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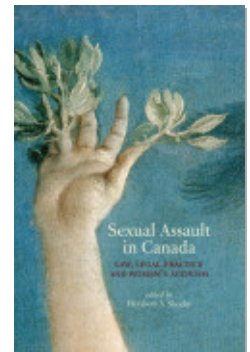
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7. The Supreme Court of Canada's Betrayal of Residential School Survivors: Ignorance is No Excuse

Sheila McIntyre

Moving away from the criminal law focus of the prior two chapters and examining tort law, Sheila McIntyre's chapter exposes the heavy costs of seeking legal redress for Aboriginal survivors of sexual abuse committed in the context of the enterprise of residential schools. She argues that the Supreme Court of Canada abuses Aboriginal survivors in the same manner as did the institutions themselves, by discounting the corporeal, sexual, psychological, and spiritual harms the children experienced, and subjugating their interests to those of "innocent" taxpayers and institutions. Erving Goffman's concept of a "total institution," used in an earlier chapter by Laura Robinson to describe hockey culture, is powerfully invoked by Sheila in condemning the racism of the entire enterprise of residential schools. Given that the Supreme Court was free to develop the legal principles to govern the liability of residential schools, and that it maintained "studied ignorance" about the real context in which the claims arose, despite mountains of available social science evidence, it is impossible to remain optimistic about the potential of law to recognize and compensate these deeply racialized and gendered harms.

Between 1999 and 2005, the Supreme Court of Canada decided nine civil lawsuits brought by adult survivors of child sexual abuse against those who created and operated institutions in which such abuse was enabled, licensed, ignored, and covered up.¹ Elsewhere I have analyzed in detail the court's deeply disappointing record in adjudicating four distinct areas of tort law engaged by those nine claims.² In this chapter,

1 See *Bazley v Curry*, [1999] 2 SCR 534 [*Bazley*], *Jacobi v Griffiths*, [1999] 2 SCR 570 [*Jacobi*], *KLB v British Columbia*, [2003] 2 SCR 403 [*KLB*], *EDG v Hammer*, [2003] 2 SCR 459 [*EDG*], *MB v British Columbia*, [2003] 2 SCR 477 [*MB*], *John Doe v Bennett*, [2004] 1 SCR 436 [*Bennett*], *HL v Canada (AG)*, [2005] 1 SCR 401 [*HL*], *Blackwater v Plint*, [2005] 3 SCR 3 [*Plint*], *EB v Oblates of Mary Immaculate in the Province of British Columbia*, [2005] 3 SCR 45 [*Oblates*], and *Jesuit Fathers of Upper Canada v Guardian Insurance Co of Canada*, [2006] 1 SCR 744 [*Guardian*].

2 This paper is adapted from a far longer analysis of the Supreme Court of Canada's de-

I focus on the last of the nine decisions, *EB v Oblates of Mary Immaculate in the Province of BC [Oblates]*³ as an illustration of the court's refusal to engage the realities of systemic inequality in institutional child abuse decisions. I argue that this refusal amounts to a stark indictment of the limits of our current Supreme Court and, thus, of current Canadian civil law, in holding our governments and public institutions accountable for abuses of children forced or entrusted into their care.

There is much to lament and deplore in the terrible history exposed in these cases. The court, however, appears mostly unmoved and remote. It reasons as if policing its out-of-date, highly formalistic versions of tort doctrine is more important than framing current doctrine to remedy and deter the individual and collective harms done by public institutions that failed profoundly in their responsibilities to the vulnerable children involuntarily subjected to their care. It analyzes the facts and law hermetically, each case in isolation, even as thousands of claims from numerous institutions were flooding the court system,⁴ and even if the abuser had already been convicted of multiple abuses.⁵ In short, the court's reasoning is abstract and utterly decontextualized when it looks backward in time. However, when it looks forward to the policy

cisions in institutional abuse cases entitled, "Guardians of Privilege: The Resistance of the Supreme Court of Canada to Institutional Liability for Child Sexual Abuse," that was published simultaneously in (2009) 44 SCLR (2d) 1 ["Guardians of Privilege"], and in Sanda Rodgers, Rakhi Ruparelia & Louise Bélanger-Hardy, eds, *Critical Torts* (Markham: LexisNexis Canada, 2009) 1.

3 *Oblates*, *supra* note 1.

4 An estimated 10,000 lawsuits arising from Aboriginal residential school abuses were being processed in 2002. See JR Miller, "Troubled Legacy: A History of Native Residential Schools" (2003) 66 Sask L Rev 357 at 381.

5 Prior to the launching of the civil institutional abuse suits that ultimately went to the Supreme Court of Canada, the assailant had already been found to have committed the assaults either in criminal proceedings or civil suits by others of his victims. Curry had been criminally convicted on nineteen counts of sexual assault, two of them concerning Bazley (see *Bazley*, *supra* note 1, at para 4). Griffiths had been criminally convicted of fourteen sexual assaults against the Jacobi children and other members of the Boys and Girls Club (see *Jacobi*, *supra* note 1, at para 3). The club was not found vicariously liable for the assaults on the Jacobis. Thirty-six plaintiffs sought damages from the church for Bennett's abuse (Bennett, *supra* note 1, at para 1). Canada had settled civil suits with sixteen of Plint's victims prior to the Blackwater proceedings launched by seven additional plaintiffs, one of whom was found not to have been abused, see Susan Vella & Elizabeth Grace, "Pathways to Justice for Residential School Claimants: Is the Civil Justice System Working?" in Joseph E Magnet & Chief Dwight A Dorey, eds, *Aboriginal Rights Litigation* (Toronto: Butterworths, 2003) 195 at 218. Canada had settled nearly two hundred claims against Starr before HL launched his suit (Vella & Grace, *ibid* at 221).

