VICARIOUS LIABILITY

IN THE NON-PROFIT SECTOR

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VICARIOUS LIABILITY
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EXECUTIVE SUMMARY

1. Overview

While it is undoubtedly true that many cherished institutions are under attack, and that society, in general, has become more litigious, the matter is particularly acute in the charitable and non-profit sector because, for the most part, the law provides no special protection to them with respect to the conduct of those persons through whom they carry on their activities, whether such persons are paid or unpaid. Apart from altruism, the value of which should not be underestimated, there is no counter-balance to this exposure to liability. Thus, charities and non-profit organizations find that they are faced with many of the same challenges as for-profit entities, but without the same resources. This Report attempts to outline the nature of these challenges, and to suggest some legal and policy options for dealing with them.

The assembly of this Report involved the following elements:

1. research and review of the literature and case law on vicarious liability, including an assessment of the issue as it relates to children and other vulnerable people;

2. analysis of how the case law may impact on the activities of non-profit corporations, as well as directors and officers of such corporations;

3. analysis of the effects of vicarious liability on the ability of volunteers to perform their duties and the legal risks that arise for non-profit corporations and charities that make use of volunteers; and

4. analysis of the legal and policy options for governments and others that might be
implemented to reduce the impact and risk of vicarious liability in the non-profit sector.

Consistent with the foregoing, the Report does not deal with the following:

1. liability of a non-profit organization in its own right (e.g. for its own negligence in hiring, instruction or supervision of employees and volunteers);

2. personal liability of directors and officers (although the Report does touch on the impact of vicarious liability on decisions by directors and officers on how to conduct the activities of the non-profit organization);

3. liability imposed by statute (e.g. human rights, occupational health and safety, highway traffic, etc.)

2. The Nature of Vicarious Liability

The starting point of the Report is a discussion of what vicarious liability entails. In essence, it primarily is the liability of an employer for the conduct of an employee that results in harm to another person in circumstances in which it is deemed to be appropriate to impose liability on the employer. The focus, therefore, is on defining the boundaries of activities and conduct which can be said to be attributable to the employment relationship. To that end, it is first necessary to determine who is an employee and who is really an agent or an independent contractor. Various tests have been applied over the years, including a “control test” (by which a person is determined to be an employee where the employer tells him/her not only what to do but how to do it), a more involved “entrepreneur test” (by which the relationship is determined to be one of employment where it is clear that it is the employer who bears the risk associated with the particular business), and an “organization test” (under which a person is held to be an employee if his/her work is an integral part of the employer’s business). Professionals present a particular problem because of the
independence associated with this status. However, the same type of approach can, generally speaking, be taken with respect to them.

The situation in which an employee of one employer does work for another employer also can present a problem. Usually, it is resolved by reference to the person with ultimate responsibility for the employee. In most cases, this is the permanent employer. However, there are cases in which it was held that the temporary employer should bear vicarious liability because of the authority which it asserted over the employee.

The actions of independent contractors are usually not subject to the vicarious liability principle. However, there is an exception for activities which are inherently dangerous. In such circumstances, the “employer” owes a duty to take reasonable precautions to avoid the danger presented by the activity and this duty is not avoided by hiring an independent contractor.

The conduct of volunteers is not subject to any special treatment. The same principles are to be applied regardless of the fact that there is no monetary benefit to the worker. Similarly, the fact that the employer is a charitable and/or non-profit organization does not give it any special status in determining whether or when it will be vicariously liable for its employees.

Once it has been determined that the person is someone for whom the charitable or non-profit organization can be held vicariously liable, the question is whether the conduct was such that such liability should attach. This is not difficult in those situations where the conduct occurred during normal business hours and in the course of the employee’s usual activities. The issue becomes more complicated where, for example, the activity was expressly prohibited or is something which can be said to have been beyond the range of the employer’s reasonable expectation. Under the traditional
approach, an employer could rarely, by the simple expedient of a prohibition of a particular of activity, protect itself from vicarious liability in respect of that activity. However, vicarious liability was generally avoided where the conduct was of such a nature as to be beyond that which could have been reasonably contemplated as occurring in the course of the employee doing his/her job.

This approach may now have been overtaken by a new approach in two recent Supreme Court of Canada decisions which involved actions against non-profit organizations for sexual abuse committed by employees. An “enterprise risk” theory was applied which required the court to determine whether the wrongful act was sufficiently related to conduct authorized by the employer to justify the imposition of vicarious liability. The court concluded that vicarious liability is generally appropriate where there is a significant connection between the creation or enhancement of a risk and the wrong that thereby accrues, even if it is unrelated to the employer’s wishes. In that regard, it is necessary to look to whether the employer placed the employee in a position where he/she had the opportunity to abuse his/her power, whether the situation created by the employer was intended to advance its objectives, whether there was inherent risk involved in the employer’s enterprise, the extent of the power conferred on the employee in relation to potential victims, and the vulnerability of potential victims to the wrongful exercise of the employee’s power. These two cases involved intentional torts and, therefore, it is not entirely clear whether the principles enunciated in them will be given broader application to other fact situations.

However, no real distinction is to be made between negligent and intentional or criminal conduct on the part of the employee insofar as vicarious liability is concerned. Although under the traditional approach it may have been more likely that intentional or criminal conduct would be held to be beyond the scope of reasonable contemplation by the employer, and therefore something for
which it could not be held vicariously liable, this may no longer be the case where the enterprise risk principle is applicable.

3. **Legal and Policy Options**

The last part of the Report deals with possible legal and policy options for dealing with the problems presented by vicarious liability. On the legal side, certain operational initiatives can be taken, including developing and implementing employment policies with a view to minimizing risk (e.g. personnel policies relating to hiring and supervision of workers, scrutiny of applicants, ongoing education and training and regular supervision and audits of activities) and ensuring that appropriate insurance is in place.

In addition, in those cases where it is expedient and thought to be appropriate, contracts can be entered into which contain exclusions or limitations of liability. It is possible to draft a limitation of liability clause which protects not only the employer but its servants and agents, notwithstanding that there is no privity between the latter and the third party. Further, as long as the appropriate language is used, the exclusion can survive a breach of a contract and can cover certain types of intentional torts, although probably not fraud.

Similarly, where appropriate, it may be possible to assert a right to be indemnified by the employee.

Another possible legal option is to structure the affairs of the charitable or non-profit organization in such a manner as to minimize the risk of exposure of its assets to judgment creditors. This can involve, on the one hand, creating separate asset-owning and operating entities, so the latter
is the one exposed to potential liability, and on the other hand devising structures through which the source of the organization’s assets (whether direct gifts or gifts subject to a trust) are directed to entities which are not exposed to potential liability but can confer benefits (such as grants) on the relevant charitable or non-profit organization.

On the policy side, any increase in the operating costs associated with vicarious liability might be made up, in whole or in part, by government assistance, whether direct or through tax relief. Alternatively, or in addition, some form of protection from liability could be legislated. There are number of options in this regard, which are not necessarily mutually exclusive, ranging from a blanket immunity from liability, to limited protection depending on the nature of the claim, the claimant, the particular activity or the assets against which execution on a judgment is sought. A short limitation period or a damage cap are other possibilities.

If some form of immunity is granted, it is probably appropriate that it be contingent on certain requirements, such as insurance coverage. If insurance is not readily available from the private sector, the appropriate level of government could implement a statutory insurance scheme.

Governments may also attempt to regulate the activities of charities and non-profit organizations by imposing standards of compliance and implementing testing, education and inspection requirements. However, this would likely add operational costs which would necessitate some form of funding. Ultimately, for those enterprises that are considered to provide essential public services but find it prohibitively expensive to carry on, governments may find it necessary to take on these responsibilities, since without some sort of protection, insurance or funding, they will not be able to continue.
1. **Introduction**

This report discusses vicarious liability in the context of the charitable and non-profit sector. In that regard, it is first necessary to outline some general principles. Where appropriate, special note is made of the ramifications for charities and non-profit organizations.

Vicarious liability is the legal principle whereby one person is held responsible for the conduct of another regardless of personal blameworthiness or fault. It is therefore an instance of strict liability. Strict liability is generally regarded as liability that does not depend on actual negligence or intent to harm, but rather is based on the breach of an absolute duty, regardless of intent. As a result, strict liability will generally result merely because the act or omission took place.

The doctrine of vicarious liability has its roots in the common law maxim *qui facit per alium facit per se* (“he who acts through another, acts for himself”), although it is probably more properly described by the principle of *respondeat superior* (“let the master answer”). Its history and function are described in Fleming, *The Law of Torts* (9th ed., 1998), at pp. 409-410:

The early medieval idea of holding a master responsible for all his servant’s wrongs gave way, with the passing of the feudal system, to the principle that his liability be limited to the particular acts he had ordered or afterwards ratified. As long as this command theory prevailed, the master’s liability could, with some semblance to reality, be justified by reference to that hard worked maxim, ‘qui facit per alium facit per se’. But the expansion of commerce and industry, which set in towards the end of the 17th century, necessitated an adjustment of this narrow rule. The change from home industry to ever larger units of production vitiated the assumption that a master could exercise a close control over his servants, and the increasing hazards arising from modern industry necessitated a wider range of responsibility than that previously countenanced. After some experiment with the theory of implied command, the basis of the modern principle of liability for all torts committed by the servant ‘in the course of his employment’ was finally laid in the earlier part of the 19th century. This formula represented a compromise between two conflicting policies: on one end, the social interest in furnishing an innocent tort victim with recourse against a financially responsible defendant; on the other, a hesitation to foist any undue burden on business enterprise.

