-delegable duty in these circumstances.

2. Source of Statutory Non-Delegable Duties: Commenting on the Canadian Approach

The cases in the recent Canadian trilogy were distinguished from *Lewis* on the ground that the relevant statute in *Lewis* specifically imposed non-delegable duties on the defendant whereas no corresponding provisions were found in the statutes involved in the trilogy. Although the finding of a non-delegable duty in *Lewis* was anchored primarily on the statutory provisions there was no indication that it could be the *only* source of the duty. Rather than follow the categorical approach that had characterized this area up to that point, in *Lewis*, Cory J. sought to identify a unifying theme in situations where a non-delegable duty has been imposed on employers for the torts of independent contractors. He noted that existence of a non-delegable duty "will depend on the nature and extent of the duty owed by the defendant."[60] Where the defendant is acting under a statutory authority, the existence of a non-delegable duty will depend to a large extent on relevant statutory provisions and the circumstances of the particular case.[61] The common law duty to use reasonable care arising from the exercise of statutory authority would not always give rise to a non-delegable duty. Again, it depends on the circumstances of the case.[62] McLachlin J. (as she then was) echoed these sentiments in her concurring judgment, noting that whether an employer should be subject to a non-delegable duty for the torts of an independent contractor should be a contextual enquiry focussing on the relationship between the parties to determine if such a duty is warranted in the circumstances.[63]

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[59] Liability for breach of non-delegable duty does not affect the liability of the independent contractor; the employer retains a right of indemnification. Thus, the real value of non-delegable duty is in situations where the contractor is unable to satisfy judgment against them, for example because they are insolvent, uninsured, bankrupt or untraceable. Additionally, the ability to fix the employer with liability is valuable where there are several contractors involved and it is impractical for victims to determine which of them actually caused their loss. This was one of the policy considerations that justified recognition of non-delegable duties in *Lewis*, *supra* note 41 at 610-11. Even in the latter situation, the employer can still seek indemnification against all the contractors, for example on the basis of the principle in *Cook v. Lewis*, [1951] S.C.R. 830.

[60] *Lewis*, *supra* note 41 at paras. 17, 20, per Cory J.

[61] *Ibid*, at para. 20.

[62] *Ibid*, at para. 27.

[63] *Ibid*, at para. 53.

In addition to evidence of statutory non-delegable duty for the construction and maintenance of highways, the Court also found it necessary to find further grounds to anchor liability, namely policy factors. The court referred to the reasonable expectation of vulnerable parties in protective relationships as well as the practical difficulties that such persons might experience in trying to obtain compensation from independent contractors to justify recognition of a non-delegable duty. The risk of personal or fatal injury to the motoring public if work is not performed or negligently performed was a further reason to justify a non-delegable duty in the circumstances.

It is reasonable to assume that since protective relationships can arise outside of statutes, a non-delegable duty could still have been recognized even if the legislation in question did not impose such a personal duty for the maintenance of highways on the Minister of Highways and Transportation. As McLachlin J.'s approving reference to Mason J. in *Kondis* shows, the ultimate determinant of whether a non-delegable duty arises is the existence of a special relationship between the parties and the defendant's assumption of responsibility for the plaintiff's welfare in situations where the plaintiff might reasonably expect the defendant to exercise a duty of care. In *Hammer*, McLachlin, C.J.C., noted that the words of the statute must be the starting point for the inquiry into whether a statutory non-delegable duty exists in particular circumstances.[64] However, the statutory provisions *cannot* be conclusive. Ultimately, determining whether a non-delegable duty exists will require a contextual analysis focusing on the statutory provisions involved and the circumstances of the case.[65] Examples of such relevant circumstances would include victims' vulnerability to abuse and the risk of non-compensation due to the employer's use of independent contractors (usually as a matter of convenience) who are unable to satisfy judgements. Atiyah notes that to impose liability on employers on the basis of non-delegable duties in these circumstances is consistent with justice.[66]

The concept of non-delegable duty therefore presupposes that the victims of the independent contractor's torts are often vulnerable persons who deserve protection of their physical and emotional safety and assurance of effective remedies from a reliable source in the event of injury.[67] Fleming refers to this as a "special protective relationship" that gives rise to "a corresponding special reliance or dependence" on

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[64] *Hammer, supra* note 54 at paras. 15-21.

[65] See *Lewis, supra* note 41 at 615, McLachlin C.J.C., affirming Cory J.'s principled approach to the issue. In her concurring judgment, McLachlin was not as certain as Cory that the relevant statutory provisions unequivocally imposed a non-delegable duty on the Ministry of Transportation and Highways (she thought the words pointed to a basic direction that the Ministry was charged with road maintenance). Notwithstanding the equivocal nature of the statutory provisions, McLachlin still found it appropriate to recognise a non-delegable duty in the circumstances based on the nature of the relationship between the parties. This suggests that the wording of statutes cannot be taken as conclusive of whether a non-delegable duty exists or not.

[66] Atiyah, *supra* note 23 at 334; Swanton. Pt. I, *supra* note 47 at 186, also notes that such an approach may be necessary in light of the changes in employment relationships.

[67] See Fleming, *supra* note 15 at 413, 435.

the employer to protect the vulnerable party.[68] There does not appear to be a closed category of protective relationships for which non-delegable duties arise. This seems to be a flexible approach deployed for justice in particular cases where to do otherwise would effectively leave plaintiffs without a remedy. No doubt, the practical effect of imposing non-delegable duties on an employer would be to achieve the same result as if the employer was vicariously liable but this outcome is defensible on the ground of fairness to plaintiffs who become unfortunate victims of the employer's enterprise.[69] There would also often be a possibility of effective loss distribution by the employer in ways that might not be always feasible by the independent contractor. This rationale loses its force where the employer is actually a vulnerable party with no liability insurance to meet the claim and/or no ability to spread losses.[70] But this concern does not arise in relation to public authorities.

Thus a careful examination of *Lewis* demonstrates that the construction of the source of statutory non-delegable duties in the trilogy was overly restrictive and inconsistent with other case law. An inference of a general non-delegable duty to ensure the safety of children in foster care was possible from the specific non-delegable duties imposed under the legislation applicable in *K.L.B.* and *M.B.*, all of which relate to the safety and welfare of children in care. Additionally, the Court did not consider policy or the reasonable expectations of foster children and the general public as it did in *Lewis*.[71] Children in care and, more generally, average members of the public would likely not appreciate the distinction between an employee and independent contractor. As well, foster children will hardly inquire about the precise relationship between foster parents and the Superintendent or government agency that placed the children in foster care. Rather, they are likely to perceive foster parents as part of the government agency responsible for children in care. Hence foster children and members of the public likely have reasonable expectations that the government will ensure the safety of children it brings into care. For the most part, children who are brought into the care of the government do not choose their foster parents – they are placed in homes based upon choices made by their social workers and/or availability of foster homes. It does not seem realistic for children in care to decline to be placed in foster homes because foster parents are independent contractors.

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[68] *Ibid*, at 435.

[69] See McKendrick, *supra* note 23 at 773.

[70] Since independent contractors are expected to carry their own liability insurance it appears unnecessary to protect victims through non-delegable duties. However, independent contractors may not always be a practical source of compensation for a variety of reasons. For example, an independent contractor may be a shell company that goes out of business, becomes bankrupt or discontinues liability insurance. See Fleming, *supra* note 15 at 434, where he notes that Australian courts have been reluctant to follow English and American jurisprudence to impose liability on the basis of non-delegable duties in cases involving principals who are neither insured nor in a position to spread the losses. Having liability insurance would often be a required term of the contract between the principal and the independent contractor. Termination of an insurance policy will constitute a breach of contract for which the principal can pursue a remedy. However, such an action is unlikely to yield any result because the independent contractor may not have any assets at that point.

[71] See *Lewis*, *supra* note 41 at para. 33.