implications of imposing liability on institutions, its sympathy is awakened. It becomes preoccupied with an array of benignly imagined dominant interests whose routines and expectations would be unacceptably burdened if institutions were to be found liable for harms committed on their watch. Seemingly disinterestedly, the court explicitly asks itself which of two “innocents” — public institutions judicially deemed unaware of abusers in their midst or children — should, in the broader “public interest,” bear the cost of institutional abuse. In most cases, the court sides with the institutions and against the children. It invokes floodgates⁶ or utilitarian calculations⁷ and fatuous imaginings about the unfairness to taxpayers,⁸ or the undue burden on charitable enterprises⁹ and religious institutions,¹⁰ or the unfair stigmatization as inherently risky of all mentoring relationships,¹¹ or the harms to family spontaneity of child welfare monitoring of foster placements,¹² as self-evidently undesirable consequences of awarding damages to the individual victims of institutional failures.

The failing that lies at the heart of these decisions is the court’s absolute refusal to engage the multiple relations of inequality that generated and rationalized children’s institutionalization and that empowered abusers, facilitated serial abuse, inhibited or discredited reporting, excused institutional inaction, and compromised resort to law as a vehicle of redress. None of the obvious, compound, structural, and situational inequalities that permeate these cases is acknowledged or addressed by the court. Racism, colonialism, poverty, misogyny, and cultural supremacy are never adverted to in the majority judgments. Nor are hunger, social isolation, confinement, harsh discipline, loneliness, or terror. The cases are surreal and frightening narratives of studied ignorance and privileged innocence in the country’s top court.¹³ The Supreme Court of Canada abuses survivors in the same ways and from the same supremacist presumptions as did institutional defendants. Plaintiffs are never truly seen or truly heard. Their evidence and exper-

6 See *EDG*, *supra* note 1, at para 54, *KLB*, *ibid* at para 26.

7 See majority opinion in *Jacobi*, *supra* note 1 at para 76.

8 See *MB*, *supra* note 1 at para 34.

9 See *Jacobi*, *supra* note 1 at para 78.

10 See *Oblates*, *supra* note 1 at para 48.

11 See *Jacobi*, *supra* note 1 at para 83.

12 See *KLB*, *supra* note 1 at para 54.

13 For an extended elaboration of these habits of the dominant, see Sheila McIntyre, “Studied Ignorance and Privileged Innocence: Keeping Equity Academic” (2000) 147 *CJWL* 147.

ience are diminished from the lofty and detached heights of privileged insularity and imaginings. Their humanity and its injury are persistently discounted as their claims are reflexively subordinated to the material interests and policy preferences of the dominant.

Pivotal to the court's privileged logic is resort to rape myths and stereotypes long debunked by thirty years of data from rape crisis centres, by thirty years of feminist legal and social science scholarship, and by facta and judicial dicta in not a few Supreme Court of Canada cases.¹⁴ Long after feminist scholarship had unpacked sexual violence as an abuse of power enabled and rationalized by systemic sexual, racial, class, and other inequalities, the court continues to cling to rape myth. Where the court refuses to hold institutions liable, the individual abuser is an isolated, sexual deviant who just happens to work in the institution and to whom the institution provides no more than "mere opportunity" to prey sexually on institutionalized children. He is unforeseeable, undetectable with ordinary screening and oversight, and undeterrable. So it would be unfair and serve no policy goal to saddle institutions with damages for his deviant misconduct.¹⁵ Only if the abuser has so much institutional power that he IS the institution,¹⁶ or if his residential duties

14 For arguments derived from rape crisis workers' records and from feminist scholarship, see, eg, intervenor facta filed by the Women's Legal Education and Action Fund [LEAF] in *Seaboyer and Gayme v R*, [1991] 3 SCR 577; *R v MLM*, [1994] 2 SCR 3; and *R v O'Connor*, [1995] 4 SCR 411, in LEAF, *Equality and the Charter: Ten Years of Feminist Advocacy Before the Supreme Court of Canada* (Toronto: Emond Montgomery, 1996) at 173, 271, 427 respectively. For Supreme Court dicta acknowledging and rejecting some rape myths and stereotypes, see *Seaboyer, ibid*, per McLachlin J at 604, 630, and per L'Heureux-Dubé J at 647–95; *Osolin v The Queen*, [1993] 4 SCR 595 per Cory J at paras 162, 168, and per L'Heureux-Dubé J at paras 48–52, 55; *R v W(R)*, [1992] 2 SCR 122 per McLachlin J at 136; and *R v Ewanchuk*, [1999] 1 SCR 330 per L'Heureux-Dubé J at paras 82–101. It should be noted, however, that the Court has sometimes invoked rape myths even within decisions purporting to reject them. See, eg, hypothetical scenarios cited in *Seaboyer* by the majority that they claimed warrant admission of sexual history evidence (at 613–17). See also the majority's embrace, without hearing any evidence, of defence counsels' invocation of the risks of so-called "false memory syndrome" and the corollary spectre of ill-motivated therapists who implant false memories in clients and then urge them to report imagined violations, in *R v O'Connor* (*ibid* at para 29).

15 For the most distilled versions of this insistence on the absence of linkage between the institution and abuses that occurred within its walls, see *Jacobi* and *Oblates*, *supra* note 1.