Despite the frequent invocation of such tired tags as ‘respondeat superior’ or ‘qui facit per alium facit per se’, the modern doctrine of vicarious liability cannot parade as a deduction from legalistic premises, but should be frankly recognized as having its basis in a combination of policy considerations. Most important of these is the belief that a person who employs others to advance his own economic interest should in fairness be placed under a corresponding liability for losses incurred in the course of the enterprise; that the master is a more promising source of recompense than his servant who is apt to be a man of straw without insurance; and that the rule promotes wide distribution of tort losses, the employer being a most suitable channel for passing them on through liability insurance and higher prices. The principle gains additional support for its admonitory value in accident prevention. In the first place, deterrent pressures are most effectively brought to bear on larger units like employers who are in a strategic position to reduce accidents by efficient organization and supervision of their staff. Secondly, the fact that employees are, as a rule, not worth suing because they are rarely financially responsible, removes from them the spectre of tort liability as a deterrent of wrongful conduct. By holding the master liable, the law furnishes an incentive to discipline servants guilty of wrongdoing, if necessary by insisting on an indemnity or contribution.
As can be seen, vicarious liability primarily denotes the liability of an employer for an employee although, as will be discussed later on in this report, it can have broader application. With respect to the employment relationship, the “course of employment test”, which is also known as the “Salmond test”, has traditionally been the starting point. It contains a formulation which is derived from an implied connection between the activities which comprise the employer’s enterprise and the “modes” by which such activities may be carried on by the employee. Most recently, it has been stated in the following terms:

A master is not responsible for a wrongful act done by his servant unless it is done in the course of his employment. It is deemed to be so done if it is either (1) a wrongful act authorized by the master, or (2) a wrongful and unauthorized mode of doing some act authorized by the master. Although there are few decisions on the point, it is clear that the master is responsible for acts actually authorized by him for liability would exist in this case, even if the relation between the parties was merely one of agency, and not one of service at all. But a master, as opposed to the employer of an independent contractor, is liable even for acts which he has not authorized, provided they are so connected with acts which he has authorized that they may rightly be regarded as modes—although improper modes—of doing them. In other words, a master is responsible not merely for what he authorizes his servant to do, but also for the way in which he does it. If a servant does negligently that which he was authorized to do carefully, or if he does fraudulently that which he was authorized to do honestly, or if he does mistakenly that which he was authorized to do correctly, his master will answer for that negligence, fraud or mistake. On the other hand, if the unauthorized and wrongful act of the servant is not so connected with the authorized act as to be a mode of doing it, but is an independent act, the master is not responsible: for in such a case the servant is not acting in the course of his employment, but has gone outside it.


Although the statement of the principle seems straightforward, it is often difficult in its application. It involves the determination of a number of matters, including:

1. Who is a person in respect of whom the principle can be applied?

2. What kind of activity can be said to be authorized or unauthorized, as the case may be.

3. Whether the conduct in question is reasonably related to authorized activity or is wholly outside it.

With respect to the first question, consideration must be given to whether any distinction is made between employees, independent contractors and volunteers. With respect to the second question, the issue is whether the consequences are different for negligent and intentional or criminal conduct, as well as for conduct which is both “onsite” and/or during working hours and that which
is “offsite” and/or outside normal working hours. The third question involves both factual and policy considerations. Each of these aspects will be dealt with in turn.

For the purposes of this report, we have assumed there is a corporate employer. Thus, no attempt will be made to address any peculiar problems associated with some other type of entity (e.g. partnership, unincorporated association).

2. **Nature of Relationship**

(a) **Agents**

There is often confusion in discussing vicarious liability for agents as the terms “servant” and “agent” are often used indiscriminately as though the legal principles governing the two were identical. Indeed, the terms “agent” and “independent contractor” are also sometimes used interchangeably. An agent can be described as a person authorized to do something on behalf of another. See: Atiyah, *Vicarious Liability in the Law of Torts* (1967), at p. 102. Vicarious liability is therefore an inaccurate description of the principal’s liability for an agent as the principal’s liability is personal because the agent is acting in a representative capacity for him. See: Fleming, *supra.*, at p. 414. The distinction between an employee and an agent is that an agent does not act under the principal’s control and supervision. An agent is different from an independent contractor because an agent must act subject to the principal’s instructions and is not completely independent of his control. In general, a principal is only liable for torts committed by its agent acting within the scope of the agency even where the principal prohibits such acts. There is no liability for acts outside the scope of an agency, although a principal may be personally liable if the acts were expressly authorized or subsequently ratified or adopted by it. See: Rainaldi (ed.), *Remedies in Tort* (1987, Looseleaf), Vol. 4, at paras. 88-91.
(b) Employees

(i) The Control Test

Various approaches have been taken in an attempt to define the essentials of the employer/employee relationship. The traditional test that has been utilized to distinguish a servant from an independent contractor, or what has been said to amount to the same thing, between a contract of service and a contract for services, is the so-called “control test”. In its most basic form, it posits that an individual will be considered to have been hired as an employee for the purposes of vicarious liability where the employer not only tells the person what to do, but how to do it. See, for example: Yewens v. Noakes (1880), 6 Q.B.D. 530 (C.A.), at 532-533. This test is deceptively simple and is said to be the product of an age and economic conditions in which the employer was able to instruct the employee in the techniques of performing the work because the employer’s knowledge and experience were at least the equal of the employee. See: Fleming, supra., at p. 414. It has been shown to be of limited usefulness in modern society.

(ii) The Entrepreneur Test

Control over the manner and means by which a worker is to perform his allotted tasks may be the relevant consideration in many cases, but does not comprehend all of those circumstances in which it will be determined that an employer/employee relationship exists. Further, with a view to pursuing the objectives of vicarious liability, the courts have been willing to apply a broad range of factors with respect to this issue. In a leading case, Montreal v. Montreal Locomotive Works Ltd, et al., [1947] 1 D.L.R. 161 (P.C.), Lord Wright enunciated what has been described as the “entrepreneur test” which suggests that, besides control, other factors may demarcate the difference between employees and independent contractors. In that regard, it is necessary to consider all aspects of the relationship, with the focus being on a determination of whose business it is. He stated (at p. 169):

...In earlier cases a single test, such as the presence or absence of control, was often relied on to determine whether the case was one of master and servant, mostly in order to decide issues of tortious liability on the part of the master or superior. In the more complex conditions of modern industry, more complicated tests have often to be applied. It has been suggested that a fourfold test would in some cases be more appropriate, a complex involving (1) control; (2) ownership of the tools; (3) chance of profit; (4) risk of loss. Control in itself is not always conclusive. Thus
the master of a chartered vessel is generally the employee of the shipowner though the charterer can direct the employment of the vessel. Again the law often limits the employer’s right to interfere with the employee’s conduct, as also do trade union regulations. In many cases the question can only be settled by examining the whole of the various elements which constitute the relationship between the parties. In this way it is in some cases possible to decide the issue by raising as the crucial question whose business is it, or in other words by asking whether the party is carrying on the business, in the sense of carrying it on for himself or on his own behalf and not merely for a superior. ...


(iii) The Organization Test

It has also been recognized that, given the increasing technical complexity of modern industry and commerce, and the greater likelihood that the employee will be sought out because it is he or she that has the expertise, the control test can be problematic. Thus, while it remains a starting point, and is sufficient to dispose of many cases, it has been supplemented or supplanted as required. In some instances, an “organization test” has been applied. The distinction is described in Armstrong v. Mac’s Milk Ltd. et al. (1975), 7 O.R. (2d) 478, in which Holland J. stated (at pp. 481 – 482):

The conventional test for distinguishing a servant from an independent contractor is the ‘control’ test. MacKinnon, L.J., in Hewitt v. Bonvin et al., [1940] 1 K.B. 188 at p. 191, said:

I think the definition of a servant in Salmond on Torts can hardly be bettered: ‘A servant may be defined as any person employed by another to do work for him on the terms that he, the servant, is to be subject to the control and directions of his employer in respect of the manner in which his work is to be done.’

As pointed out in Fleming, Law of Torts, 4th ed. (1971), at p. 316, changes in the structure of modern business have made it increasingly difficult to apply the control test as a meaningful working rule to many situations characteristic of modern conditions. Another test that has been applied is the ‘organization’ test. Lord Denning, in Stevenson Jordan and Harrison, Ltd. v. Macdonald and Evans, [1952] 1 T.L.R. 101 at p. 111, said:

It is often easy to recognize a contract of service when you see it, but difficult to say wherein the difference lies. A ship’s master, a chauffeur, and a reporter on the staff of a newspaper are all employed under a contract of service; but a ship’s pilot, a taxi-man, and a newspaper contributor are employed under a contract for services. One feature which seems to run through the instances is that, under a contract of service, a man is employed as a part of the business, and his work is done as an integral part of the business; whereas, under a contract for services, his work, although done for the business, is not integrated into it but is only accessory to it.

See also: Lapenseé et al. v. Ottawa Day Nursery Inc. et al. (1986), 35 C.C.L.T. 129 (Ont. H.C.), varied as to damages 38 C.C.L.T. 113 (Ont. H.C.). The organization test was expressly adopted by

(iv) Professionals

As can be seen, no one test can be applied in all circumstances. The problem is particularly acute with respect to professional employees. This issue has been much discussed in a number of cases dealing with the liability of a health care authority for those who work within its confines. It cannot be said that hospitals control the manner in which interns, residents, specialists, nurses or other professional full-time personnel perform their tasks, yet vicarious liability has been imposed in a number of cases where the person was on staff. Physicians who merely have “privileges” at a hospital are, for the most part, treated as independent contractors. See: Picard, Legal Liability of Doctors and Hospitals (3rd ed., 1995), at pp. 381-397.