Childern in care are vulnerable in other respects as well. It is not uncommon for children in care to have been victims of abuse (which could have been the reason for their apprehension). In addition to the vulnerability of abuse victims to further abuse by the same or other perpetrators, children in care may be even more vulnerable in foster homes. This heightened vulnerability stems from, among other things, the power and authority that foster parents have over their charges and the likelihood of abuse that can result. In *K.L.B.*, Arbour J., in her dissenting judgment notes:[72]

> the foster care arrangement reflects the highest possible degrees of power, trust and intimacy. The relationship...materially increases the risk that foster parents will abuse...some foster parents might impose excessive physical discipline on children in a misguided effort to carry out their duty to educate and care for [foster] children... Because foster homes generally operate free from day-today supervision, some foster parents may believe that they can take advantage of foster children without being detected...foster children are required to be in the physical custody of their foster parents. They have nowhere to go to escape abuse in the short-term. The power relationship between foster parents and foster children gives rise to its own set of concerns: foster children may submit to their foster parents even when their foster parents are abusive. Children may fear their foster parents more than they would other adults.[73]

Foster children face the same "potential vulnerability" and "lack of knowledge" as highway users, making it reasonable for them to rely on and expect that social workers acting on behalf of the Superintendent of Child Welfare will ensure that no harm befalls them while in care. It is also reasonable for children to expect to be able to look to the Superintendent for redress should they suffer abuse while in care.

Failing to acknowledge the existence of a non-delegable duty absent specific legislative provisions ignores the need for fairness in cases such as *K.L.B.* because it effectively denies redress to vulnerable victims placed in harm's way by public authorities. In a way, demanding specific legislative provisions to ground statutory non-delegable duty could effectively immunize public authorities from liability where services within their legislative authority are out-sourced to so-called independent contractors when they would have been liable for the same wrongs if the work had been done by their employees. This constitutes privatization of losses

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[72] The majority decision per McLachlin C.J.C. did not consider whether the abuses in question were sufficiently connected with the tortfeasor's (foster parents) assigned tasks (foster care) as required by the enterprise risk test because she dismissed the claim for vicarious liability on the basis that the government could not be vicariously liable for the torts of foster parents; she concluded that foster parents are properly characterized as independent contractors and not employees. Hence there was no need to determine whether the enterprise risk test was satisfied in this case. In her strongly worded dissenting judgment, Arbour J. came to the opposite conclusion, holding that the relationship between the defendant and tortfeasors was sufficiently close to attract vicarious liability and finding that the wrongful activities were sufficiently connected with the foster parents' assigned duties to justify vicarious liability.

[73] *K.L.B.*, *supra* note 54 at 552-53, Arbour J., dissenting.

arising from the exercise of governmental authority or provision of public services and leaves the burden on those who can least afford it – the citizens. It also amounts to improper exercise of governmental authority because it is unlikely that the governing body or statute under which the employer delegator operates would knowingly confer powers to persons who are unlikely to be able to satisfy judgments against them.[74] This may be inconsistent with the principles of justice, equality and common sense that engendered the abolition of governmental immunity in the first place. It is also inconsistent with the Supreme Court's own reasoning that a public authority such as a school board usually has a greater capacity to spread losses arising from the performance of its duties.[75] This failure as well undermines the need to adopt different or contextual analyses in light of certain realities (different from the run-of-the-mill situations) to avoid reaching unjust results.[76]

Although direct (personal) liability of the public authority in negligence, for example, in hiring or supervising independent contractors is still an option, it often fails to provide victims with a remedy. Generally, courts tend to be protective of public authorities and are reluctant to impose liability on them.[77] Negligence of public authorities is difficult to prove especially where there is an element of discretion in the exercise of the power in question. Courts are reluctant to impose liability where the injury resulted from failure to act as opposed to positive acts. Establishing duty of care for public authorities has proved particularly difficult in the aftermath of *Cooper v. Hobart*; a *prima facie* duty of care can easily be negated at the proximity stage where courts consider whether it is fair and just to impose a private law duty of care for the benefit of plaintiffs. Courts have narrowly construed duties of public authorities holding that public law duties cannot ground private law duties of care absent specific statutory provisions to that effect.[78] Even where government authorities have been negligent, proving that abuse has occurred and establishing a causal link between negligence and abuse suffered by a plaintiff might be difficult, especially in relation to abuses that occur in private such as in foster homes.[79]

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[74] See Atiyah, *supra* note 23 at 358-59.

[75] See *Jacobi*, *supra* note 28 at para. 35, Binnie J.

[76] See *K.L.B.*, *supra* note 54 at para. 13, McLachlin C.J.C., referring to Major J.'s direction in *Snell v. Farrell*, [1990] 2 S.C.R. 311 at 330, to resort to a "robust and pragmatic approach" to causation in difficult cases.

[77] For examples refer to the policy/operational distinction by which public authorities enjoy immunity from suit in respect of policy decisions and the difficulties of establishing duty of care as evidenced in the reformulated *Anns* test in *Cooper v. Hobart*, [2001] 3 S.C.R. 537 [*Cooper*].

[78] See *Cooper*, *ibid.* at para 44; *Rogers v. Faught* (2002), 212 D.L.R. (4th) 366 (Ont. C.A.). See also Linden & Feldthusen, *supra* note 1 at 700-01.

[79] See *K.L.B.*, *supra* note 54 at para. 13, McLachlin, C.J.C. This is not to suggest that causation can never be established. In fact, in *K.L.B.*, the Court found that risk of harm to the children was reasonably foreseeable and that the social workers employed by the government failed to take adequate steps to prevent the risk from materializing, for example through proper screening of potential foster parents. It was also found that the negligence in question caused the abuse but the plaintiffs' claims for direct negligence by the government ultimately failed because they were statute-barred. In *M.B.*,

Breach of fiduciary duty is another possible basis of liability against public authorities responsible for children in the care of adults who subsequently abuse them. However, this action has been effectively foreclosed because it is not sustainable where the person sought to be fixed with liability was not at fault and did not breach the trust reposed in them for the victim's protection. This has made it impossible for plaintiffs to establish a breach of fiduciary relationship in institutional or foster care abuse cases because the fiduciary (the government) does not take advantage of the plaintiffs for its personal benefit.[80] This reasoning effectively leaves abuse victims without a remedy in most cases where the abuse resulted from the exercise of delegated authority, unless the delegator can somehow be fixed with personal wrongdoing, as for example, where they ignored the plaintiff's complaints of abuse or failed to investigate likely abuses by the delagatee.

If the purpose of non-delegable duties is to protect vulnerable victims, then the necessity of characterizing particular activities as non-delegable is heightened in relation to activities that cannot be insured (for example, intentional and criminal conduct). As well, such characterization is wanrranted in relation to delagatees who are uninsured and will not be able to satisfy judgments against them from uninsured assets, and/or unable to spread the losses to the general public or at least to the groups that benefit from the activity in question.[81] More importantly, the rise in non-standard employment as a cheap pool of labour relied on by public and private sector employers to meet their labour demands without the corresponding costs has a detrimental effect on victims' right to compensation. Many of those employed under casual arrangements are unlikely to have liability insurance or personal assets to satisfy damage awards against them.

III. RELATIONSHIP BETWEEN NON-DELEGABLE DUTIES AND VICARIOUS LIABILITY

There is some confusion regarding the difference between non-delegable duties and vicarious liability. In *E.D.G. v. Hammer*, the Court held that a claim for breach of non-delegable duty is not sustainable where a claim for vicarious liability has failed because the conduct in question was outside the scope of the tortfeasor's employment. This restrictive view of non-delegable duty was premised on an assumption that non-delegable duties and vicarious liability have similar conceptual bases and goals, with the former only coming into play in circumstances where the

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although the trial court found that the social workers were negligent in their monitoring and supervision of M.B.'s placement, it concluded that there was no evidence that this negligence caused the abuse. *M.B. v. British Columbia*, [2000] B.C.J. No. 909 (B.C.S.C.). Issue of negligence was not appealed.

[80] See *K.L.B. supra* note 54 at para. 50; *Hammer, supra* note 54 at 563-64.

[81] In *Lepore, supra* note 27 at para. 136, the High Court of Australia held that intentional acts cannot be the basis of liability for breach of a non-delegable duty. McHugh J. dissented on this point, holding that the non-delegable duty of an educational authority to ensure the safety of school children includes responsibility for deliberate harms to pupils even if the conduct in question constitutes a criminal offence.

latter is inapplicable because the requisite relationship of employer-employee is absent.