16 Hence, the Court was able to see a link between the spiritual and social power and trust invested in a rural Catholic parish priest and his unchecked sexual exploitation of altar boys and other parish youth. See *Bennett*, *supra* note 1. Likewise, an on-reserve residential school administrator who organized community sports open to non-resident youth was found to be empowered sufficiently by the institution to

routinely include intimate or bedtime access,¹⁷ will the court see a sufficient link between the abuser and the institution to be comfortable imposing liability on the employer. For the court, institutional liability turns on the abuser's formal job description, independent of institutional mission, operating culture, and relations of power and powerlessness, and on whether the court itself, rather than institutionalized children, ascribes power to holders of such jobs.¹⁸

Save for one solo dissent by Justice Abella in the last of the nine institutional abuse cases decided between 1999 and 2005,¹⁹ the court completely ignored the extensive scholarship on institutional abuse in Canada, particularly the 1996 *Report of the Royal Commission on Aboriginal People [RCAP Report]*,²⁰ and the 2000 Report of the Law Commission of Canada [LCC] entitled *Restoring Dignity: Responding to*

hold the institution vicariously liable for his assaults. See *HL*, *supra* note 1. It may be that the liability decision was influenced by the fact that Starr the administrator had abused hundreds of children during his tenure.

17 For instance, in *Bazley*, *supra* note 1, the employer was found vicariously liable for abuses of boys in a group home by Curry who was a resident staff member. Likewise, in *Plint*, *supra* note 1, the church and federal government that ran an Aboriginal residential school were found jointly vicariously liable for abuses of resident students by the dormitory supervisor. However, in *KLB* and *MB*, *supra* note 1, child welfare officials were found to be neither vicariously liable nor liable for breach of non-delegable duty or of fiduciary duty in respect of Crown wards they had negligently placed with foster parents whom they also failed to monitor adequately. Although intimate access to foster children is as inherently a part of foster parenting as it is of being overnight staff in a residential school setting, the court found narrow doctrinal grounds for de-linking provincial officials from abuses of children they had entrusted to abusive foster parents.

18 Hence the majority refused to find a non-profit organization vicariously liable for sexual assaults on children who attended its after-school activities program by Griffiths, the program director. The majority was skeptical of the children's claim that they considered Griffiths to be "God-like," a claim accepted by the trial judge. In any event, the majority reasoned that enjoying God-like influence over the children he mentored was neither part of the program director's job description nor a risk inherent to adult-child mentoring relationships (*Jacobi*, *supra* note 1 at paras 39, 85). A majority of the Court likewise found that neither a public school janitor nor a residential school "odd job" man enjoyed institutional power that enhanced their ability to abuse Aboriginal children at their schools. See *EDG* and *Oblates*, *supra* note 1. The reasoning in both cases shows no awareness of the multiple inequalities that gave abusers power over the children they abused. In my view, the inability to imagine that janitors might have power in such settings and the failure to engage inequalities of race, gender, and class in these cases smacks of privileged ignorance.

19 See her dissent in *Oblates*, *supra* note 1.

20 (Ottawa: Minister of Supply and Services, 1996) [*RCAP Report*].

Child Abuse in Canadian Institutions [Restoring Dignity].²¹ Both reports decisively refute the isolated “bad apple” characterization of abusers for whom institutions provide no more than “mere opportunity” to prey on children. The *RCAP Report* documents the supremacist genesis of the Aboriginal residential schools, their culturally genocidal function, and the financial and other governmental and church interests they served. It methodically links physical and sexual abuse to other injuries endemic to the persistent underfunding and understaffing of the schools: overcrowding, systemic malnutrition, inadequate shelter, poor or no medical care, including for lethal infectious diseases, and the substitution of harsh subsistence labour for “school” work. The *RCAP Report* exposes how the schools’ lab experiment in cultural erasure and reprogramming was executed by means of deliberate familial and social isolation, programmatic humiliation and degradation, regimentation, authoritarian structures, and a harsh regimen of corporal discipline administered by poorly trained and supervised religious and lay staff committed to the premise of Aboriginal children’s lesser humanity.²² The *RCAP Report* leaves no doubt that state and church officials knew throughout the one-hundred-year tenure of the schools about the severe neglect, epidemic abuse, and high mortality of resident children.²³

The LCC’s study, *Restoring Dignity*, unpacked these same basic operational dynamics in a wide variety of other residential institutions in which institutional staff and children were systematically schooled in the children’s lesser humanity. Its introduction rejects any illusion that the physical and sexual abuse pervasive across a significant number and range of institutions can be characterized as the unforeseeable and unpreventable misconduct of isolated, deviant, individuals. The introduction to *Restoring Dignity* underlines three “clear” lessons. First, most institutionalized children come from society’s most marginalized and powerless groups, and lack the financial and political leverage to make themselves heard or taken seriously.²⁴ The structural inequalit-

21 (Ottawa: Minister of Public Works, 2000) [*Restoring Dignity*].

22 See Chapter 10 of Volume 1, *Looking Forward, Looking Back, RCAP Report*, *supra* note 20.

23 *Ibid* at 353–74. See also Roland Chrisjohn & Sherri Young, *The Circle Game: Shadows and Substance in the Indian Residential School Experience in Canada* (Penticton: Theytus Books, 1997); John Milloy, *A National Crime: The Canadian Government and the Residential Schools System, 1879 to 1986* (Winnipeg: University of Manitoba Press, 1999); and JR Miller, “Troubled Legacy: A History of Native Residential Schools” (2003) 66 Sask L Rev 357.