The difficulty in the proper assessment outside the hospital milieu can be demonstrated by two apparently similar cases. In Robitaille et al. v. Vancouver Hockey Club Ltd. (1981), 124 D.L.R. (3d) 228 (B.C.C.A.) a hockey team was held vicariously liable for the negligence of staff doctors for a failure to properly diagnose and treat the plaintiff player. The Court adopted the reasons of the trial judge on this issue, stating (at p. 243):

…In our opinion, the trial Judge was correct in his appreciation of the law and he applied that law properly to the facts of this case. His findings were that [at p. 175]:

The defendant had the power of selecting, of controlling and of dismissing. The doctors were supplied as part of the services rendered to the plaintiffs. That service was supplied to further the defendant’s business purposes. The measure of control asserted by the defendant over the doctors in carrying out their work was substantial. The degree of control exercised need not be complete in order to establish vicarious liability. In the case of a professional person, the absence of control and direction over the manner of doing the work, is of little significance: Rosen and Morren v. Swint on and Pendlesbury Borough Council, [1965] 1 W.L.R. 756, [1965] 2 All E.R. 349 at 351 (D.C.). …

Conversely, in Wilson et al. v. Vancouver Hockey Club et al. (1983), 5 D.L.R. (4th) 282 (S.C.C.), aff’d. 22 D.L.R. (4th) 516 (C.A.), leave to appeal refused, 22 D.L.R. (4th) 516n (S.C.C.) it was held that the defendant hockey club was not vicariously liable for the negligence of a doctor employed by it who failed to refer the plaintiff player immediately to a specialist for diagnosis and treatment. In coming to this conclusion, the court relied on evidence which indicated that the doctor
made the final decisions as to what treatment a player received and whether he should play without advice from management of the Club.

(c) The Borrowed Servant

Sometimes an employee who is ordinarily under the control of one employer is transferred to another employer (e.g. in order to operate equipment or to work on a specific project). This raises an interesting question as to whether the second employer can be held vicariously responsible for the negligence of the employee in light of the tests previously described. Liability must lie on one employer or the other, as the law does not permit several liability of two principals who are not connected. See: Salmond, supra., at p. 440. In the leading case, Mersey Docks Harbour Board v. Coggins and Griffith (Liverpool) Ltd., [1947] A.C. 1 (H.L.), Lord Porter stated (at p. 17):

…the ultimate question is not what specific orders, or whether specific orders, were given but who is entitled to give the orders as to how the work should be done.

Thus, factors such as who pays the employee, who has the right to dismiss him, the length of time of the transfer, who owns the machinery used and who can tell the employee how to do the work, are critical. Consequently, in that case, it was held that a firm of stevedores was not liable for the negligence of a craneman employed by the Harbour Authority who provided the employee to assist in loading a ship. The craneman had simply been sent to perform a specific task and the Harbour Authority, as his general employer, continued to control the method of performance, even though it might be said that he was under the immediate control of the stevedores. See also: Trans-Canada Forest Products Ltd. v. Heaps Waterous Ltd., [1954] S.C.R. 240 (general agent liable for employee who negligently repaired diesel engine at request of local agent).

In McKee et al. v. Dumas et al. (1976), 12 O.R. (2d) 670 (C.A.), leave to appeal refused 12 O.R. (2d) 670n (S.C.C.), it was held that the burden of proving that control over the employee has been transferred from the general employer to the temporary employer is a heavy one which must be discharged by the general employer. Control with respect to the manner in which work is to be done is only one factor; the authority to fire, hire, suspend or reprimand, the manner of payment and the right of selection are also to be considered (per Dubin J.A., at p. 674). That was another case in which the liability was visited on the general employer even though the employee was lent in order
to operate equipment that was owned by the temporary employer. However, there have been cases in which responsibility was borne by the temporary employer where the permanent employer agreed to let the employee on hire for all purposes so that the permanent employer really retained no overriding authority with respect to the work to be undertaken. See, for example: Spalding v. Tarmac Civil Engineering Ltd., [1967] 1 W.L.R. 1508 (H.L.) (hirer of excavator liable for negligence of driver whose failure to lower boom and maintain brakes resulted in injury to third party).

(d) Independent Contractors

(i) Test as to Status

The previous discussion as to when it will be found that an employer/employee relationship exists obviously also describes circumstances in which it will be held that the relationship is that of employer/independent contractor. The relationship between an employer and an independent contractor, subject to certain limited exceptions, typically does not give rise to a claim for vicarious liability. The main policy concerns justifying vicarious liability are to provide a just and practical remedy for the plaintiff’s loss and to encourage the deterrence of future harm. Vicarious liability is fair in principle because the hazards of the business should be borne by the business itself. Consequently, it has not been considered to be just to impose liability on an employer for the acts of an independent contractor because he/she is someone who is in business on his/her own account. In addition, the employer does not have the same control over an independent contractor so as to be able to reduce accidents and intentional wrongs by efficient organization and supervision. While there is no one conclusive test which can be universally applied to determine whether a person is an employee or an independent contractor, what must always occur is a search for the total relationship of the parties with the central question being whether the person who has been engaged is performing services as a person in business on his/her own account. In making this determination, the level of control the employer has over the worker’s activities will be a factor, but other factors to consider include whether the worker provides his/her own equipment, whether the worker hires his/her own helpers, the degree of financial risk taken by the worker, the degree of responsibility for investment and management held by the worker, and the worker’s opportunity for profit in the performance of his/her tasks. See: 671122 Ontario Ltd. v. Sagaz Industries Canada Inc., (2001), 204

It is important to emphasize that the courts will look to substance rather than form. The fact that a person does not enjoy all of the normal benefits provided by an employer does not necessarily detract from the legal relationship between the parties. Thus, even if an individual is free to provide services to others, that freedom does not necessarily mean that the person is an independent contractor, provided the requirements of one of the tests previously described is met. Further, while the failure of the alleged employer to make source deductions and to contribute to statutory benefits may be a factor in determining this issue, in many such situations, the courts have found that an employment relationship existed despite the fact that such deductions and contributions were not made. See: S.R. Ball, Canadian Employment Law (1996, Looseleaf), Vol. 1, at para. 3:10.4.

In short, in determining whether an individual is an employee or an independent contractor, the court will attempt to ascertain the real facts of the situation and not rely on titles, labels or terminology used by the parties.

(ii) Non-Delegable Duties

There is an exception to the rule that an employer cannot be held vicariously liable for the conduct of an independent contractor where the activity undertaken is inherently dangerous. In such circumstances, it is said that the employer owes a duty to take reasonable precautions to avoid the danger presented by the activity. It is no excuse that the employer does not know of the danger if it is one which would be obvious to any reasonable person, and the employer therefore cannot avoid liability for non-performance of such duty by delegating it to an independent contractor. See: City of St. John v. Donald, [1926] S.C.R. 371 (municipality employing contractor who used dynamite to deepen stream); Savage v. Wilby, [1954] S.C.R. 376 (owner of building hiring contractor who used inflammable paint remover in course of renovation of premises.). As was stated by Anglin C.J.C. in St. John v. Donald, supra., at p. 383:

…no doubt, the general rule that the person who employs an independent contractor to do work in itself lawful and not of a nature likely to involve injurious consequences to others is not responsible for the results of negligence of the contractor or his servants in performing it. The employer is never responsible for what is termed casual or collateral negligence of such a contractor or his workmen in the carrying out of the contract; and it is not universally true that he is responsible for injury occasioned by improper or careless performance of the very work contracted for; he is not so
where the work is not intrinsically dangerous and, if executed with due care, would cause no injury, and the carrying out of it in that manner would be deemed to have been the thing contracted for. His vicarious responsibility arises, however, where the danger of injurious consequences to others from the work ordered to be done is so inherent in it that to any reasonably well-informed person who reflects upon its nature the likelihood of such consequences ensuing, unless precautions are taken to avoid them, should be obvious, so that were the employer doing the work himself his duty to take such precautions would be indisputable. That duty imposed by law he cannot delegate to another, be he agent, servant or contractor, so as to escape liability for the consequence of failure to discharge it. That, I take it, is a principle applicable in such a situation whatever be the nature otherwise or the locus of the work out of which it arises.

Under this test, it is essential that the employer retain ultimate responsibility for the work and not be a mere conduit for the retainer of the contractor. See: Majorcsak et al. v. Na-Churs Plant Food Co. (Canada) Ltd. et al., [1966] 2 O.R. 397 (C.A.), aff’d. [1968] S.C.R. 645. Further, much will depend on the characterization of the work. No useful purpose would be served in listing the cases on either side of the line. Suffice it to say that they are not entirely consistent. See: Rainaldi, supra., at paras. 93-102.

It is not entirely clear that this liability is vicarious. Arguably, it is a direct one imposed for failure of the employer to supervise the activity so as to ensure that it is conducted properly. Practically speaking, it appears that it is imposed for policy reasons given the nature of the activity and the risk thereby created, as there can be no real expectation, where performance has been delegated to someone with presumed expertise, that the employer will or can supervise. See: Lewis v. British Columbia, [1997] 3 S.C.R. 1145. That being the case, a distinction can perhaps be made between persons who are ordinarily in the habit of hiring independent contractors, and lay persons. See, for example: Aiello v. Centra Gas Ontario Inc. (1999), 47 C.C.L.T. (2d) 39 (Ont. S.C.J.) in which it was held that the defendant homeowners were not liable for the injury suffered by their neighbours as a result of an explosion caused by a defective gas furnace and hot water heater installed by the employees of the defendant gas company. In contrast, in Carriere v. Schlachter, [2000] 1 W.W.R. 397 (Alta. Q.B.) vicarious liability was imposed on the defendant homeowners for injuries sustained by an employee of an independent contractor who was electrocuted while performing roofing work. The court upheld a jury verdict which found that the homeowners had failed in their duty to reasonably supervise the contractor which, in the circumstances, entailed advising of the presence of uninsulated power lines, as this was not known either to the worker or the contractor. The result in this case appears to depend, therefore, not on there being anything necessarily inherently dangerous about the work which was undertaken, but rather on the failure to
disclose a known danger associated with the work.

The difficulty in the distinction was also highlighted in B. (M.) v. British Columbia, [2001] 5 W.W.R. 6 (B.C.C.A.), in which the majority of the court made a finding of liability against the Crown arising from the sexual assault of the plaintiff by his foster father. Prowse J.A. held that the liability was vicarious as the relationship between the Crown and the foster parents was similar to that of employer-employee notwithstanding the foster parents were described as independent contractors. MacKenzie J.A., concurring in the result, held that the Crown’s liability was defined in terms of non-delegable duty rather than vicarious liability. Again, no consideration appears to have been given to the aspect of inherent danger.