> The rationale for breach of non-delegable duty is to extend liability for torts of independent contractors in appropriate cases where there would be vicarious liability if the independent contractor were an employee. I do not think that vicarious liability and non-delegable duty should overlap to permit inconsistent results for the same tort of an employee. The duplication of vicarious liability and non-delegable duty would create doctrinal confusion for no valid policy purpose.[82]

In addition to limiting the applicability of non-delegable duty, this position also attempts to preserve doctrinal purity, an approach referred to by the High Court of Australia as the doctrine of incompatibility.[83] This approach has been criticized as unduly restrictive and as undermining the development of the common law.[84]

The existence of non-delegable duties should not be contingent on the availability of vicarious liability in the circumstances. To insist on this requirement defeats the purpose of non-delegable duties and renders the principle superfluous. As McHugh J. points out in *Lepore*, the conceptual foundations of the two bases of liability are different. Whereas vicarious liability imposes liability on a person for another's tortious conduct (indirect), liability for breach of non-delegable duty is direct (personal).[85]

> The liability of the employer of an independent contractor is not properly vicarious: the employer is not liable for the contractor's breach of duty; he is liable because he himself has broken his own duty. He is under a primary liability, not a secondary one.[86]

In fact, liability for breach of non-delegable duty appears to be a fall-back mechanism in some cases where vicarious liability would be unavailable, and fairness and justice dictate that the victim should be entitled to an effective remedy in

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[82] *G.(E.D.) v. Hammer* (2001), 197 D.L.R. (4th) 454 (B.C.C.A.) at para. 75, MacKenzie J.A., affirmed on appeal.

[83] See *Sullivan v. Moody* (2001) 207 C.L.R. 562 at 580 (H.C.A.), where the Court held that to impose a duty of care on a welfare organization for the benefit of a father accused of sexual assault of her child would not be compatible with the organisation's duty to the child and the law of defamation. Gummow J. and Hayne J. adopted a similar position in *Lepore* when they held that extending non-delegable duty to intentional torts would be inconsistent with the doctrine of vicarious liability.

[84] Prue Vines, "*New South Wales v. Lepore*; *Samin v. Queensland*; *Rich v. Queensland*: Schools' Responsibility for Teachers' Sexual Assault: Non-delegable Duty and Vicarious Liability" (2003), 27 Melbourne U. L. Rev. 612 at 616.

[85] *Lepore*, *supra* note 27 at para. 136, Gummow and Hayne JJ. See also *Commonwealth of Australia v. Introvigne*, [1982] H.C.A. 40 at pp. 269-70, Mason J.; *Wilsons*, *supra* note 37; *Jaman Estate v. Hussein* [2005] M.J. No. 48 at para. 16 (Q.B.).

[86] John William Salmond, *Salmond & Heuston on the Law of Torts*, 21st ed. by R.F.V. Heuston and R.A. Buckley (London: Sweet & Maxwell, 1996) at 461.

the circumstances.[87] In this sense, the principle of non-delegable duty maintains the compensatory focus of tort law by ensuring that victims unable to obtain compensation on the basis of vicarious liability can still access effective remedies through non-delegable duty. Instrumentalist conceptions of vicarious liability and non-delegable duty are particularly important in light of increasing reliance on outsourcing to provide essential services that would otherwise have been performed by employees. Contracting out governmental services has become common in the era of privatization, mostly as a matter of convenience. It is questionable whether public authorities should be able to relieve themselves of responsibility for the safety of members of the public or, more specifically, those who rely on those services – especially when such reliance is engendered and enforced by the state itself, as in the case of foster children. In fact, there might be a greater need to protect vulnerable members of the public when government services are contracted out. Otherwise, public authorities will insulate themselves from liability by contracting out services that are likely to produce casualties, leaving victims to seek justice against contracted agencies, who may have to bear a disproportionate burden of costs without adequate opportunity to spread the losses. Theoretically, contracted agencies are able to internalize costs through the prices they charge for their services. However, these agencies often operate under market pressures and may face competition from other agencies. Hence there may be a limit to how much they can charge for their services or the extent of cost internalization they can reflect in their charges, and a limit upon their ability to absorb losses or provide effective compensation for persons injured in the performance of their work.

IV. WHO QUALIFIES AS AN EMPLOYEE FOR PURPOSES OF VICARIOUS LIABILITY?

The two preconditions for vicarious liability are: (a) that the person who committed the tort in question must be an employee of the person sought to be held vicariously liable for the tort; and (b) that the tort was committed in the course of the employee's employment. Triggering the second pre-condition depends on whether the tortfeasor qualifies as an employee in the first place. Employees are distinguished from independent contractors for a variety of reasons including the purpose of determining whether to hold an employer vicariously liable for the torts of others.

As discussed above, an employer is generally not vicariously liable for the torts of independent contractors.[88] It is generally said that an employee is hired under a contract *of* service whereas an independent contractor is hired under a contract *for*

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[87] See *Lepore, supra* note 27 at 475, Gummow & Hayne JJ, and also at 485, Kirby J. See also Vines, *supra* note 84 at 623.

[88] See Williams, *supra* note 42.

service.[89] Traditionally, the element of control has been used to distinguish between employees and independent contractors – an employer-employee relationship exists where the former controls not only *what* the latter does but also *how* the work is done. On the other hand, independent contractors are hired to perform specified tasks but the employer does not dictate how the task is to be accomplished.[90]

The control test was perceived to be determinative of whether a tortfeasor was an employee or independent contractor in pre-industrial times.[91] It is now commonly accepted that the control test is no longer adequate to determine who is an employee and who is an independent contractor in the modern economy given the highly specialized and professional nature of the modern labour force. In fact, meaningful control over the activities of employees is impractical in some situations but this does not preclude the characterization of the worker as an employee. Hence, vicarious liability can arise even when control is not feasible or desirable.[92] The basis of vicarious liability has also been adapted in light of the changing realities of the modern economy such that a person is still regarded as an employee with the corresponding possibility of vicarious liability for the employer even if the latter has absolutely no idea of how the former carries out his or her work. Fleming sums up the situation of the modern labour force and how the law on vicarious liability has adapted to the changing realities:

> More often than not, the skilled craftsman or professional worker is engaged for the very reason that [they possess] the "know-how" which [their] employer lacks. Industrial relations have changed to the point where even a crane driver's assertion "I take no orders from anybody" is regarded as the normal attitude of a skilled [person] who knows [their] job and will carry it out in [their] way.
>
> The policy underlying vicarious liability would have been jeopardised by a literal adherence to the control test, and the courts have not hesitated to hold the employer answerable "even though the work which their servant is employed to do is of a skilful or technical character, as to the method of employing which the employer...is ignorant." [Footnotes omitted][93]

The crucial question is no longer whether the employer supervises the person's work or even whether such supervision is possible. Rather it is whether the

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[89] See *Cassidy*, *supra* note 37 at 579, per Somervell, L.J.; Atiyah, *supra* note 23 at 35. In *Ready Mixed Concrete v. Minister of Pensions*, [1968] 1 All E.R. 433 at 439-40 (Q.B.D.), MacKenna J. stated that the existence of a contract of service depends on three conditions being met; namely that: (a) the worker accepts a wage or remuneration in exchange for his/her skill in performing some service for the employer; (b) the worker is subject to the employer's reasonable control; and (c) an employment relationship is not inconsistent with the provisions of the contract.

[90] Klar, *supra* note 25 at 583.

[91] See *Yewens v. Noakes* (1880) 6 Q.B.D. 530 at 532-33.

[92] See Fridman, *supra* note 3 at 277.