24 “Issues of race, class, ability and gender were never far from the surface in decisions

ies that allowed dominant society to regularize such children's institutionalization also made it easier to discount their disclosures of abuse and to discount its harms.²⁵ Second, there was an "enormous" imbalance of power, status, and authority between the children and the governments, churches, and social agencies that ran the institutions. Institutional power and status facilitated the disbelief or discreditation of disclosures.²⁶ Lastly, *Restoring Dignity* noted the invisibility of the children once institutionalized. Although vigilance in ensuring the welfare of children entrusted to institutional care was essential, very little oversight of any kind was exercised by those ultimately in charge of the institutions. The result was "a recipe for abuse of power."²⁷

The LCC study emphasizes the particular abuse-enabling dynamics of residential institutions such as those involved in the litigation in the *Bazley*, *HL*, *Plint*, and *Oblates* cases.²⁸ Such "total institutions" in different degrees aimed to fundamentally re-socialize residents to habits and values deemed superior to those the residents had internalized during their upbringings.²⁹ Re-socialization typically was pursued by isolating children from all external community supports and all familial connections, subjecting them to daily routines modelling dominant norms that were enforced by rigid institutional hierarchies, authoritarian formal and informal instruction, harsh and frequently

about which children would wind up in institutions" (*Restoring Dignity*, *supra* note 21 at 21).

25 *Ibid* at 4–5. The *RCAP Report* contains many instances of officially documented reports of physical and sexual abuse, as well as of unsafe residential conditions over the century that residential schools operated (*supra* note 20). "Head office, regional, school and church files are replete, from early in the system's history, with incidents that violated the norms of the day" (*Looking Forward*, *supra* note 22 at 367). A persistent pattern of inaction and cover-up was also a well-documented response of many other institutions to reported abuses. See, eg, Goldie Shea, "Redress Programs Relating to Institutional Child Abuse in Canada" (paper prepared for Law Commission of Canada, 1999, on file with author).

26 *Restoring Dignity*, *supra* note 21 at 5.

27 *Ibid* at 5, 6. Note these three lessons would apply to current institutions as well.

28 *Supra* note 1.

29 Aboriginal residential schools were explicitly designed to eliminate Aboriginal culture, as well as the fiscal obligations of the federal government associated with treaty obligations, reserves, and forcible relocations. Schools for the deaf had assimilative purposes designed to discourage deaf culture and deaf sign languages in favour of communication methods accessible to the hearing population. Reform and training schools were intended to discipline young women and men considered socially, sexually, or criminally delinquent and to convert them to middle-class values and norms.

arbitrary discipline,³⁰ and individual humiliation and degradation. The resulting message to those in power and to the children alike was of the children's lesser humanity.³¹ Throughout, *Restoring Dignity* stresses the importance of contextualizing abuse within the systemic relations of inequality — racism, classism, sexism, ableism — that rationalized children's institutionalization and then compounded their powerlessness and perceived worthlessness within the institutions, thereby virtually ensuring little or no political or legal accountability or redress for the wholesale abuses incubated in so corrupted an environment. *Restoring Dignity* contains a twenty-eight page bibliography of studies on sexual abuse generally and on Canadian institutional abuse in particular. None of these specialized studies, far less the *LCC Report* itself, is referred to in any of the Supreme Court majority decisions.

In deciding these cases, the court had considerable scope to develop jurisprudence adequate to the widespread and devastating harms of institutional abuse. In six of the cases there was no binding precedent concerning similar legal claims on similar facts. In aggregate, it was appeal courts that defeated claimants. Plaintiffs were successful at trial more often, and under more causes of action, than on appeal, perhaps because trial judges were able to observe plaintiffs and saw in their deportment and testimony the harms done to them. Well-resourced defendants, by contrast, benefited from the abstractions that structure the appeal process and its focus on doctrine and the policy implications of liability findings.³² All nine plaintiffs won at least one of their institu-

30 A "reign of disciplinary terror punctuated by incidents of stark abuse" was "the ordinary tenor of many [residential] schools throughout the system" over their one hundred years of existence: see *Looking Forward*, *supra* note 22 at 373. For an indicator of the severity of abuses recognized as sufficiently standard to be itemized in benchmarks for compensation under the Indian Residential Schools Agreement, see The Independent Assessment Process Guide, online: <<http://www.irsrrqpi.gc.ca/english/index.html>> at 13.

31 *Restoring Dignity*, *supra* note 21 at 22–28. For a compelling synthesis of this inequality analysis of abuse as applied to *Plint*, *supra* note 1, see factum of the interveners LEAF, Native Women's Association of Canada and DisAbleD Women's Network of Canada in *Barney v Canada* at the Supreme Court of Canada, online: <www.leaf.ca/legal/briefs/barney-2005.html>.

32 Defendant institutions can well afford to appeal. Given the volume of cases coming forward, defendants also have much to gain from using the appeal process not only to limit or reduce liability and damage awards, but to induce discount settlements and discourage under-resourced potential claimants from even launching civil actions. Where institutions have faced multiple civil suits from adult survivors, they have often established claims resolution vehicles that process individual claims according

tional liability claims at trial, and a total of sixteen claims succeeded at trial against ten of the thirteen institutional defendants.³³ However, only seven of the sixteen wins survived final appeal. In particular, only five defendant institutions were ultimately found vicariously liable, two of them jointly in the *Plint* case.