(e) Volunteers

Vicarious liability has also been imposed on those for whom services are performed gratuitously. In Gramak Ltd. et al. v. O’Connor et al. (1973), 1 O.R. (2d) 505 (C.A.) it was held that the owner of a car was responsible for the negligence of a mechanic who offered to drill a hole in the trunk for the purpose of connecting the lighting system to a trailer. In the course of the work, the mechanic pierced the fuel tank of the car causing a fire that damaged the plaintiff’s garage. The court based its conclusion on the evidence that the mechanic was authorized to perform the task, rendered his services in the presence of the owner of the car, and acted with the owner’s authority, under his delegation, and for his direct benefit. As was stated by Schroeder J.A. (at p. 512):

…It follows clearly and logically that [the owner] must be taken to have retained to himself the power of control whether he actually exercised it or not. That is the crucial test upon which vicarious liability of the owner falls to be determined in such a case as the present.

As can be seen, the test applied in Gramak v. O’Connor focused on the aspect of control which was probably reasonable in the circumstances as it involved an isolated incident rather than a continuing engagement. In an institutional setting, however, involving a volunteer organization, it may be more appropriate to consider both the “control test” and the “organization test” to determine whether the volunteer is someone for whom the organization should bear vicarious liability. See, for example: Backes v. King, unreported, April 7, 1992 (Alta. Q.B.) in which it was held that a charitable organization (Farmers for Peace) was liable to indemnify one of its members
who was responsible for an accident involving a front end loader, as the member was acting within the scope of his authority. In contrast, in Seeley v. Billows, unreported, September 6, 1995 (B.C.S.C.) it was held that a political candidate and his campaign manager were not vicariously liable for assaults committed by volunteer workers at a political rally. As was stated by Gill J. (at paras. 20-21):

20 There is no evidence that these defendants had any liability to control such individuals, or that any directions were given as to what they should or should not do. It is not of significance that Ms. Imlah asked persons present at the rally to permit the Premier unobstructed access to the building.

21. Assuming that volunteers who undertake specific tasks in a political campaign could be described as gratuitous servants or agents, the issue becomes whether what was done by the wrong doer was within the scope or course of what he or she undertook or what he or she was employed to do. In my view, assaults such as were committed in the present case cannot be within that scope or course.

Care must otherwise be taken not to extend the principle in cases such as Gramak v. O’Connor too far. As is stated in Salmond, supra., at p. 439:

…The owner of a dog is hardly liable if a friend takes it for a walk and a pedestrian trips over the lead carelessly held. Nor is a householder liable if a guest, as distinct from a hired domestic help, carelessly pours hot tea over a fellow-guest, for it must always be remembered that the mere existence of a right of control is not sufficient to found liability. Otherwise a parent would always be responsible for the torts of his child, or the Crown for the torts of its prisoners.

(f) Non-Profit Sector

The fact that the employer is a charitable and/or non-profit organization does not give it any special status with respect to the issue of vicarious liability for its employees. The same sort of analysis as previously described is applied, with the result that a non-profit organization as an employer is not permitted to avoid the consequences of being in an entrepreneurial position if it sets the activity which is the subject matter of the action in motion. See: Lapenseé v. Ottawa Day Nursery, supra., in which liability was imposed on a Crown corporation which financed a day care centre and which undertook to supervise and monitor such institutions, for the negligence of the centre operator as a result of which the infant plaintiff suffered severe injuries from a fall down some stairs. Sutherland J. explained the reason for this conclusion as follows (at p. 155):

In my opinion the Corporation is vicariously liable on the facts stated above for the negligence of Mrs. Couvillon. There is ultimate control, co-ordinational control, in the Corporation. The fact that Mrs. Couvillon was free, within limits, to provide services to others, does not mean that vis-à-vis the Corporation she was an independent contractor: Market Investigations Ltd. v. Minister of Social Security, [1969] 2 Q.B. 173, [1968] 3 All E.R. 732.
The Corporation’s undertaking involved two main activities, the provision of group day care and the provision of family day care. The services of Mrs. Couvillon were integral, and not merely accessory, to latter.

Upon the application of either the modern version of the control test or the variation thereof known as the organizational test the Corporation is, in my opinion, vicariously liable.

There is a further reason for holding the Corporation vicariously liable for the negligence of Mrs. Couvillon, and that is that the Corporation is in a far better position than she to make provision for the fact that some accidents are virtually inevitable in that line of work, to devise and implement practices calculated to reduce the risk of accidents and to distribute the risk. The fact that the Corporation happens to be a non-profit organization must not be allowed to disguise the fact that it is in the entrepreneurial position in the sense that it sets the activity in motion.

Recently, the Supreme Court of Canada rejected any suggestion that non-profit organizations should be the subject of a judicial exemption. See: Bazley v. Curry, [1999] 2 S.C.R. 534; Jacobi v. Griffiths, [1999] 2 S.C.R. 570. These two cases are discussed in more detail later on in this report.

3. Nature of Activity

(a) Course of Employment

An employer is vicariously liable only for the torts of employees which were committed during the course of employment. Once again, while the principle is easily stated, its application can be difficult. Tortious conduct can range from that which is expressly condoned or authorized by the employer to that which is expressly prohibited and clearly outside the range of the employer’s reasonable expectation. While it is clear that there would be vicarious liability with respect to the former and not with respect to the latter, it is the conduct within those margins that creates the difficulty. As to where the courts draw the line, the traditional approach has been to distinguish between conduct which is said to be an “unauthorized mode of committing an authorized act” and that which is so unconnected to the employee’s job as to be something apart from it. This distinction has been previously alluded in this report (at p. 2).

A number of specific factors must be borne in mind in applying this test. First, although the time and place at which the employee’s act is committed may often be important, and in some cases even decisive, it cannot be said that as a general principle it is a necessary or sufficient condition of liability that the employee commit the tort on his employer’s time or at his place of work. An employee may render his employer liable even if he has acted outside the time during which he is strictly employed and away from the place where he is required to work. See: Atiyah, supra, at pp.
Conversely, a servant may be at the place of work during the hours of his employment, but may do some act which has nothing whatever to do with the work in which he is supposed to be engaged and which is done entirely for purposes of his own. In such circumstances, the act may well not be within the purview of the test. Ibid., at p. 176. The learned author goes on to explain (at pp. 176-177):

...Nevertheless, the time and place at which the act is committed are important factors, and in appropriate cases may point clearly to the fact that the servant has or has not been in the course of his employment. On the one hand, if the servant is actually at the place where he is required to be at the very time he is required to be working, and certainly if he is actually engaged on work he is supposed to be doing, he will almost certainly be in the course of his employment. On the other hand if a servant comes back to his master’s premises after working hours at a time when he has no business to be there at all, and surreptitiously engages in some work entirely for his own benefit, the master will not be liable.

So far as time is concerned, a further difficulty sometimes arises in the case of servants who are paid not merely while they are actually engaged on their employers’ business. In such cases, the mere fact that the servant is being paid for his time is not by itself enough to show that he is in the course of his employment, but, taken together with other factors, may be sufficient to impose liability on the master. So, for instance, a servant who is sent out on a day’s job may be in the course of his employment if he drives to a nearby town during his dinner hour (on time for which he is paid) to have a meal.

The place at which an act is committed, taken by itself, has often little significance, for a servant may be engaged on duties which can be performed in many different places, or even by moving from one place to another as in the case of a truck-driver. But where a servant is required to do a specific task in one particular place, and the place is of the essence of the task in the sense that the task cannot be properly performed, or cannot be performed at all, elsewhere, the servant may well be outside the course of his employment if he leaves the prescribed place.

Note also that, under the Salmond test, the bare fact, without more, that it is the employment which gives the employee the opportunity to commit the action in question is not enough to establish that it was committed in the course of his/her employment. As is stated in Atiyah, supra., at p. 177:

...Thus access to the place where the tort was committed, or to the instrumentality with which it was committed are insufficient to fix liability on the master. As already seen, a servant may be where he is, because he is working there, but he may still do some act wholly outside the scope of his employment. And, to take an obvious illustration of access to an instrument, a truck-driver, although prima facie within the course of his employment in driving his master’s truck is not necessarily so. If, for example, he should set off on some wholly unauthorized journey of his own, and negligently injure someone by careless driving on the way, the master will not be liable, despite the fact that the accident is caused by the negligent driving of his truck, and that the servant would never have had the truck in his possession unless he was the master’s servant.

On the other hand, if a servant’s employment gives him the opportunity to commit a fraud on his master’s clients because of the contact which it gives him with those clients, then even though, in law, the mere fact that the employment creates the opportunity for the fraud is perhaps still not enough, in practice, it will generally suffice to confer an ostensible authority on the servant. And this will usually be sufficient to fix liability on the master.
In other words, the precise terms of the authority conferred on the employee are not determinative. Rather, the function, the operation, the class of act to be done, whatever the instructions as to the time, the place or the manner of doing it is the test under the traditional approach. Insofar as negligent conduct is concerned, the employer’s liability does not rest on any notion that the employee has been given authority to perform the act in question and, therefore, even an express prohibition, whether as a matter of law or at the employer’s instigation, does not necessarily take the act outside the course of employment if the prohibition does not define the scope of the employment. See: Fleming, supra., at p. 423. In other words, an employer can rarely, by the simple expedient of a prohibition on certain kinds of activities, protect itself from vicarious liability. The question, rather, is whether the particular conduct was of such a nature as to be beyond that which could have been reasonably contemplated as occurring in the course of the employee doing his/her job. As is noted in Fleming, supra., at pp. 421-422:

…the limit is exceeded when, instead of acting in furtherance of the assigned task, the servant indulges in an unrelated and independent venture of his own, that is ‘when he so acts as to be in effect a stranger in relation to his employer with respect to the act which he has committed’. Thus a decision by firemen in furtherance of an industrial dispute to delay the arrival [of] a fire engine until the property was substantially destroyed was viewed as a complete repudiation of an essential obligation of their employment rather than merely as a wrongful manner of fighting fires. Often it is a question of degree. If I employ a man to do navvying, I am not responsible if he takes it upon himself to drive away a truck. A bus conductor may perhaps still be acting within the course of his employment if he merely turns the bus around at the terminal during the driver’s delayed absence, but he certainly ventures beyond it by careering around the streets. A fork lift operator who backs away a diesel lorry that is blocking his access to a warehouse must be distinguished from one who drives off with it merely in order to test his ability to manage it.