[93] Fleming, *supra* note 15 at 414-15.

employer has ultimate authority or *right* of control over the person performing the task - whether that person is subject to the employer's orders and directions in some form, regardless of whether the employer actually exercises that power, or the extent to which it is in fact exercised.[94] The focus of the inquiry into such status characterization is whether the worker is engaged in a separate enterprise, referred to as the enterprise risk test.[95] The enterprise risk test focuses on the extent of financial risk assumed by the worker. This will not always be an appropriate barometer, especially in the non-commercial context. In *K.L.B.* the Court noted that the test must be adapted in relation to non-profit endeavours like the government-administered foster care system: in such situations the test must be whether the tortfeasor was acting on her own account or on behalf of the employer.[96]

According to Major J. in *Sagaz*, although the level of control an employer exercises over workers is not determinative, it will always be a relevant factor in the inquiry.[97] Flannigan notes that the requisite degree of control must be sufficiently high to justify characterizing the worker as an employee.[98] Other factors such as ownership of tools used, opportunities to profit and responsibility for financial risk will also point to whether the tortfeasor was in business on their own or whether their activity is to be considered integral to the employer's enterprise.[99] The determination of when an employer-employee relationship exists is to be flexible and purposeful bearing in mind the nature of the tasks to be performed and the extent to which control in how the work is to be done is feasible and desirable. The nature of some tasks is such that it is best to give the employee a substantial degree of discretion in how it is to be completed so long as both parties are aware of the common goal. The nature of the task to be performed may be such that it would be necessary for employees to act on their own terms with little or no room for detailed directions or instructions from the employer; yet they will nevertheless be considered

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[94] According to the High Court of Australia in *Zuijs v. Wirth Brothers Pty Ltd.* (1955) 93 C.L.R. 561 at 572 (H.C.A.) [*Zuijs*], control in this context ought to be defined as the right or legal authority to control regardless of whether the employer actually exercises that right and regardless of the extent to which it actually controls the worker in what he or she does. See also *Brodribb Sawmilling*, *supra* note 39 at para. 16.

[95] *Sagaz*, *supra* note 33 at para. 47.

[96] *K.L.B.*, *supra* note 54 at para. 21, McLachlin, C.J.C. In her dissenting judgment, Arbour J. affirmed the need to modify the focus of the enterprise control test in relation to the non-profit activities. However, she preferred to focus on whether the tortfeasor was acting on behalf of the employer as opposed to whether she was acting on her own account because the former allows the objective of the *Sagaz* inquiry (namely, the imposition of liability on the party responsible for the activity that gave rise to the harm) to be meaningfully adapted in the present case. *K.L.B.*, *supra* note 54 at para. 71.

[97] *Sagaz*, *supra* note 33 at para. 47. The rationale for the centrality of the element of control in determining who is an employee is that it would be unfair to impose vicarious liability on employers when they could not have influenced or deterred the tort in question because the worker was pursuing his/her own private ends. *Sagaz*, *supra* note 33 at para. 35.

[98] Flannigan, *supra* note 15 at 51.

[99] See *Montreal (City) v. Montreal Locomotive Works Ltd.* [1947] 1 D.L.R. 161 at para. 19 (Canada P.C.) [*Locomotive*]; Fridman, *supra* note 3 at 281; Flannigan, *supra* note 15 at 41-53.

employees so long as the employer retains lawful authority to give ultimate directions or instructions when it is possible to do so, and the worker could be sanctioned for failure to follow the instructions, for example through dismissal.[100] In fact, the work in question may be subject to the idiosyncrasies of the person engaged to execute it, such as foster parents subjecting children placed in their care to their particular parenting styles so long as it does not compromise the welfare of those children. Kidner suggests that perhaps the inquiry should focus not so much on the power to direct how work is done but on accountability – to what extent is the person accountable to the party sought to be held vicariously liable.[101]

Thus, notwithstanding Major J.'s statement in *Sagaz* that the extent of control that the employer exercises over workers will always be a relevant factor in determining whether an employer-employee relationship exists, he also acknowledged that there is no set formula for that inquiry. In addition, the relative weight attached to the various factors to be considered depends on the circumstances of each case.[102] He also cautioned against undue reliance on control of the employer over the worker's activities because such reliance could be misleading.[103] Ultimately, the question should be whether, in light of all the circumstances of a particular case, it is fair to impose vicarious liability on the employer for the torts of a person employed to complete specified tasks.[104]

The jurisprudence to date shows judicial willingness to consider a broad range of factors in making the determination of whether to fix an employer with vicarious liability. The goals of vicarious liability (i.e. to provide a practical remedy, that is, just and fair compensation to tort victims, and to deter future torts) must inform the inquiry into the status of workers. The various goals may sometimes be oppositional, but judgment in individual cases must be informed by the relative importance of particular factors with the view to doing justice in the circumstances.[105] This approach could lead to characterizing some workers as employees to justify imposition of vicarious liability on the employer in situations that may appear to point in the opposite direction.[106] Contrary to criticisms that this might lead to uncertainty in the law,[107] such an outcome is dictated by the interests of justice and is consistent with changing patterns of employment relationships in

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[100] *Zuijs*, *supra* note 94 at 571; Fleming, *supra* note 15 at 415; Trindade & Cane, *supra* note 25 at 719.

[101] Richard Kidner, "Vicarious Liability: for whom should the 'employer' be liable?" (1995), 15 Legal Stud. 47 at 59

[102] *Sagaz*, *supra* note 33 at 558.

[103] *Ibid.* at 554.

[104] See Linden & Feldthusen, *supra* note 1 at 553.

[105] See Klar, *supra* note 25 at 585-86.

[106] See *Hollis*, *supra* note 21.

[107] See O. Kahn-Freund, "Servants and Independent Contractors" (1951) 14 Mod. L. Rev. 504 at 507; Atiyah, *supra* note 23 at 37.

today's society. Indeed, as McEachern C.J.B.C. pointed out in *Critchley*, in spite of attempts to distinguish between employees and independent contractors the line may be blurred especially in cases of overlapping obligations.[108]

V. CHANGING PATTERNS OF EMPLOYMENT

The face of work is changing in the modern economy and so is the relationship between employers and workers. There is a growing trend of non-standard employment.[109] The non-standard workforce consists of part-time workers, temporary workers, persons working from home, consultants, freelancers, etc. Many, but not all, non-standard workers are also self-employed.[110] Non-standard workers do not only work in clerical or low-skilled jobs; many are also professionals, working in atypical positions. There are both social and economic reasons for the increase in non-standard employment.[111] Some people choose to work in non-standard jobs because of the flexibility and other strategic advantages they offer,[112] but many do not choose non-standard employment freely. Rather, market forces push many people into non-standard jobs; many businesses and organizations resort to non-standard employments allegedly in order to cut costs and stay competitive and workers simply take the jobs available to them.[113] The increase in non-standard

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[108] *A. (C.) v. Critchley* (1998) 60 B.C.L.R. (3d) 92 at 119 (C.A.) [*Critchley*]. Appeal to SCC discontinued: [1999] S.C.C.A. No. 32.

[109] Jobs are now defined as standard and non-standard employment. Standard employees work for a single employer, work full time, year round and enjoy some measure of job security. They often have benefits and opportunities for upward mobility. In contrast, workers with non-standard jobs do not work full time for a single employer. Non-standard workers tend to be poorly paid, have little or no benefits and do not enjoy job security compared to permanent and full-time employees. Just over half of workers in Canada hold standard jobs. See BC Ministry of Education, *Making Career Sense of Labour Market Information*, "The Shift to Non-Standard Work" by Elaine O'Rielly, 2nd Ed., online: <http://www.makingcareersense.org/CHAPTER2/CHAP2-9.HTM>. See also GPI Atlantic, *Working Time and the Future of Work in Canada: A Nova Scotia Case Study* by Linda Pannozzo (2004) at 261-62 (accessed through University of Victoria electronic library site: http://site.ebrary.com).

[110] For rising trend in part-time employment between 2001 and 2005, see Statistics Canada, "Full-time and part-time employment by sex and age group", online: <http://www40.statcan.ca/l01/cst01/labor12.htm>. See also Statistics Canada, "Self-employment: historical summary" <http://www40.statcan.ca/l01/cst01/labor64.htm>; and Statistics Canada, "Self Employment Activity in Rural Canada" by Valerie du Plessis (July 2004) 5:5 Rural and Small Town Canada Analysis Bulletin, at 3 (Statistics Canada catalogue No. 21-006-XIE), online: <http://www.statcan.ca/cgi-bin/downpub/listpub.cgi?catno=21-006-XIE2004005>.