Regardless of the cause of action, plaintiffs mostly lost. In my view, they lost because the court refused to inform itself about abuse when developing four separate new lines of doctrine for the adjudication of the wave of abuse claims that hit the courts in the 1990s. Beyond ignoring the vast array of authoritative research on the history and power dynamics of institutional abuse, the court also consulted little jurisprudential theory and comparative law even though it was creating landmark precedents in what was new legal territory. The very few references by the court to tort scholarship were to traditional tort textbooks and to very dated doctrinal commentary.³⁴ This disinterest in relevant historical, social science, and legal scholarship strikes me as shockingly anti-intellectual in a final appeal court that effectively shapes both social and legal policy. Rather than learning about and engaging the social, political, and legal factors underpinning institutionalization and enabling abuse, the court narrowed its inquiry to the search for direct causal links between an individual perpetrator's official duties and his institutional employers or principals. This search was conducted in relation to narrow and literal-minded readings of job descriptions, institutional contracts, and statutory powers and duties — all abstracted from socio-historic context and the lived realities of institutional players. When the court referred to inequalities of power at all, its analysis was cursory and superficial: the abuser had parent-like power, or children were from "troubled" homes. Racism, poverty, disability, and sexism

to standardized compensation schedules and without any adversarial structure. Defendant institutions have considerable incentive to contest early lawsuits very aggressively in order to establish lowered compensation benchmarks in advance of group settlement negotiations. For examples, see Shea, *supra* note 25.

33 None of the reported decisions in the *Bazley* litigation explains why there were no findings against two named provincial ministries.

34 *Bazley*, eg, cites nine secondary sources: five of them are doctrinal textbooks, one article is from 1916, and one text is from 1967. Fully six of the authorities cited pre-date 1990. *KLB*, which revisited four distinct bodies of tort doctrine, cites only two torts textbooks (including the 1967 text cited in *Bazley*), and a 1987 article (also cited in *Jacobi*). See *Bazley*, *Jacobi*, and *KLB*, *supra* note 1. Notwithstanding a joint intervention from three feminist organizations citing thirty-seven books or articles that offered egalitarian, feminist, and anti-racist analysis of the legal issues in play, *Plint* cites only the 1967 text plus one 1995 article on strict liability, *supra* note 1. See factum of LEAF *et al* in *Plint*, *supra* note 31.

were, by omission, adjudged irrelevant to the institution's purposes, its typical residents or service population, the abusers' power vis-à-vis their victims and, thus, the inherent risks of the institutional enterprise. In sum, the decisions lack any meaningful attempt to grapple with the multiple inequalities that generated and rationalized both institutionalization and institutional abuse, inhibited or discredited reporting, excused institutional inaction, compromised resort to law as a vehicle of redress, and accounted for the unconscionable defence tactics³⁵ deployed by defendant institutions to continue to evade responsibility for abuses of children in their care. I count this as an egregious instance of privileged ignorance in operation.

The first of the court's nine decisions appeared to lay the foundations for an approach to institutional liability that does take into account the systemic relations of inequality that permeate the history and abusive dynamics of institutions like residential schools, orphanages, adolescent reform schools, schools for the deaf, child welfare placement facilities, and the like. In *Bazley v Curry*,³⁶ a unanimous Supreme Court rejected a century-old doctrinal formula for determining an employer's liability for injuries caused by an employee in the course of employment.³⁷ That formulaic framework required convoluted reasoning and led to inconsistent results where the employee engaged in intentional criminal misconduct, such as theft or violence at work. The *Bazley* court proposed a substantive test for vicarious employer liability where there were no unambiguous precedents applicable to the case being litigated. As the court found no unambiguous precedent applicable to the *Bazley* facts — sexual abuse of boys in a group home by a resident staffer — it appeared that the new test would apply to all cases of institutional abuse committed by institutional employees.

The new test implicitly rejected the decontextualized conception of abuse as the misconduct of an isolated, deviant perpetrator. Instead

35 For three compelling critiques of routine resort to hyper-aggressive defence tactics even after the defendant institutions have globally apologized for such abuses, see Elizabeth Adjin-Tettey, "Righting Past Wrongs Through Contextualization: Assessing Claims of Aboriginal Survivors of Historical and Institutional Abuses" (2007) 25 Windsor YB Access Just 95; Bruce Feldthusen, "Civil Liability for Sexual Assault in Aboriginal Schools: The Baker Did It" (2007) 22 Can JL & Soc 61; and Vella & Grace, *supra* note 5 at 249–58.

36 *Supra* at note 1. Prior to 1999, the Supreme Court had heard a criminal appeal by an Indian residential school principal and priest accused of raping four Aboriginal women at the school: *R v O'Connor*, [1995] 4 SCR 411.

37 See John Salmond, *The Law of Torts* (London: Steven and Haynes, 1907) at 83.

of focusing solely on the abuser's formal job duties and looking for a link — however contrived — between authorized duties and the misconduct, it focused on the nature of the enterprise that employed the abuser and on whether that enterprise carried inherent risks of abuse. The court reasoned that, as a matter of fairness, an enterprise that introduces risk into a community to advance its own interests should be responsible for damages that occur in the course of operating that enterprise. Practically, the court held, such a policy will promote effective compensation by improving the likelihood that those injured will recover damages from a solvent defendant and by ensuring that the party best able to spread the costs of inherent enterprise risks bears the losses of those risks that materialize.³⁸ As well, such a policy should deter the risk of future harm by encouraging the enterprise to take imaginative administrative and supervisory steps beyond those required in negligence law to reduce those risks that are inherent to the enterprise.³⁹

In determining whether the enterprise enhanced the risk of employee misconduct which, in fact, materialized, the court proposed consideration of five contextual factors:

- (a) the opportunity the enterprise afforded employees to abuse their power;
- (b) the extent to which the tort may have furthered the employer's aims;
- (c) the extent to which the tort was related to conflict, confrontation, or intimacy inherent in the enterprise;
- (d) the extent of power conferred on the employee in relation to his victim;
- (e) the vulnerability of potential victims to wrongful exercises of employee power.⁴⁰

In cases of sexual abuse, the court offered that such contextual analysis might address the frequency and duration of employee contacts with children, especially intimate contacts; the frequency of opportunities to be alone with children; the degree and nature of employees' employment-related power and authority over children and the children's

³⁸ *Bazley*, *supra* note 1 at paras 30, 31.