(b) Enterprise Risk

All of the previous analysis may have been rendered superfluous, at least in the context of intentional torts, as a result of the recent decisions of the Supreme Court of Canada in Bazley v. Curry, supra, and Jacobi v. Griffiths, supra,. In Bazley v. Curry, McLachlin J. (as she then was) considered the Salmond test to be inadequate because it focuses on the question of whether there is a sufficient connection between that which was done and that which the employer authorized to be done. In her view, this is problematic because it is often difficult to distinguish between an unauthorized “mode” of performing an authorized act that attracts liability and an entirely independent act that does not. She stated (at p. 544):

…Unfortunately, the test provides no criterion on which to make this distinction. In many cases, like the present one, it is
possible to characterize the tortious act either as a mode of doing an authorized act (as the respondent would have us do), or as an independent act altogether (as the appellants would suggest). In such cases, how is the judge to decide between the two alternatives?

McLachlin J. noted that one answer has been to look at cases decided on similar facts, and where this does not help, the impasse may be resolved by resorting to procedural devices which shift the evidentiary burden to the employer. But, in her view, this is unsatisfactory and the better approach is to apply a two-step procedure to the second branch of the Salmond test. First, the court should determine whether there are precedents which unambiguously determine on which side of the line between vicarious liability and no liability the case falls. If prior cases do not clearly suggest a solution, the next step is to determine whether vicarious liability should be imposed in light of the broader policy rationales behind strict liability. Those policy considerations are (1) the provision of an adequate and just remedy, and (2) deterrence. A court should therefore avoid the semantic discussion of “scope of employment” and “mode of conduct” fostered by the Salmond test and, instead, should attempt to answer the following fundamental question (at p. 559):

…whether the wrongful act is sufficiently related to conduct authorized by the employer to justify the imposition of vicarious liability. Vicarious liability is generally appropriate where there is a significant connection between the creation or enhancement of a risk and the wrong that accrues therefrom, even if unrelated to the employer’s desires. (emphasis in judgment)

McLachlin J. went on to explain that in determining the sufficiency of the connection between the employer’s creation or enhancement of the risk and the wrong complained of, subsidiary factors may be considered which may vary with the nature of the case. With respect to intentional torts, the factors may include, but are not limited to, the following (at p. 560):

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

**Bazley v. Curry** and **Jacobi v. Griffiths** are discussed in more detail below. As noted, they involved intentional torts, more particularly, sexual abuse and, therefore, it is not entirely clear
whether the “enterprise risk” theory postulated in them will be applied to all tort claims. They do signify a change in approach to one which is more policy oriented and which imposes an obligation on an employer to ensure that it does not introduce unnecessary risks into the work place or foster situations that can facilitate an employee engaging in wrongful acts. See: G. M. Dickinson, “Precedent or Public Policy?: Supreme Court Divided on the Rules for Vicarious Liability for Sexual Abuse by Employees of Non-Profit Organizations” (2000), 10 E.L.J. 1 (No. 1) 137, at p. 160; M. Hall, “Responsibility Without Fault: Bazley v. Curry” (2000), 79 Can. Bar Rev. 474, at p. 487.

4. **Nature of Conduct**

(a) **Negligence**

More often than not, the issue of vicarious liability arises in cases of careless work performance. As stated, consideration must be given to time, place and purpose of the employee’s conduct in order to determine whether the tort was committed while the employee was attempting to perform the requirements of his/her job, or whether it was unconnected to or independent from it. Having said that, the results in the cases are not always consistent and, indeed, can be surprising. This is amply demonstrated in the following discussion of “Frolic and Detour” in Fleming, *supra*, at pp. 424-426:

In an oft-repeated phrase, Parke B. once enunciated that a servant steps outside the scope of his employment when ‘going on a frolic of his own’. This is not to suggest that a master will get off merely because the servant, though on his master’s business, was temporarily pursuing a personal end. The question is whether the activity was reasonably incidental to the performance of his authorized duties or involved so substantial a departure that the servant must, [for this particular occasion], be regarded as a stranger vis-à-vis his master. The former was the case when a lorry driver struck a match to light a cigarette whilst transferring petrol to an underground tank, thereby causing an explosion. Smoking is admittedly for the employee’s own comfort and not for his employer’s benefit, but it is a habit which, at least in the absence of an express prohibition, must regretfully be regarded as a normal or typical incident during the performance of most kinds of work. But where, by contrast, a miner during a break ventured upon a forbidden part of the premises in order to smoke and there lit a match in defiance of orders and penal regulations, his employer was excused because such conduct could not fairly be treated as merely a forbidden mode of performing an authorized task.

Again, to take the case of a driver who temporarily deviates from his route on personal business and during the detour negligently causes injury: if his private errand were alone decisive, he would in logic leave the scope of his employment as soon as he started his detour and not re-enter until he returned to his original route. But the law recognizes that the employer cannot entirely dissociate himself from the trip until it ends in the home garage; hence it embarks on the uneasy task of striking a pragmatic compromise, having regard to the space, time and purpose of the deviation. So in one case, a truck driver, on a long distance run, turned off the main road in order to get a drink at a hotel, and on the way negligently collided with a motorcycle. He was held to be still within the course of employment because divergence from the most direct route is not necessarily forbidden, particularly when made to obtain
refreshment. Even if the employee acted in defiance of orders, it may be open in such a case to find that the detour was still incidental to his employment. On the other hand, a driver who had been sent to deliver wine and collect empty bottles, and on the return trip obliged a friend by driving off in another direction, was held to have started on an entirely new journey. It was not merely a roundabout way of getting home: ‘every step he drove was from his duty.’

A chauffeur who takes his employer’s car without authority for a joyride is obviously bent ‘on a frolic of his own’. Hence if he collided with a cyclist, his employer would not be responsible. Yet if the car also suffered damage, and happened to have been entrusted to the employer for hire or repair, he would be answerable to the bailor. How can the servant be acting, at one and the same time, both outside and inside the course of employment? The standard way of explaining this paradox is that the master’s duty is different: in the second case we are concerned not with vicarious or imputed liability, but with his personal duty as bailee which is so stringent that he cannot escape even by proving that the car was damaged by a servant outside the scope of his employment, if—though only if—the servant had been actually entrusted with its custody. An alternative explanation points to a difference in the duties of the servant: his duty to the cyclist sprang from his driving along the road, but his duty to the bailor from having custody of his car. Unlike the former, the latter occurred in the course of his employment, precisely because that custody was entrusted to him by his employer. This approach entails, however, the vexing conclusion that a servant may, for purposes of truly vicarious liability, be at once within the course of employment qua one person, but not qua another.

No less perplexing has provided the stock situation of a servant driver giving a lift to a stranger despite an express prohibition and injuring him in a collision en route his master’s business. In this context, vicarious liability has been repeatedly rejected on the specious ground that, qua the passenger, the servant was as much on a frolic as if he had been driving for his amusement. Although it seems to be well recognized that a servant remains in the course of employment unless the activity pursued for his private ends involves a clear deviation from the master’s business, it is here suggested that a servant may assume a dual personality and that anything connected with his unauthorized object, although not competing with his master’s business, falls outside the scope of the latter’s responsibility. This may be supportable where the servant’s negligence is inseparable from his private venture, but in the present situation the injury is caused by doing the very thing he was employed to do, that is drive the van along its proper course. In any event, the rule was held inapplicable where the prohibited passenger assisted the driver in the master’s business: a boy who helped a milk roundsman distribute bottles from his float.
(b) Intentional/Criminal

Deliberate wrongdoing or unlawful, wilful or malicious conduct has posed a problem for the courts. There are a number of examples of the rejection of vicarious liability in such cases on the ground that the activity in question was so beyond the pale that it could not be said to have occurred in or been incidental to the course of employment. See, for example: **R. v. Crown Diamond Paint Co. Ltd.,** [1983] 1 F.C. 837 (C.A.) (fire caused while government inspector removing sprinkler system to facilitate theft); **Plains Engineering Ltd. v. Barnes Securities Services Ltd.** (1987), 43 C.C.L.T. 129 (Alta. Q.B.) (security guard committing arson for own amusement). However, there is much authority to the contrary. **Lloyd v. Grace, Smith,** [1912] A.C. 716 (H.L.) is a leading case in which vicarious liability was imposed on an employer for the fraud of an employee. Similarly, in **R. v. Levy Brothers Co. Ltd.,** [1961] S.C.R. 189, the employer was held vicariously liable for theft by an employee. In the first case, the employee was the managing clerk at a firm of solicitors and was able to induce a client to convey certain cottages which she owned to the clerk on the pretence that the documents which she signed were intended to effect a disposal of the cottages and mortgages for the purpose of reinvestment. The court held that the law firm was liable for the actions of the clerk because it was within the scope of his employment to advise clients that came to the firm to sell property, how best to do it and to attend to the execution of the necessary documents.

In **R. v. Levy Brothers, supra.,** the Crown was held liable for the actions of postal employees who stole a parcel of diamonds which had been imported by the plaintiff. Although the conduct of the employees was fraudulent, it was in the course of their employment. See also: **B.P.I. Resources Ltd. v. Merrill Lynch Canada Inc. et al.** (1986), 34 B.L.R. 105 (Alta. Q.B.), aff’d 43 B.L.R. 1 (C.A.) (wrongful stock manipulation by account executive in order to earn commissions); **Caron v. Allport,** [1995] O.J. No. 4220 (Gen. Div.) (fraudulent real estate transaction for a personal benefit of agent); **Thiessen v. Mutual Life Assurance Co. of Canada,** [2001] B.C.J. No. 1849 (S.C.) (fraudulent conversion of proceeds of sale of home by sales representative for own purposes).
(c) A New Test?