[111] See BC Ministry of Education, *supra* note 109.

[112] Changes in social conditions such as rise in dual earner families, younger people having to work to support themselves while in school, the need for better work-life balance in light of pressures on people's lives such as child care, caring for elderly relatives, the desire to have independence, flexibility and variety in what work they do, and sometimes opportunities for increased income have resulted in many workers demanding flexible work arrangements, even within standard employments. See BC Ministry of Education, *Making Career Sense of Labour Market Information*, by Elaine O'Rielly, 2nd Ed. Table 1, "Social Trends Affecting Non-Standard Work", online: <http://www.makingcareersense.org/FIGURES/Figures.htm>; and Pannozzo, *supra* note 109 at 262.

[113] See Statistics Canada, "Reasons for part-time work by sex and age group" (2006), online: <http://www40.statcan.ca/l01/cst01/labor63a.htm>.

employment is also attributable to the trend of "just-in-time" production by which employers and organizations maintain minimal services, stocks or inventory with the hope of relying on casual workers to meet unexpected increases in demand.[114] Stricter eligibility criteria for income assistance and pressures on welfare recipients to participate in the waged labour force also compel people to take whatever jobs are available. Many of these jobs tend to be non-standard.

From the perspective of employers, reasons for this emerging phenomenon of non-standard employment relationships are many, including cost efficiency, tax purposes, not having to pay employment benefits for employees, and the avoidance of vicarious liability. Resorting to a non-standard workforce enables employers to reduce their costs, increase productivity and stay competitive with lower wages, non-payment of benefits and reduced over-head costs. Non-standard workers have therefore become the "sacrificial lambs" in the modern economy with their desire for full-time/permanent employment, higher remuneration and some measure of job security subordinated to pressures for economic efficiency and higher profits.[115] As England notes: "Today, many employers facing stiffening...competition are attempting to increase their productivity by placing the risks associated with their business on their workers – for example, by transforming them into self-employed casuals..."[116] Many of these workers cannot be considered independent contractors in the traditional sense of the word - as persons who have chosen to engage in their own business ventures.

The phenomenon of non-standard employment has become a mainstay of the modern labour market.[117] Both private sector employers and government departments rely on non-standard workers to provide a variety of services previously or otherwise performed by workers in standard positions. Reasons for reliance on non-standard employers include efficiency in meeting unexpected increases in workload and/or demand for services (just-in-time production or services), the need for expertise not readily available in-house, replacing public sector employees on temporary absences such as sick and maternity or parental leaves, and to relieve taxpayers of the burden of providing for certain services. Government departments rely on non-standard employees to provide a wide range of services in key areas such as social services, health, education, forestry, environment, communication, and

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[114] See Pannozzo, *supra* note 109 at 286.

[115] See BC Ministry of Education, *supra* note 109; Geoffrey England, *Individual Employment Law* (Toronto: Irwin Law, 2000) at 13.

[116] England, *ibid* at 16.

[117] See McKendrick, *supra* note 23 at 771-72; Hugh Collins, "Independent Contractors and the Challenge of Vertical Disintegration" (1990) 10 Oxford J. Legal Stud. 353 at 356-57; Social Development Canada, "Flexible Work Arrangements: Gaining Ground" by Brenda Lipsett and Mark Reesor, (April 1997) 3:1 Applied Research Bulletin, online: <http://www.hrsdc.gc.ca/en/cs/sp/sdc/pkrf/publications /bulletins/1997-000020/page03.shtml >

property maintenance. Some services are provided by professionals such as architects and engineers while others are provided by non-professionals. Services in the latter category may include janitorial, cleaning, building maintenance and repair, and grounds maintenance.[118]

Based on the traditional distinction between employees and independent contractors, many workers in the atypical workforce would be characterized as independent contractors. Hence, employers will generally not be vicariously liable for torts committed by non-standard workers in the execution of their work, no matter how central their work might be to the employer's enterprise or organisation.[119] Yet, the reality is that many of the workers in this category do not fit the traditional conception of independent contractors and may not have the financial means to satisfy tort judgments against them – they may not have liability insurance or if they do the coverage might be limited. They are also unlikely to be able to satisfy tort judgments against them with uninsured assets. In this sense, the situation of many non-standard workers regarding their ability to satisfy judgments against them is no different than that of employees. Yet, those injured by the former are less likely to receive effective compensation, one of the principal purposes of vicarious liability.[120] Some of the service providers may be sophisticated business organizations with liability insurance or self-insurers who can easily satisfy tort liability arising in the course of their work. However, many of them do not fit into that category and hence are less likely to be able to satisfy tort judgments against them and spread losses effectively. Many of these workers are drawn from an army of cheap labour ready to be exploited in the name of economic efficiency. Workers in this category have aptly been described as "the contingent labour force" or "peripheral workers".[121] The pressures to provide services with the least possible costs create a high likelihood of workers cutting corners in order to stay competitive. This in turn increases the likelihood of compromising the safety of workers and

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[118] See Government of British Columbia, Ministry of Management Services, online: <http://www.pc.gov.bc.ca/psb/Welcomemat.htm>; Government of Canada, Business Access Canada, online: <http://contractscanada.gc.ca/en/contra-e.htm>.

[119] See McKendrick, *supra* note 23 at 770-72. See also *Leichhardt Municipal Council v. Montgomery* [2007] HCA 6 at para. 98 (per Kirby J.).

[120] In rationalizing the distinction between employees and independent contractors, Williams notes that the latter were often entrepreneurs with considerable assets with which they could easily satisfy judgments against them compared to employees who are unlikely to be capable of paying judgment debts. In fact, in many cases, the contractors were even wealthier than the employers and it therefore made sense to call on them to pay for tort damages arising from their wrongdoing. Williams acknowledges that some contractors might be insolvent and hence unable to satisfy judgment against them. However, this would be rare and not worth changing the rules regarding the distinction between employees and independent contractors for purposes of vicarious liability. Williams, *supra* note 42 at 195, 198. See also Atiyah, *supra* note 23 at 334. As already noted, a tort victim will often sue the independent contractor if it is practical to do so. Since they can only recover once for their injuries, there would be no practical advantage in suing the employer. Even if they choose to sue the employer for the torts of the solvent contractor, the employer's right of indemnification would neutralize their liability.

[121] Pannozzo, *supra* note 109 at 261.

members of the public, and hence increased likelihood of injuries.[122] It is therefore questionable whether such low-level workers who provide essential services for the public sector should bear the burden of compensating those who become casualties in the provision of "public services" when that could clearly affect their bottom line and, in some cases, drive them out of business.

Given the precarious situation of many non-standard workers, it is fair that the law considers such workers employees, at least for the purpose of imposing vicarious liability for torts arising in the course of their work on employers who ultimately benefit from these arrangements.[123] In any event, many non-standard employees are unlikely to be able to satisfy tort damages without significant costs to them. Victims of their torts would often ultimately have to bear the cost of those arrangements.

The rising phenomenon of non-standard workers who are considered independent contractors also raises the question of the nature of the distinction between employers and independent contractors. Fridman notes that the basis of that distinction, namely that an independent contractor exercises discretion in how the work is performed, is not sustainable in modern employment relations. At best, the element of discretion in determining the status of workers is merely a theoretical guide in determining when vicarious liability attaches.[124] This points to a malleable concept that requires a contextual analysis and should give way to common sense and practical considerations. Courts faced similar challenges in characterizing the status of workers with the advent of industrialization and the skilled labour force, in which employers no longer exercised detailed control over work to be done by their employees.[125]

Society is once again at a similar juncture with the rise in non-standard employment and many self-employed workers. Hence, we need to reconsider the indicators of status characterization used up until now to determine when an employer should be vicariously liable for torts of workers in order not to frustrate the social purposes of the principle of vicarious liability. Additionally, part of the traditional rationale for maintaining a distinction between employees and independent contractors – namely, the contractor's supposed ability to satisfy judgment either from insured or personal assets – is no longer sustainable in modern

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[122] *Ibid* at 285-86.