³⁹ *Ibid* at para 34. This distinction between owing a duty of care to take steps to prevent foreseeable risks caused by specific employees (negligence) and having a policy-based, legal incentive (vicarious liability) to take steps to prevent risks inherent to the enterprise generally is reiterated (paras 39, 42). It is this distinction that should have eliminated resort to the deviant perpetrator or "one bad apple" view of institutional abuse.

⁴⁰ *Ibid* at para 41.

dependency on or trust of the employee; and the spatial and temporal proximity of wrongful conduct to authorized work functions. It should be noted that these illustrations relate to job duties rather than to systemic enterprise risks, and do little to illuminate factors (a), (d), and (e). Applying the five factors to the *Bazley* facts, the court also emphasized that the group home was a “total intervention” institution that “created the environment that nurtured and brought to fruition” Curry’s sexual abuses of resident youth. He enjoyed full-time parent-like power over all aspects of the child residents’ lives. His duties of tucking children into bed or overseeing their personal hygiene afforded him “special opportunities for exploitation” of the proximity and routine intimacy expected of his job. Concluding that “it is difficult to imagine a job with a greater risk of child abuse,” McLachlin, CJC, underlined that future cases need not rise to the same level to impose vicarious liability.⁴¹

Although the *Bazley* decision was well received in the torts bar,⁴² its substantive import was eroded almost immediately in a companion case released the same day, *Jacobi v Griffiths*.⁴³ In subsequent cases, the majority reverted to a decontextualized formalism focused on narrowly defined job descriptions of isolated abusers deemed unforeseeable or undeterrable. Its focus dimmed on risks inherent to the enterprise and the power hierarchies it created or enhanced, and its attention shifted to risks to defendant enterprises of vicarious liability findings. The case law quickly became inconsistent as the original rationales for enterprise risk liability were abandoned.

Perhaps the most shocking instance of the post-*Bazley* jurisprudence is the last of the court’s decisions on the vicarious liability of the enterprises that managed Aboriginal residential schools, *EB v Order of the Oblates of Mary Immaculate in BC*.⁴⁴ The trial began in 2001, ten years after the Order of the Oblates issued an apology for their role in

41 *Ibid* at para 58.

42 Jason Neyers and David Stevens offer a comprehensive list of explicitly and implicitly positive comments in “Vicarious Liability in the Charity Sector: An Examination of *Bazley v Curry* and *Re Christian Brothers of Ireland in Canada*” (2005) 42 Bus LJ 371.

43 *Supra* note 1. In that case, the program director at an after-school club for young girls and boys molested several children. His employer, the club, was found by a narrow majority of the court not to be vicariously liable for his misconduct on a variety of policy grounds that contradict the *Bazley* reasoning. For a more detailed analysis of the contradictions between *Bazley* and *Jacobi*, see McIntyre, *supra* note 2 at 15–18, and Vaughan Black & Sheila Wildeman, “Parsing the Supreme Court’s New Pronouncements on Vicarious Liability for Sexual Battery” (1999) 46 CCLT (2d) 126 at 127.

44 *Supra* note 1.

“the cultural, ethnic, linguistic and religious imperialism” that animated their treatment of Aboriginal people and for the harms it caused.⁴⁵ The Supreme Court’s decision was released in 2005, nine years after the *RCAP Report*, five years after the *LCC Report*, and seven years after the federal government’s “Statement of Reconciliation” that acknowledged its role in the “culture of abuse” within Aboriginal residential schools and that established a \$350 million healing fund to help alleviate the individual and collective harms done.⁴⁶

Despite the general apology issued by the Oblates for its role in the harms caused by residential schooling, the Order adopted an aggressive, three-part defence against EB’s claims of abuse by Saxey, an employee at the Christie Indian Residential School operated by the Oblates at the relevant time.⁴⁷ First, it denied any abuse had occurred, rigorously challenging the credibility of EB on numerous testimonial details concerning whether and how Saxey secured his acquiescence and silence, the sexual specifics of what occurred, and the time and place it occurred.⁴⁸ Secondly, and in the alternative, it argued that Saxey alone was responsible and that imposition of vicarious liability was inappropriate because there was no link between Saxey’s job duties and his power or opportunities to abuse.⁴⁹ Saxey, it claimed, lacked routine proximity to children in the school, and had no authority or responsibility over the children. Finally, it sought to minimize the quantum of damages by attributing EB’s numerous psychological problems to causes that pre-dated and post-dated the abuse.

The facts found by the trial judge were as follows: EB was sexually abused by Saxey on a weekly basis for five years beginning when EB

45 See *Restoring Dignity*, *supra* note 21 at 82.

46 For the text of the Statement of Reconciliation, see online: <http://www.ainc-inac.gc.ca/ai/rqpi/apo/js_spea-eng.asp> (accessed 31 July 2009). For the terms of the healing fund, see George Erasmus, “Reparations: Theory, Practice and Education” (2003) 22 *Windsor YB Access Just* 189.

47 *EB v Order of the Oblates of Mary Immaculate in the Province of BC*, [2001] BCJ No 2700 (BCSC). The decision is 335 paragraphs long and contains lengthy, painful excerpts from cross-examination of the plaintiff about minute details of the sexual assaults he endured. The Oblates’ efforts to discredit experts for the plaintiff also consume several pages of the trial decision.