As stated, there may no longer be any need to make the semantic distinction necessitated by the use of the terms “scope of employment” and “mode of conduct” in light of Bazley v. Curry, supra., and Jacobi v. Griffiths, supra., both of which concerned sexual assaults in an institutional setting. In Bazley v. Curry, the employer was the Children’s Foundation, a non-profit organization which operated residential care facilities for the treatment of emotionally troubled children. As substitute parent, it practised total intervention in all of the aspects of the lives of the children for which it cared. The Foundation’s employees would do everything a parent would do, from general supervision to intimate duties like bathing and tucking in at bedtime. Unbeknownst to the Foundation, an employee in one of its homes (Curry) was a paedophile. Background checks had indicated that he was a suitable employee. After investigating a complaint about Curry, and verifying that he had abused children in one of its homes, the Foundation discharged him. Curry was subsequently convicted of 19 counts of sexual abuse, two of which related to Bazley, a resident of one of the Foundation’s facilities. Bazley sued the Foundation for damages for the injuries he suffered while in its care. The parties stated a case to determine whether the Foundation was vicariously liable for Curry’s tortious conduct. In a unanimous judgment, the Supreme Court of Canada held that vicarious liability should be imposed applying the two-step procedure and factors relevant to the determination of whether the defendant had created or enhanced the risk that sexual abuse would occur previously described. In this case, the opportunity for intimate private control and the parental relationship and power required by the terms of employment created a special environment that nurtured and brought to fruition the sexual abuse. The Foundation’s enterprise created and fostered the risk that led to the ultimate harm. While it performed a needed service on behalf of the community as a whole, it put Bazley in the intimate care of Curry and in a very real sense enhanced the risk of the former being abused by the latter. Further, from Bazley’s perspective, it was fair that as between him and the institution that enhanced the risk, the institution should bear legal responsibility for the abuse and harm that occurred. See also: British Columbia Ferry Corp. v. Invicta Security Service Corp., [1998] 4 W.W.R. 536 (B.C.C.A.) in which vicarious liability was imposed on a security company for arson committed by one of its security guards. The court held that the arson was facilitated by the fact that the guard was assured, by virtue of his employment, that
he could commit the crime undetected and uninterrupted. This was therefore more than a situation
where the employer merely provided opportunity for the tort to occur; the employer had created a
situation in which the risk of arson was a foreseeable event. This case can be contrasted to Plains
Engineering v. Barnes Security, supra, in which, on somewhat similar facts, the court concluded that
the security company could not be held liable for the “idiosyncratic and delinquent behaviour” of
one of its employees.

In contrast, in Jacobi v. Griffiths, a divided court held that the defendant Boys’ and Girls’
Club was not vicariously liable for sexual assaults committed on two children by its Program
Director (Griffiths) because there was no “strong connection” between the enterprise risk and the
sexual assault. Speaking for the majority, Binnie J. held that to find a strong connection, there must
be a material increase in the risk that harm would occur in the sense that the employment
significantly contributed to the occurrence of the harm. In this case, the Club’s “enterprise” was to
offer group recreational activities for children to be enjoyed in the presence of volunteers and other
members. The opportunity that the Club afforded Griffiths to abuse whatever power he may have
had was slight, given his particular position. The sexual abuse only became possible when Griffiths
managed to subvert the public nature of the activities. The success of his agenda of personal
gratification depended on his ability to isolate the victims from the larger group, and while the
progress from the Club’s program to the sexual assaults was a chain of multiple links, none of them
could be characterized as the inevitable or natural outgrowth of its predecessor. There was therefore
not enough to postulate a series of steps each of which might not have happened “but for” the
previous steps. Here, the chain of events constituted independent initiatives on the part of Griffiths
for his own personal goals, and it was too remote from the Club’s enterprise to justify imposing “no
fault” liability on it.

The differing results in these two cases is indicative of the fact that, although the court has
postulated a new approach to the issue of vicarious liability, much still depends on the facts and,
in particular, the nature and scope of both the enterprise of the employer and the position held by the
21, at pp. 24-25. Binnie J., speaking on behalf of the majority in Jacobi v. Griffiths, made much of
the fact that Griffiths was not placed in a special position of trust with respect to the children’s care,
protection and nurturing (at p. 594). While any situation which places adults in contact with children creates some possibility of abuse, an employer who encourages an employee to create no more than a positive rapport with children is not at the same end of the spectrum of risk as the employer in *Bazley v. Curry* (at p. 596). Griffiths had no job-created authority to insinuate himself into the intimate lives of the children (at p. 597), and liability should not be imposed merely on the basis of job-created opportunity even where accompanied by privileged access to the victim (at p. 600).

It is also worth noting that although McLachlin J. refused to afford non-profit organizations any special status in *Bazley v. Curry*. In *Jacobi v. Griffiths*, Binnie J. does appear to have given some weight to the status of the defendant as such. He held that imposing vicarious liability in the circumstances of *Jacobi v. Griffiths* would not serve the two purposes of the law, compensation and deterrence. With respect to compensation, the “strong connection” test limits the ability of the court to impose liability on an employer simply because it has the financial resources to satisfy a judgment and, therefore, there were no grounds upon which to enlarge no-fault liability because that particular policy justification has little or no application to the broad category of non-profit “enterprise” which was in issue (at pp. 612-613). With respect to deterrence, the imposition of no-fault liability would tell non-profit recreational organizations dealing with children that even if they take all of the precautions that could reasonably be expected of them, and despite the lack of any direct fault for the tort that occurs, they will still be held financially responsible for what, in the negligence sense of foreseeability, are unforeseen and unforeseeable criminal assaults by their employees. The rational response of such organizations may be to exit the children’s recreational field altogether. No “greater good” would be served by such a result in the absence of a strong connection between the enterprise risk and the sexual assault (at pp. 615-617).

5. **Legal and Policy Options**

There are several options available from a legal and policy perspective to address the current state of the law as it relates to the charitable and non-profit sector and the role of volunteers. The following is an attempt to canvas the more viable ones, although it is probably not exhaustive.
(a) Operational

(i) Employment Policies

The obvious practical approach to minimizing exposure to vicarious liability is to institute programs and policies designed to prevent hiring or retaining persons who, to the extent it can be ascertained without violating any human rights legislation, present a real risk to the employer. In that regard, the directors and officers must provide leadership and see to it that their organizations, amongst other things:

1. implement and monitor personnel policies relating to hiring and supervision of work;

2. require written applications, reference checks, criminal record checks (where appropriate) and acknowledgments;

3. undertake education and training on an on-going basis; and

4. ensure regular supervision of activities and, where necessary, conduct audits of practices and procedures.

(ii) Insurance

The employer should have comprehensive liability insurance in place. Cost and scope of coverage (i.e. who is insured, nature of insuring provisions, applicable policy period, exclusions and limits) will be relevant considerations in this regard. See: R. Bell, “Sexual Abuse and Institutions: Insurance Issues” (1995), 6 C.I.L.R. 53. For example, some courts have held that a liability policy under which the insurer agrees to pay on behalf of the insured all sums which the insured shall become legally obligated to pay as compensatory damages because of “bodily injury” does not cover claims for depression, insomnia, psychological injury, consequential loss of income and earning capacity or mental distress resulting from sexual abuse. See: Wellington Insurance Co. v. Evangelical Lutheran Church in Canada (1995), 35 C.C.L.I. (2d) 164 (B.C.C.A.), leave to appeal refused December 5, 1996 (S.C.C.).

In addition, if the wording of the policy is such as to provide coverage for damages because
of bodily injury “caused by an occurrence”, the insurer may not be obliged to indemnify in circumstances where the institution knew or ought to have known that abuse was taking place. Generally speaking, an “occurrence” is defined to mean an “accident” in the sense of a result “that is neither expected nor intended from the standpoint of the insured”, and the circumstances described above are unlikely to come within that definition. However, a distinction must be made between negligence of the institution in its own right and vicarious liability. See: Bluebird Cabs Ltd. v. Guardian Insurance Co. of Canada (1999), 173 D.L.R. (4th) 318 (B.C.C.A.) in which it was held that the employer of a taxi driver was entitled to coverage for assault by the driver as the company’s liability was vicarious only and, therefore, from its standpoint, the injury to the third party was not expected or intended.

More to the point is the situation where the policy excludes liability in respect of an intentional or criminal act. It is necessary to determine whether the employer and employee have separately insurable and insured interests. See: Scott v. Wawanesa Mutual Insurance Co., [1989] 1 S.C.R. 1445. See also: Godonoaga et al. v. Khatambakhsh (2000), 49 O.R. (3d) 22 (C.A.), at 31 where the distinction was made between liability for negligent supervision and that which is purely derivative (i.e. vicarious).

For the non-profit sector, some type of government support or funding for insurance may be required in light of the expense involved and likely exclusions (e.g. for sexual abuse) that would be sought by an insurer with respect to certain high-risk activities.

It is beyond the scope of this report to provide a more detailed analysis of these matters, but this is obviously an area that would merit further exploration.

(iii) Contractual Limitation/Exclusion

The organization may also want to consider whether it is inclined to attempt to limit or exclude its liability by contract in those cases where the circumstances are such that they are governed by a contract. Clearly, there are public relations concerns in this respect, but from the pure legal perspective, limitation and exclusion clauses can be drafted so as to prohibit action against an employer, at least in respect of negligent conduct, so long as the exclusion clause is properly brought
to the attention of the opposite party (Tilden Rent-A-Car v. Clendenning (1978), 18 O.R. (2nd) 601 (C.A.)), and express words are used, or it is a necessary implication, to exclude liability (Canada Steamship Lines Ltd. v. R., [1952] A.C. 192 (P.C.)).