[123] See Trindade & Cane, *supra* note 25 at 725.

[124] Fridman, *supra* note 3 at 281-82.

[125] As already noted, the primary means of characterising the status of workers – detailed control over the execution of tasks as indicative of employee status – was no longer adequate to the task and courts adapted the test in light of the prevailing realities about employment relationships. Control is no longer the sole test for the status of particular workers. Instead, the focus is to be on the totality of the relationship – whether the worker was an integral part of the employer's organisation (the organisational test) or whether they were in business on their own account (entrepreneurial test). Other factors such as ownership of tools, mode of payment and extent of risk assumed by workers became relevant in determining whether a worker was an employee to justify vicarious liability of the employer or independent contractor in which case no such liability arose.

times, at least in relation to many of those now classified as independent contractors. Thus, notwithstanding the increasing scope of primary liability of employers, the growing number of workers characterized as independent contractors threatens victims' rights to effective compensation unless the law finds some way to hold employers liable, for example through an expanded basis for non-delegable duties or liberal interpretation of who is an employee for purposes of vicarious liability.[126]

A reconsideration of the hallmarks of who qualifies as an employee or independent contractor and when an employer-employee relationship exists becomes more urgent given current patterns of employment that tend to deviate from traditional employment relationships. The rising incidence of atypical or non-standard employment threatens to undermine the social purposes of vicarious liability unless the determination of when an employer-employee relationship exists is also altered in light of the new social reality.

VI. CONTEXTUALIZING STATUS CHARACTERIZATION AND THE EXISTENCE OF NON-DELEGABLE DUTIES

Vicarious liability has often been deployed to protect vulnerable parties in light of changing social realities.[127] It follows then that it is not unreasonable to adopt a contextual approach to determining whether a person is an employee for the purpose of vicarious liability or whether the duty in question should be considered non-delegable to enable the employer to be fixed with liability for loss caused by an independent contractor.[128] A contextual approach will resolve these issues not in the abstract but in relation to the context in which the plaintiff's loss arose. It appears that a contextual approach to the question of who is an employee would offend the generalist approach of the common law and, more specifically, the definition of an employee because among other things, who is an employee may be variously defined depending on the context (with a possibility that the definition in one context could negatively impact how employee is defined in other contexts). However, this is defensible as a sound public policy choice in the interest of protecting innocent victims as well as advancing the purposes of the principle of vicarious liability; both of which are threatened with the growing number of workers classified as

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[126] A possible dilemma arises in attempts to broaden the scope of vicarious liability in response to changing employment patterns. Employers are increasingly relying on self-employed and casual workers specifically to reduce costs and stay competitive. This goal is undermined if courts find creative ways to broaden the definition of an employee to make employers vicariously liable for the torts of non-standard workers. Employers will likely look for cheaper alternatives such as relocating their operations to other jurisdictions or relying heavily on labour-saving technology, both of which could lead to unemployment. See England, *supra* note 115 at 14.

[127] For instance consider the factors in *Bazley, supra* note 20 at para 41, for determining when an employer's liability may be engaged under the enterprise risk liability test – opportunity that the activity in question afforded the person to abuse his/her power, the extent to which the wrongful conduct may have furthered the goals of the defendant's enterprise, and hence be more likely to have been committed by the employee, etc.

[128] McKendrick, *supra* note 23 at 782; Kidner, *supra* note 101 at 54.

independent contractors and with increasingly restrictive interpretations of what constitutes non-delegable duties.[129] Such a contextual approach would be consistent with the origins of vicarious liability, which began as a principle of "social convenience and rough justice" as opposed to having a logical or principled basis.[130]

Fleming cautions against status characterization by analogy - relying on indicators of employer-employee relationships in some contexts as determinative of the existence or non-existence of such a relationship for purposes of vicarious liability. The law recognizes a distinction between employees and independent contractors in several areas and for different purposes, including workers' compensation benefits, pension benefits, taxation, applicability of employment legislation and workplace safety legislation, actions for wrongful dismissal and availability of vicarious liability. The policy justification for the distinction varies depending on the context. Thus, while it is important to maintain the employee–independent contractor distinction in the various contexts, care must be taken not to apply policy justifications for the distinction in other areas in determining whether vicarious liability is appropriate in particular situations.[131] Even in relation to vicarious liability, there is a need for a contextual determination of whether liability is appropriate in particular relationships because the policy reasons that may justify recognition of vicarious liability in one context may be different from what is needed to ground liability in other situations.

Factors such as the degree of control exercised by the employer over the person's work, mode of payment, degree of financial risk assumed by the worker, whether the person provides her/his own equipment, whether the worker's service is integral to the employer's organization, self declaration, etc., have generally provided sufficient bases for determining whether an employer-employee relationship exists in particular contexts and hence whether vicarious liability is appropriate. It would, however, be unreasonable to apply these factors in situations that do not bear the hallmarks of relationships in which they have generally helped to resolve the issue of whether a person is an employee for purposes of vicarious liability, especially when innocent plaintiffs may be left without an effective remedy.[132] There is a tendency or possibility that these factors will be applied in ways that defeat the purpose of vicarious liability.[133] In fact, some of those whom courts perceive as independent contractors may not consider themselves as such or if they do, they do not fully appreciate the consequences of that classification aside from some tax advantages.[134] The crucial question should be whether there is good

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[129] See McKendrick, *ibid* at 782-84; Kidner, *ibid* at 55-56.

[130] *Imperial Chemical Industries v. Shatwell*, [1964] 2 All E.R. 999 at 1011-12, per Lord Pearce.

[131] Fleming, *supra* note 15 at 416. See also Atiyah, *supra* note 23 at 31-33; Trindade & Cane, *supra* note 25 at 717-718; Flannigan, *supra* note 15 at 50; England, *supra* note 115 at 12-13.

[132] See Kidner, *supra* note 101 at 48.

[133] See Kidner, *ibid.*, at 49-50, 58, commenting on *O'Kelly v. Trusthouse Forte*, [1983] I.C.R. 728.

[134] Kidner, *ibid*, at 54.

reason for the employer to bear the risk of injury entailed in the work of persons hired to do specific tasks in the same way as those employed in the conventional sense.[135]

A possible starting point could be to recognize vicarious liability when the activity that produced the plaintiff's injury, and hence the tortfeasor, was integral to the employer's organization unless there is good reason to attribute the risk of that activity to the worker alone (for example because he or she is an entrepreneur carrying on a business on their own account).[136] This is not a perfect solution because as Atiyah points out, it still leaves unanswered when a worker is to be considered integral or part of the employer's organization.[137] It also presupposes that the employer has an organized business possibly with a standard workforce and occasionally relies on non-standard workers to accomplish its goals. This "solution" also fails to provide a satisfactory distinction between employees and independent contractors.[138] Notwithstanding these flaws, the enquiry would still be a necessary exercise. It should also be a case-by-case determination informed by the purposes of vicarious liability as a mechanism for allocating accident losses to ensure effective compensation for innocent victims.[139] According to Atiyah, such an approach is consistent with Lord Wright's decision in *Montreal (City of) v. Montreal Locomotive Works Ltd.*[140] to look to a number of factors, none of which can be solely determinative of the issue of whether an employer-employee relationship should be inferred in particular circumstances.[141] As well, given changing employment relationships and uniqueness of some employment arrangements, the indicators of an employment relationship in particular situations may depart from and sometimes call for a reconsideration of precedent but this is necessary to maintain the vitality of the law and fairness to parties.[142] In commenting on the need for courts to adopt a functional approach to the determination of the status of employees to reflect not only the policy underlying vicarious liability but also to reflect changing social and organizational realities, La Forest J. stated:

> the doctrine of vicarious liability, is a judicial creation devised in Holmes' phrase, in response to "the felt necessities of the time". In my view, like the judges who created the doctrine, it is incumbent on present day judges to adapt the law to new and evolving social and organizational realities...

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[135] Fleming, *supra* note 15 at 416; *Ibid.* at 56.