48 Defence witnesses testified that the children were supervised at all times and could never have been alone with Saxey in the bakery, on the school grounds, or in his residence. The trial judge rejected this evidence, effectively finding school religious staff to be lying.

49 Defence witnesses denied Saxey assigned children chores in the bakery and played with them during their free time. The trial judge also rejected this evidence.

was around six years old. Saxey was employed by the Christie residential school on Meares Island very shortly after his release from prison for manslaughter. He was primarily employed as a baker. However, due to the severe understaffing chronic in Aboriginal residential schools,⁵⁰ he also worked as a general maintenance man at the school and operated the tractor and the boat linking Meares Island to the Tofino area. The trial judge quoted a letter from the school principal describing Saxey as the “main cog” at the institution.⁵¹ He lived on the school property near the playground in an apartment separate from the student residence. All resident children were required to obey all staff, whether religious or lay members, on pain of physical punishment. The frequency of harsh discipline created a climate of fear and intimidation for students. A defence witness had testified that both religious and lay staff subjected resident children to “physical and emotional violence, deprivation, belittling and intimidation.” He described the disciplinary regime as “very threatening” and “very stern.”⁵² All lay staff, including Saxey, had and exercised authority to assign children chores related to the operation of the school. Saxey sometimes gave children chores in the bakery and oversaw their performance.

The trial judge rejected the defendant’s reliance on precedents that found no link between the abuser’s misconduct and the institution. He also specifically rejected the defendant’s claim that to find the church vicariously liable would be to rest liability solely on the fact that both students and Saxey resided at the school.⁵³ Instead, he adopted the plaintiff’s analysis, emphasizing features of the school that materially enhanced the risk of abuse: the removal and isolation of children from all external familial supports, their separation from siblings within the school, being held “in custody” in overcrowded and understaffed surroundings that facilitated school employees’ unrestricted and unsupervised access to them, and a regime that compelled compliance with all lay and religious staff demands by constant threat of physical discipline.⁵⁴ He also cited passages from expert testimony linking the environment and operating norms of the school to an enhanced likelihood of abuse.⁵⁵ He concluded that the witness and expert evidence estab-

50 See text at *supra* notes 22 and 23.

51 See *supra* note 47 at para 93.

52 *Ibid* at para 80.

53 *Ibid* at para 121.

54 *Ibid* at para 122.

55 *Ibid* at paras 123–30.

lished “a significant connection between the creation or enhancement of a risk and the wrong that accrues therefrom,”⁵⁶ and held the Oblates vicariously liable for Saxey’s assaults on EB

The BC Court of Appeal reversed the imposition of vicarious liability on the basis of a lack of nexus between Saxey’s official duties “on the fringes of school life” and the assaults.⁵⁷ The Supreme Court of Canada affirmed that conclusion, purportedly on the basis of precedent and policy. For the eight judge majority, Binnie, J characterized the trial judge’s ruling to be that liability flowed directly from risks created by the school’s operational characteristics without demonstrating a strong connection between the assaults and Saxey’s job-created power and authority. The flaw, held Binnie, J, was the trial judge’s placing of all school employees on the same footing and his failure

to put adequate weight on the school-created features of the relationship between *this* claimant and *this* wrongdoing employee, and the contribution of the ... enterprise to enabling the wrongdoer Saxey to do what he did in *this* case.⁵⁸

This failure, he reasoned, led to an unacceptable result: the school would be liable for all tortious acts of its employees, “no matter how remote the wrongdoing from job-created power or status.”⁵⁹ This floodgates argument overstates the case: on the trial judge’s reasoning, the church would have been liable for all abuse of residents by employees of the school because the church created and oversaw an environment that normalized routine abuse of students. Why such an outcome is problematic as a matter of justice is not explained by the majority. If an enterprise creates a climate conducive to abuse, enterprise risk principles indicate it should be held responsible for damages when such risks materialize. This is the basic *Bazley* premise. Nor is the policy argument against institutional liability self-evident, particularly considering that abuse was endemic to the schools for decades to the knowledge of school administrators and sponsors, and was an outgrowth of the school’s basic culture, as well as the subject of a pending mass settlement

⁵⁶ *Ibid* at para 131, quoting *Bazley*, *supra* note 1 at para 4.

⁵⁷ *EB v Order of the Oblates of Mary Immaculate in the Province of British Columbia*, (2003) 14 BCLR (4th) 99 (BCCA). The quotation is the Binnie J’s in his description of the Court of Appeal decision. See *Oblates*, *supra* note 1 at para 2.

⁵⁸ *Oblates*, *ibid* at paras 3 and 4 [emphasis in original].

⁵⁹ *Ibid*.

by the federal government that funded all former residents for the harm inherent in forced school attendance and supplied a grid for damages for all proved abuse no matter the job status or title of the abuser.⁶⁰

However, for the majority, Saxey's mechanical job functions "on the fringes of the school" — baking, driving, doing equipment repairs — provided the only measure of his job-related power in relation to resident children. It concluded that such tasks, in themselves, reflected little institutional power. This reasoning depends on dissociating the job from the larger enterprise of the schools. For the majority, the job did not enhance Saxey's power over the children; it merely provided an opportunity for a pedophile. Even this narrow definition of Saxey's role at the school is factually questionable given that feeding the school, operating the boat that connected the school to the mainland, and keeping equipment functioning were probably vital to the enterprise. Hence, one principal considered Saxey "the main cog" in running the school's functional operation.⁶¹ As well, the trial judge had emphasized that children were required to obey all staff — lay and religious — equally.