It is possible to draft a limitation of liability clause which protects not only the employer but its servants and agents, notwithstanding there is no privity between the latter and the third party. See: London Drugs Ltd. v. Kuehne & Nagel International, [1992] 3 S.C.R. 299. Cf. Edgeworth Construction Ltd. v. N.D. Lea & Associates Ltd., [1993] 3 S.C.R. 206 (clause in construction agreement excluding liability for misrepresentation not applicable to engineers retained by owner who were not parties to contract and therefore could not claim benefit of exclusion.) However, even where the words of an exempting clause should, on a proper construction, be held to apply to the negligence of the party or its servants in regard to all matters falling within the four corners of the contract, clear words are still necessary to extend it to cover damage caused by the negligence of the party or its servants in respect of matters that do not come within the scope of the contract. See: Salmon River Logging Company v. Burt, [1953] 2 S.C.R. 117, at 126.

A further qualification on the effect of an exclusion clause relates to the doctrine of fundamental breach. It is now settled that the question of whether a particular exclusion clause applies in the face of fundamental breach is a matter of construction. See: Beaufort Realities (1964) Inc. v. Chomedey Aluminum Co. Ltd., [1980] 2 S.C.R. 718; B.G. Linton Construction Ltd. v. C.N.R. Co., [1975] 2 S.C.R. 678. Where the nature or consequences of a breach by one party is such as to deprive the other party of substantially the whole benefit which it was the intention of the parties that he should obtain from the contract, it is one which gives the latter an election to put an end to the contract. See: Hunter Engineering Co. v. Syncrude Canada Ltd., [1989] 1 S.C.R. 426, 57 D.L.R. (4th) 321. In terms of how fundamental breach impacts on an exclusion or limitation clause, in the view of the majority of the Court (Wilson J., with whom McIntyre and L’Heureux-Dubé JJ. concurred) favoured an approach which considered the matter in terms of whether it would be fair and reasonable, in all the circumstances, to enforce the limitation. Dickson C.J.C. (with whom La Forest J. concurred) opted for an approach that dealt with the issue in terms of unconscionability. Notwithstanding this dichotomy, the essential question remains the same and provides for a two-step process. First, the court must determine whether, on its true construction, the contract excludes
liability for the kind of breach that occurred. If so, only where it would be unreasonable (in the view of the majority) or unconscionable (in the view of the minority) should the court interfere with an agreement the parties have freely concluded. See also: Kordas v. Stokes Seeds Ltd. (1992), 11 O.R. (3d) 129 (C.A.), leave to appeal refused 10 B.L.R. (2d) 201n (S.C.C.).

It may be possible to limit or exclude liability for certain types of intentional torts, such as defamation. See: Brown, The Law of Defamation in Canada (2nd ed., Looseleaf) Vo. 1, at para. 11.3(2). See also: Meditek Laboratory Services Ltd. v. Purolator Courier Ltd. (1995), 125 D.L.R. (4th) 738 (Man. C.A.) (deliberate conduct not covered by clause excluding liability of carrier “whether or not from negligence or gross negligence”). However, an attempt to contract out of liability for fraud or theft would be void on public policy grounds. See: S. Pearson & Sons v. Dublin Corp., [1907] A.C. 351 (H.L.).

(iv) Indemnity

Assuming that the employee is not impecunious, and the employer is so disposed, it may seek to recover, at least in part, for any outlay which it has made by reason of a vicarious liability which has been imposed upon it. There is authority which supports the right of an employer to recover for any amounts which it has to pay to compensate a third party in respect of the conduct of the employee. The locus classicus in this regard is Lister v. Romford Ice and Cold Storage Co. Ltd., [1957] A.C. 555 (H.L.) in which it was held that the employer of a lorry driver was entitled to be indemnified by the driver for damages which the employer paid to a third party injured when the driver negligently drove the lorry into the third party because the driver had breached the duty of care which he owed to his employer to perform his work with reasonable care and skill. The cause of action was categorized as a breach of an implied term of the contract between the employer and the employee. The authority of this case has been accepted in Canada. See, for example: Fenn et al. v. City of Peterborough et al. (1979), 25 O.R. (2d) 399 (C.A.), at 445-446, aff’d [1981] 2 S.C.R. 613.

Further, it has been suggested that where an employer is vicariously liable for the tort of an employee, it is not necessary to decide whether the employee is liable to indemnify the employer at
common law in circumstances where the relevant apportionment legislation can be applied so as to
distribute liability in accordance with the parties’ respective degrees of fault. See, for example:
Necula v. Ducharme et al. (1963), 38 D.L.R. (2d) 736 (Alta. S.C.) (Tort-Feasors Act (Alta.)); Semtex
Ltd. v. Gladstone, [1954] 1 W.L.R. 945 (Law Reform (Married Women and Tort-Feasors) Act,
1935). Indeed, this was alluded to in Fenn v. Peterborough, supra., at 445. This is because the
legislation is applied so as to require the employee to indemnify the employer for damages recovered
by the plaintiff arising from the conduct of the employee. Since the negligence is entirely that of the
employee, the employer is therefore entitled to recover contribution from the employee to the extent
of one hundred percent.

However, at least in Ontario, courts have been reticent to require an employee to indemnify
his/her employer in connection with the employee’s negligent actions in the course of employment.
Reference can be made to in Susan Ashley & Associates Inc. v. D.G. Jewellery of Canada Ltd.,
C.C.E.L. 218 (Ont. Dist. Ct.), at 223 in which the following statement of law was adopted from the
dissenting judgment of Seaton J.A. in D.H. Overmyer Co. of Canada Ltd. v. Wallace Transfer Ltd.,
[1976] 2 W.W.R. 656 (B.C.C.A.), at 662-663:

I think that it would not be desirable for the Courts to insist that all employments are the same, regardless of
the circumstances, and that each includes a term that the employee will be liable for losses owing from his error….If
an employee, by lack of care, causes a loss to his employer, I do not think that it should be presumed that the employee
will be liable, and I do not think that we should look at decisions from other employment contracts for the answer. We
should look at the hiring to see what was said and the circumstances to see what might properly be implied. It follows
that this employment and this error must be looked at to see what terms were in the contract and whether they were
breached….In the event of injury to a stranger, it is reasonable that the person who caused that injury ought to bear the
loss even if his error be only slight. But the same reasoning is not applicable to the employer-employee situation. If
by the slightest error an employee causes loss, that is one of the risks of the enterprise that the employer accepts. No
employee is infallible and the employer allows for that. He takes it into account when the insurers and when he
supervises that employee and when he estimates his cost.

Thus, it may well be that an employee will be required to indemnify his employer for losses
occasioned by the employee only if such indemnification is an express or necessarily implied term
of the employment contract. See: Lynch & Co. v. United States Fidelity & Guaranty Co., [1971]
O.R. 28, at 40-41.

In short, the circumstances in which an employer may be able to recover from its employee
for amounts which the employer has been required to pay in damages by reason of vicarious liability are likely to be limited. On the other hand, there is nothing in principle which precludes such right vis-à-vis an independent contractor. See: Atiyah, supra., at p. 427. Having said that, there is some authority which supports the view that where the employer could have avoided the damage if it had exercised care and vigilance, it is not entitled to indemnity from the contractor. See: Achdus Free Loan Society v. Shatsky, [1955] 3 D.L.R. 249 (Man. Q.B.), at 255-256. Of course, an express indemnity provision can overcome any problems in this regard. See: City of Kitchener v. The Robe and Clothing Co., [1925] S.C.R. 106.

(b) Asset Protection

The decision of the Supreme Court of Canada to impose vicarious liability on employers in the non-profit sector may not only provoke a political reaction but a practical one. More particularly, some may respond to the prospect of vicarious liability by attempting to “judgment proof” themselves. The issue has been made more acute as a result of the recent decision of the Ontario Court of Appeal in Re Christian Brothers of Ireland in Canada (2000), 47 O.R. (3d) 674, leave to appeal refused November 16, 2000 (S.C.C.) in which the court not only acknowledged that Canadian law does not recognize a principle of “charitable immunity”, but went on to hold that it does not provide for any exception for assets held on a special purpose trust. Because a charity is not immune from liability to those who have suffered wrong at its hands, whether through its trustees, employees or other agents for whom the charity is responsible, the assets of the charity, whether beneficially owned or held on trust for one or more charitable purposes, are available to respond to those liabilities. Thus, it appears to be uncertain whether anything can be done to judgment proof existing special purpose trusts or to structure future special purpose charitable gifts so that they will not become exigible by tort creditors of the charity.

The key to effective judgment proofing is for the enterprise which may incur liability to ensure that it holds as few exigible assets as possible. See: K.E. Davis, “Vicarious Liability, Judgment Proofing, and Non-Profits” (2000), 50 Univ. of Tor. Law Jo., at p. 407 wherein he states (at p. 418):
...Ideally, even assets that the operating entity needs to conduct its operations will be held by a separate entity that I will refer to as the ‘asset-owning entity’. If necessary, the asset-owning entity can then make the assets available to the operating entity pursuant to one or more contracts, with the parties taking care to ensure that the operating company’s interest in the contracts is of negligible value to its creditors.

It is not intended to provide a detailed examination of particular forms of judgment proofing. Suffice it to say that for non-charitable non-profit organizations, it involves ensuring that there are distinct asset-owning and operating entities, with the latter being the one that would bear the brunt of any tort liability. The technique is premised on the notion that the separate identity can be maintained. In that regard, the question is whether changes to an existing structure would be open to attack on the ground of, for example, corporate veil or fraudulent conveyance. The existence of such structures from the inception of operation, or their utilization where the organization moves into different fields, probably creates less concern. However, it is relatively difficult to use a non-charitable trust if it is important for the operating entity and the asset-owning entity to be under common control. This is because if the beneficiaries of the trust exercise a substantial degree of control over the trustee, the trustee may be treated as their agent, with the result that the assets of the beneficiaries, not just those held on trust for their benefit, will also be available to creditors of the trust. See: Trident Holdings Ltd. v. Danand Investments Ltd. et al. (1988), 64 O.R. (2d) 65 (C.A.) in which it was held that the principals of a corporation were personally liable on a contract for the supply and installation of electrical equipment to a development, title to which was in the name of the corporation, as the corporation was a bare trustee without any discretion of its own and wholly controlled by the principals as beneficiaries of the trust.