[136] Kidner, *ibid.* at 62.

[137] Atiyah, *supra* note 23 at 38.

[138] Trindade & Cane, *supra* note 25 at 724.

[139] See *Sagaz*, *supra* note 33 at para. 30.

[140] [1947] 1 D.L.R. 161 (P.C. Canada).

[141] Atiyah, *supra* note 23 at 38-39.

[142] See *Short v. J & W Henderson, Ltd.* (1946) 62 T.L.R. 427 at 429 (H.L.); Atiyah, *supra* note 23 at 83.

> The courts created the law; it is up to them to adapt it to meet modern needs.[143]

Similarly, in *Sweeney*, Kirby J. emphasised the need for vicarious liability to adapt to the realities of employment relationships in modern society. He noted that determinations of when vicarious liability arises must be informed by changing social conditions that affect employment relationships in contemporary society.[144]

The consequences of failure to adopt such a functional approach is made clear in the foster care cases - *K.L.B.* and *M.B.* - where the court refused to recognize that the government agency that hires foster parents should be vicariously liable for the torts of foster parents inflicted upon children placed in their care. The formalistic application of the factors outlined in *Sagaz*, without a broader analysis of the purpose of foster care and how the indices of an employer-employee relationship need to be adapted in the context of the foster care system effectively immunized the government authority that placed the children in the tortfeasors' care from liability, leaving the plaintiffs without an effective remedy.

VII. VICARIOUS LIABILITY FOR THE TORTS OF FOSTER PARENTS

In *K.L.B.*,[145] the Court held that foster parents are not government employees. Rather they are independent contractors. Hence, the government cannot be vicariously liable for the tortious conduct of foster parents. Following the *Sagaz* test the Court held that the relationship between foster parents and the government is not sufficiently close to justify vicarious liability. The Court emphasized the centrality of control in status characterization – since foster parents operate independently and are not subject to directions from the government in their daily activities in their role as foster parents, it would be inappropriate to hold the government vicariously liable for their torts. As well, the Court noted that other factors identified in *Sagaz* - ownership of tools, hiring of helpers and exercise of managerial authority - all point to a finding that governments are not vicariously liable for the torts of foster parents. Although foster parents provide a public service, they do so in their own homes. Independence over how they parent is key to the purpose of fostering and hence they cannot be perceived as acting on behalf of the government in a manner that justifies the imposition of vicarious liability.

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[143] *London Drugs, supra* note 21 at 267.

[144] *Sweeney, supra* note 15 at para. 37, Kirby J. dissenting.

[145] In *K.L.B.* the plaintiffs became wards of the state. They were placed in foster homes where they were abused. The *Protection of Children Act* obliged the government to make adequate foster care arrangements for its wards that meets the needs of such children. The social workers who placed the children in the foster homes were found negligent in failing to properly assess the suitability of the foster parents before placement and ignoring evidence that the placement might not be in the children's best interests. They also failed to adequately monitor how the children fared in the foster homes. Their claim for negligence against the government, however, failed because of statutory limitation periods. The plaintiffs also sought to hold the government vicariously liable for the torts of the foster parents, for breach of a non-delegable duty owed to them to ensure their safety in foster care and for breach of a fiduciary duty. Both actions failed.

The majority in *K.L.B.* also noted that, in any event, vicarious liability in these circumstances would not promote deterrence because it would simply impose liability on a party that has no control over how the activity in question is performed and who therefore has no means of deterring future abuse. Further, the court noted that not only is government control over foster parents not practical but it is also not desirable because it is not in the overall interest of society. The threat of liability could force governments not to place children in foster care and instead place them in environments where they could exercise control over how children are cared for such as group homes, even though this would not be ideal for children.[146]

Arbour J. dissented on the issue of vicarious liability. Unlike the majority, she found that it is appropriate to hold governments vicariously liable for the torts of foster parents. She noted that although foster parents exercise a great deal of independence in their work, a contextual analysis of the relationship shows that they act on behalf of the government and should therefore not be considered independent contractors. As well, vicarious liability in such circumstances would be consistent with the policy rationales for vicarious liability – fair and just compensation and deterrence of future harms. She emphasized that the functional inquiry in *Sagaz* requires a holistic assessment of the relationship between the tortfeasor (i.e. foster parents) and the government to determine whether vicarious liability is appropriate in the circumstances. A contextual analysis makes it clear that foster parents act on behalf of the government regardless of how independently they operate and regardless of the fact that they carry out their activities within their own homes. Among other things, Arbour J. pointed out that the government remains the legal guardian of foster children. This gives the government sufficient power or right of control over the care of foster children to justify vicarious liability. Although the government does not exercise this right to dictate the day-to-day care of foster children it is still involved with their care in a variety of ways including developing plans of care for the children, ensuring that their needs are met in foster homes and terminating the foster care arrangement if things do not work out well for the children.[147]

The effect of the finding of no vicarious liability against the government in *K.L.B.* essentially left the plaintiffs without a remedy.[148] In the words of Kirby J. in

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[146] It is worth noting that shifting the care of children in care from the foster care system to a non-home based system would not necessarily insulate the government from vicarious liability. In fact, vicarious liability has been imposed on employers for abuse in non-home care facilities because workers in those settings are readily characterized as employees. See *Bazley, supra* note 20; *Lister, supra* note 27.

[147] See also *Marshall v. Williams Sharpe & Sons*, 1991 S.L.T. 114 (Court of Session, Inner House, Second Division).

[148] As already noted, the plaintiffs attempt to ground liability on breach of non-delegable and fiduciary duties also failed. Although the personal liability of the tortfeasors provides another avenue for compensation, it was not an option open to these plaintiffs, as in many other such cases. The tortfeasors were judgment-proof (some of them were even deceased). Even if the claims were feasible, they would have suffered the same fatal blow from the limitation defence as the Court concluded that with the exception of the sexual abuse claim, all the others were statute-barred.

Sweeney, such an outcome "is not a proud moment in [the] administration of justice."[149] The unfairness of this outcome is made even clearer when one considers the status of children placed in foster care; they are frequently vulnerable children who have often experienced adversity in their lives or who are from troubled backgrounds. Removal from their natural families and placement in foster care is supposed to improve their well being and life chances. Yet, the risk of abuse in foster care is real. Sadly, some children come out of foster care much worse off and yet are often unable to obtain effective redress for the abuse suffered. Such an outcome marginalizes an already vulnerable group and should be avoided through a contextual analysis of the relationship between tortfeasors and government agencies that place children in harm's way bearing in mind the incredible vulnerability of children in such situations.

Even if foster parents are not subject to detailed control by social workers, they cannot be said to be carrying out the activity of fostering on their own account or considered entrepreneurs who use their own capital and assets to generate profits. As Major J. noted in *Sagaz*, although the element of control is important, it is not conclusive in determining the status of a worker in particular circumstances.[150] The appropriate inquiry in this regard should be whether the person is undertaking the activity[151] in question on her/his own accord as a business venture that is whether they are an entrepreneur, or whether they are acting on behalf of another, the employer.[152] The focus of the inquiry should not be limited to whether the worker is gaining a benefit, but more importantly the kind of benefit they receive relative to the risks they assume.[153] Similarly, Flannigan notes that the employee-independent contractor distinction presumes that the parties are engaged in separate enterprises or activities, one conducted by the employer and one by the worker engaged to complete the tasks in question.[154] "Whenever it can be established that the worker conducts a separate enterprise, the limits of the employer's enterprise will have been ascertained and the employer should not be liable for torts attributable to that other enterprise. The distinction...is based on control."[155] Factors that might elucidate the status of particular workers will vary depending on, among other things, the nature of the work to be done and the extent of control that is possible in the circumstances. This would often require a contextual assessment of the relationship between the

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[149] *Sweeney*, *supra* note 15 at para. 117, Kirby J., dissenting.

[150] *Sagaz*, *supra* note 33 at 554.

[151] I have chosen to use the more encompassing term 'activity' as opposed to 'business' because the latter term connotes a profit generating venture but as is evident from *K.L.B.* and *M.B.* issues of status characterization can equally arise in relation to non-commercial activities such as fostering.

[152] *Sagaz*, *supra* note 33 at 558.

[153] Kidner, *supra* note 101 at 57.

[154] Flannigan, *supra* note 15 at 32, 41.

[155] Flannigan, *supra* note 15 at 36.

worker and the employer to determine whether the two are engaged in a single enterprise or whether they are each carrying out their own activities.[156]

Realistically, foster parents cannot be said to be engaged in an enterprise separate from the mission of government agencies that place children in their care. A more realistic view of foster parents accepts that they provide a public service that is essential to the government's responsibility for child protection - providing safe home environments for children in care. Given the nature of fostering and its goal of replicating the natural home environment, any detailed supervision or control of activities of foster parents in relation to foster children will defeat the purpose. In *United Wholesale Grocers v. Sher,*[157] although the employer exercised little if any control over the worker in question, who was a casual employee and used his own tools, he was nevertheless found to be an employee for purposes of vicarious liability because he was "part and parcel" of the defendant's business and not working on his own account. The organizational test – the necessity of the activity that generated the plaintiff's loss to the defendant's overall enterprise - is not sufficient to ground the characterization of the worker as an employee to justify vicarious liability. However, that together with the fact that foster parents cannot be considered entrepreneurs provides a strong basis for vicarious liability. As Kidner notes, even if a person's activity is not central to the employer's enterprise and even if they are not regarded as part of the organization for managerial purposes, they can still be regarded as an employee provided there is clear evidence that they are not acting as an entrepreneur in relation to the defendant's enterprise. The focus should be on the person's role in the defendant's enterprise regardless of any formal designation.[158] In this way, courts would have the discretion to make reasonable inferences from the nature of particular relationships in light of prevailing social realities in ways that achieve justice for all the parties while maintaining vicarious liability's goal of providing effective compensation to innocent victims who become casualties of an activity.

The perception and expectation of foster children cannot be ignored in determining whether foster parents are "employed" by the Superintendent of Child Welfare in order to make the latter vicariously liable for the wrongs of the former. Children are placed in the care of adults who are expected to act as their parents and give them as "normal" a home life as possible. To the children, foster parents have apparent authority over them and that power relationship has been created by the Ministry's conferral of authority on foster parents over the children. It would be a fundamental breach of trust for children who are abused or neglected by their caregivers to discover that the party that placed them in harm's way is not vicariously liable for the wrongs of the caregivers, has no non-delegable duty regarding their safety and well-being in foster care, and that no breach of fiduciary

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[156] See *Locomotive*, *supra* note 99 at para. 19 (P.C.)

[157] *United Wholesale Grocers v. Sher*, 1993 S.L.T. 284 at 285-87.

[158] Kidner, *supra* note 101 at 64.

duty is engaged, especially where the tortfeasors are not capable of compensating the plaintiffs. Both *Bazley* and *Critchely* support the conclusion that vicarious liability should attach where a party has placed the wrongdoer and victim in a parent-like relationship that leaves the weaker party vulnerable to abuse even if the wrongful conduct in question was for the personal gratification of the tortfeasor and contrary to the employer's enterprise. Although the employment status of the tortfeasor in *Bazley* was not in issue (because he was an employee) the torts in question did not fit within the category of conduct traditionally considered to have been committed in the course of one's employment. Yet, vicarious liability was considered appropriate in those circumstances because the employer, by creating the parent-like relationship between the tortfeasor and victims, enhanced the risk of abuse of the vulnerable children left in the charge of the tortfeasor. More importantly, in *Critichley*, the government was held vicariously liable for the intentional torts of a surrogate parent although he was explicitly designated as an independent contractor by the terms of his contract with the government. From the children's perspective, the governmental employers had placed them in the parent-like situation with the primary tortfeasor.[159] Whether or not the nature of the abuse can be considered conduct occurring in the course of the tortfeasor's employment, it is fair that children expect some remedy from the person who placed them in the tortfeasor's care in the first place (given the difficulties in proving employers' negligence that should not be the only viable basis of liability). In the same vein, foster children are not privy to the terms of the contract between the Superintendent of Child Welfare and foster parents. All they know, and probably care about, is that they have been placed by the government and would, therefore, expect some remedy for their potential victimization; even in the absence of personal fault on the part of the social workers in charge of their placement. As well, the power relationship created in such circumstances supports imposition of vicarious liability even absent direct supervisory control over the activities of the tortfeasor.[160] Thus, the foster care cases serve as an excellent example of the pressing need for a contextual approach to non-delegable duties and imposition of vicarious liability on public authorities.

CONCLUSION

Governments provide a myriad of services that bring their workers in direct contact with members of the public. Risk of injury to the public is real. Historically, governmental immunity made it difficult for victims injured by government employees to obtain a remedy. This created differential treatment among tort victims based on the identity of tortfeasors. This inequality became intolerable, especially with the increase in governmental activities and widespread recognition of the idea of equality before and under the law, resulting in the abolition of governmental immunity for the torts of its employees. Other developments that have made it easier for plaintiffs to obtain effective remedies include the principles of vicarious liability and non-delegable duties that impose liability on employers for the torts of their

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[159] *Critchley, supra* note 108 at 118-22.

[160] See *J.L. v. Canada (Attorney General)* (1999) 175 D.L.R. (4th) 559 at 574 (B.C.S.C.).

employees and independent contractors in appropriate circumstances even in the absence of personal fault. In order to maintain the continued viability of these concepts in modern tort law, courts have adapted the elements necessary to trigger liability based on these concepts in light of prevailing social realties.

The growing phenomenon of non-standard workers undertaking jobs in both public and private sectors and for whose torts employers are generally not liable threatens to undermine these victim-favourable developments unless courts reconsider the traditional characterization of workers for both the purposes of vicarious liability and for determining when employers owe non-delegable duties to victims. Many of the workers now considered independent contractors do not fit the traditional understanding of workers in this category, who would often be carrying out their own enterprises and were rightly the only ones held liable for the materialization of risks associated with their activities. The same is not true of many non-standard workers today. Many of these workers find themselves in non-standard positions out of necessity and convenience. They are actually being exploited in the name of business efficiency and cost cutting measures. Failure to hold the employers who actually benefit from the services of these workers liable puts some victims at a disadvantage because of the status of the tortfeasors.

In the context of providing public services, the use of non-standard workers effectively immunizes governmental authorities from liability for risks associated with services the government is mandated to provide, leaving the losses to be absorbed by other parties who can least afford it and depriving victims of effective remedies. It is problematic for the costs associated with the provision of public services to be borne by vulnerable workers who themselves are often being exploited or by innocent victims who cannot obtain effective remedies from tortfeasors. This phenomenon privatizes the costs associated with the provision of public services. It also undermines liability of public authorities and should be avoided through contextual analysis of current employment relationships that produce such outcomes. Further, it creates inequalities among tort victims depending on the status of workers responsible for their injuries.

This is an unfortunate outcome for those placed in harm's way by public authorities when services they are mandated to provide are outsourced to so called independent contractors. As has been pointed out throughout this paper, this problem is exacerbated by the rising trend in non-standard employment where work that would otherwise have been completed by an employer's employees is contracted out to persons who look like independent contractors but can hardly be characterized as such in practice. This practice undermines the need for equality of treatment of accident victims simply based on the characterization of workers who carry out the injury-producing activities. It is also inconsistent with the historical rationale for vicarious liability to avoid the disruptive effect of tort liability by ensuring fairness in the imposition of liability.

Even if control continues to be perceived as essential to the employer-employee relationship, the hallmarks of control should be reconsidered in light of current social realities. Specifically, what constitutes control should take account of the uniqueness of particular situations to determine what form control may realistically take in different contexts. The variety of employment relationships means that there can be no universal test of what constitutes the exercise of control by an employer over an employee to justify vicarious liability. All these point to the necessity for contextual approaches to when vicarious liability should be imposed on an employer and when non-delegable duties arise in ways that remain attentive to changing social realities, and the goals underlying vicarious liability and non-delegable duties. Inability to impose liability on the basis of vicarious liability should not preclude a successful claim based on breach of non-delegable duty and vice versa.