With respect to charitable non-profit organizations whose assets are likely to be comprised, in large part, of donations, whether by outright gift or subject to a trust, Re Christian Brothers is problematic insofar as it exposes to execution assets which were intended to be applied for a specific charitable purpose. Some strategies which may be considered for creating structures for future special purpose charitable gifts are suggested in T. Carter, “Case Comment: Christian Brothers Decision Exposes Charitable Trust Assets to Tort Creditors” (2000), 16 Philanthrop. 28, at p. 31:

1. creating a special purpose charitable trust by having the donor give the intended gift to a community foundation or a trust company to be held in trust for the benefit of a specific named charity;
2. creating a special purpose charitable trust by having the donor give the intended gift to an arm’s length parallel foundation established solely to advance the purposes of the intended charity; or

3. structuring a donation as a conditional gift with a condition subsequent that would become operational upon the winding-up, dissolution or bankruptcy of the charity accompanied by a “gift over” to another charity that has similar charitable purposes, or alternatively, providing that the gift revert to the donor.

All of these options, and in particular the utilization of a conditional gift, would require addressing the various legal issues associated with determining the validity and consequences of structuring a gift or trust in a particular way, including those previously identified. In addition, the potential income tax consequences to the donor would have to be considered. At the time this Report is being written, the Supreme Court of Canada has refused to grant leave to appeal the decision of the Ontario Court of Appeal in the Christian Brothers case. As a result, a charitable corporation that holds property as trustee pursuant to a special purpose charitable trust and that is open to proceedings by its creditors risks exposing all of the assets held in the trust. This suggests that where there are risks associated with vicarious liability, organizations should contemplate a separate operating entity, with the assets held in a different entity. In this way, it may be possible to insulate those assets from claims against the operating entity, whether on account of vicarious liability or otherwise.

There is no empirical evidence one way or the other as to whether donors, volunteers, employees or others would necessarily change their approach with respect to a charity or non-profit organization merely because of a perception that it might not have sufficient assets to meet its liabilities. It has been suggested that the incentives of volunteers and employees to take precautions may become stronger as the assets at risk diminish for the organization, particularly if the employees themselves can be identified and may be open to legal action in their own right. This could perhaps have a bearing on the willingness of volunteers to continue to serve in the charitable and non-profit sector. See: K.E. Davis, “Vicarious Liability, Judgment Proofing, and Non-Profits”, supra., at p. 438.
Despite their best efforts, organizations relying on volunteers may not be able to protect themselves to the extent that they would be able to do so, in the case of paid employees or independent contractors. Notwithstanding that a volunteer may be prepared to sign the equivalent of an employment contract or a retainer agreement, with terms and conditions as to expected behaviour, the fact is that a volunteer may have less incentive than an employee or independent contractor to live up to the expectations of the organization. In an extreme case, a volunteer will simply not be asked to serve again in future. On the other hand, an employee or independent contractor runs the risk of losing a source of income. This is not to suggest that volunteers are necessarily less likely to consider the potential liability they may cause to the organization, but directors and officers of organizations employing their services should bear this in mind.

Of course, any of the problems described above could be solved by legislation.

(c) Financial Assistance

Any increase in operating costs associated with vicarious liability might be partially alleviated directly by consumers of the services through higher user charges, membership fees, etc. Alternatively, or in addition, the government could adopt a policy which recognizes that society at large should bear some of the responsibility for the added costs, and this can be accomplished through tax benefits (deductions or exemptions, where possible) or direct grants in aid within or without a broader legislative framework. See: G.M. Dickinson, supra., at p. 162. This is discussed in the next part of this Report.

(d) Legislation

(i) Protection from Liability

Of course, one possible solution to the uncertainty surrounding vicarious liability at common law would be to enact legislation that establishes a clear rule. On the one side, the rule could provide for no-fault liability across the board. An alternative policy approach would involve carving out exceptions for volunteer and charitable organizations, whether in terms of complete immunity, by way of a limited protection depending on the nature of the claim (e.g. excluding motor vehicle
accident claims) or the claimant (e.g. distinguishing between injuries to other employees and third parties), or in respect of the ability to execute as against trust property or funds held by the organizations. See: 15 Am. Jur. 2d (Charities), at paras. 183, 191-193. Other possibilities include a short limitation period or a damage cap.

The United States passed the Volunteer Protection Act of 1997 (in force as of June 18, 1997), which provides a broad form of protection to a “volunteer” for negligence as a result of work done in the scope of his/her responsibilities for a “non-profit organization” or a “governmental entity”. While the statute establishes a minimum level of protection that preempts any inconsistent state law, insofar as the conduct of the volunteer renders the organization for which he/she was acting vicariously liable, the organization must look to state law for relief. In that regard, there is no uniformity in how the various states approach the matter, and the schemes are as varied as the possibilities outlined in the previous paragraph. See: Non-Profit Risk Management Center, State Liability Laws for Charitable Organizations and Volunteers (Washington D.C., 2001).

However, there is some consistency to the extent that most states have passed legislation which provides some form of immunity from ordinary negligence for volunteers, including directors and officers, of non-profit associations. The protection is usually contingent on certain requirements, such as insurance coverage, and may be limited to certain classes of organization, such as charities. The rationale offered for immunity is the promotion of robust, active, bona fide and well-supported charitable organizations and the encouragement of persons to offer their services to these organizations on a volunteer basis. However, this “halo” effect has been the subject of some criticism. As is stated by R. Flannigan in “The Liability Structure of Nonprofit Associations: Tort and Fiduciary Liability Assignments (1998), 77 Can. Bar Rev. 73, at pp. 90-91 (at pp. 92-93):

It may be that this legislation has been insufficiently considered by the American public. A first observation is that conventional tort liability is itself a social construction. It was created to implement the communal view of appropriate responsibility, requiring, currently, only that each of us act in a reasonable manner. There is no obvious reason why volunteers should be excused from complying with this standard. There is nothing that would alter the standard risk regulation analysis. On the practical side, it is evident that there will be a victim. Indeed, there will be more victims, at least where it is understood by volunteers that they will not be held responsible for their torts. The nonprofit sector will become a less hospitable sector. Losses that arise will be borne by those who suffer them. If the victim cannot cope, the loss will be socialized to the entire community. Consider also that most persons will regularly come into contact with volunteer workers. Is the public prepared ex ante to give up its right to be compensated for injuries suffered in the course of that contact? Are we prepared to lift the minimal regulation that would otherwise
discipline the risk-taking of volunteers? Would it make any difference if the association was the Salvation Army, a private school, a health clinic, a rugby club, a lobby group or a real estate board? What of the volunteers, themselves, given that many injuries will be ones they inflict on each other? On what coherent basis is one volunteer to be protected or favored over another?

If volunteers are withdrawing, it is for the association to convince them to stay, by, for example, providing comprehensive insurance cover, arranging for indemnification, or demonstrating effective implementation of systems for avoiding loss. If insurance is expensive, then it is expensive. The cost, presumably, is justified by the loss experience associated with the particular activity. A higher insurance cost, indicating a greater risk of loss, is no reason to excuse the tortfeasor. It should be added that we do not excuse others from liability simply because they assert that they cannot afford insurance. As for diminished services, if that were ever empirically demonstrated, it would still be necessary to compare the loss of service with the alternative of diminished care. Will we accept fewer services, if that would be the true consequence, or must we have more services, provided negligently? Further, if the community really does have an ‘overriding interest’ in the continued and even ‘increased’, delivery of these [unspecified] services, they will be provided – either by private enterprise (for a price) or by the government (with taxes contributed by the public for the provision of services of ‘overriding interest’). It may also be observed that volunteer immunization requires different treatment of victims depending on whether or not their tortfeasors are paid. Apart from the more obvious considerations, the union establishment might have something to say about this privileging of volunteer labour.

The trouble with [this type of legislation] is that it fails to identify any feature of volunteerism, as such, that justifies immunity from liability. Rather, the ostensible justification is the need (or government desire) for associations ‘to perform essential and needed services.’ This, however, would justify immunity for anyone who performed an essential or needed service, whether paid or not. There is no necessary connection here with volunteer immunity. The ostensible justification instead suggests an incentive effect (for legislators) in the form of the potential for a reduced demand for government services. Combined with the ‘halo’ effect on legislators, it begins to look like these statutes are primarily designed to serve narrow political and governmental interest.

Further, there appears to be no empirical evidence that fear of liability has led to a large scale reduction in volunteerism. Indeed, statistics out of the United States show that, between 1980 and 1995, the number of volunteers grew from 80 million to 93 million (an increase of 16%). It has been suggested therefore, that what volunteers who are concerned about liability do is take a closer look at the discipline of risk management and the opportunities which exist to integrate proactive measures into the various facets of their organization, from fund-raising functions to client services. See: Non-Profit Risk Management Center, supra., at p. 4.

It is also to be emphasized that most of the statutes do not provide for blanket immunity; wilful and criminal conduct is almost always excepted, and conditions requiring insurance and the exercise of ordinary care by the organization in the selection and retention of volunteers and employees are usually imposed as well. Thus, the protection afforded by the legislation is usually confined to fairly narrow parameters.

(ii) Government Regulation
It is possible, because of the risk posed by the care for or interplay with children and other vulnerable persons, that certain kinds of non-profit organizations will either severely curtail the services which they provide or get out of the business entirely. Consequently, the government may wish to attempt to assuage the concerns of both the institutions and the public by playing a more active role in regulating activities, particularly in the high-risk areas (e.g. where there is potential for sexual abuse). This could include imposing standards for compliance, testing, education, inspection, etc. Consideration may also have to be given to implementing a statutory insurance scheme, in which case issues relating to the model that would be used (e.g. whether it would be mandatory, to what it would apply, how it would be funded, whether it would operate as first-party insurance akin to workers’ compensation) would have to be addressed. Ultimately, governments may find it necessary to take over the high-risk enterprises which perform essential public services (e.g. care for the disabled, daycare, etc.) as, without some sort of protection, insurance or funding, charities and non-profit organizations will not be able or willing to bear the risk of vicarious liability.