But Saxey's power and the children's comparative powerlessness were not just a question of job duties, or even of brutally enforced institutional rules requiring strict obedience of all staff, even mere "odd job" men. The majority could only de-link Saxey's abuse from the residential school enterprise by studiously ignoring the historical, social, racial, and physical context of Saxey's functions in a culturally genocidal project serving the fiscal interests of the federal government and the fiscal and spiritual interests of the Catholic Church. For the majority, there was no *enterprise* behind Saxey, nor any of the "cultural, ethnic, linguistic and religious imperialism" that the Oblates acknowledged and apologized for in 1991.⁶² Because the majority seems to look

60 *Oblates* was issued by the Supreme Court in late October of 2005. The Agreement in Principle for settlement of residential school claims was signed in November of 2005 and approved by the federal government in May of 2006. For details of the settlement agreement, see online: <<http://www.residentialschoolsettlement.ca>>. For an indicator of the severity of abuses recognized as sufficiently standard to be itemized in benchmarks for compensation under the Indian Residential Schools Agreement, see the Independent Assessment Process Guide, online: <<http://www.irsr-rqpi.gc.ca/english/index.html>> at 13.

61 *Supra* note 51.

62 See text at *supra* note 45. I should note that, as defendants, the Oblates also disregarded their earlier apology. Before the Supreme Court of Canada, they raised "their good intentions towards the students in their care ... and the fact that the Oblates attempted on a not-for-profit basis to meet a need for education of First Nations' children that otherwise perhaps would have gone unmet" as policy arguments against imposition of vicarious liability (*Oblates*, *supra* note 1 at para 56). Binnie, J rejected

down on Saxey as a menial labourer, they discounted his institutional and institutionalized leverage as a staffer-who-must-be-obeyed by an isolated, frightened six year old in a systemically hostile and alien environment. They specifically rejected expert evidence accepted by the trial judge that children were unlikely to distinguish among school staff given the pervasive reliance of all staff on fear, intimidation, and harsh discipline.

The majority decision is almost surreal in its non-advertence to race and racism in applying doctrine to facts. Had it actually respected *Bazley* principles, it would have had to engage the hard truth that the residential school enterprise was racist. The enterprise was a classic “total institution,”⁶³ a violent social experiment to eradicate an entire culture by destroying its families and reprogramming children through a variety of abuses and humiliations to become assimilated into the dominant society as self-supporting individuals of little or no cost to the federal purse. Even the educational mission of the schools was racist. Students were not educated for middle-class jobs, but for employment as labourers in disrespected jobs just like the job held by Saxey.⁶⁴ Because the enterprise pursued its explicitly imperialist agenda on the cheap, it knowingly risked resident children’s physical and mental health and their lives over a period of a century.

In a paradigmatic illustration of white privilege, the only reference to race in the majority judgment was notice in the first paragraph of the judgment of the fact that Saxey was Aboriginal,⁶⁵ which fact was pressed by the church to diminish the evidence of EB’s isolation and absence of support within the school.⁶⁶ The majority viewed Saxey as an isolated perpetrator whose assaults were “abhorrent,” but “in direct opposition” to the church’s aims.⁶⁷ Not surprisingly, the church’s “aims,”

such policy arguments — but note the rosy picture of residential schools offered by the Oblates.

63 See text at *supra* notes 28–31.

64 See *Restoring Dignity*, *supra* note 21 at 52–54, and George Erasmus, *supra* note 46 at 189–92.

65 *Oblates*, *supra* note 1 at para 1.

66 See trial decision, *supra* note 47 at paras 129–30.

67 *Oblates*, *supra* note 1 at para 48. Sexual abuse by an institutional employee will always be contrary to an institution’s aims. *Bazley* recognized this fact, *supra* note 1. In *Bennett*, the Court unanimously held the church liable for serial sexual abuses of young parishioners by a priest (*ibid*). Such abuse was even more in opposition to the defendant church’s aims than Saxey’s misconduct. The contradiction between abuse and church mission was no obstacle to liability.

since discredited by the church itself, were not discussed by the majority. Binnie, J decreed that Saxey's formal job as baker and handyman conferred on him no power beyond being an adult among children who were no more vulnerable than in "any" residential setting: "it is the nature of a residential institution rather than the power conferred by the [Oblates] on Saxey that fed [EB's] vulnerability."⁶⁸ In short, in the view of eight judges of the court, the trial judge had pushed the boundaries of vicarious liability "too far":

global inclusion of all employees, including odd-job men, in the "enterprise risk" paints with too broad a brush. It goes against the policy of ensuring that compensation is both effective and *fair*.⁶⁹

For the majority, Saxey was just any baker, any odd-job man in any residential context, save for his unaccountable, unforeseeable, undeterrable sexual proclivities that just happened to be directed at this child who was no more vulnerable than any child in any residential setting. Only in this judicially constructed socio-economic, cultural, racial moonscape, would it be "unfair" to legally link a child abuser to the "operational dynamics" of the enterprise.

The majority concocted this raceless, classless, innocent version of the Christie school and of Saxey's role within it in the face of powerful challenges to such perversely benign abstractions. Interveners supported arguments in favour of employer liability for Saxey's sexual violence by reference to considerable scholarship on the Aboriginal residential schools as well as scholarship illuminating the risks of abuse under conditions of systemic inequality. They also relied on modern tort theory. The majority judgment referred to none of this material in its reasoning. In fact, the majority judgment referred to no secondary sources of any kind.

As problematic, every falsely benign premise underpinning the majority's reasoning was explicitly confronted and refuted in the compelling solo dissent by Justice Abella. Abella, J returned to *Bazley* and its call for a contextualized, substantive approach to determining whether the relationship between the residential school enterprise and the abuser's employment enhanced his power and opportunity to abuse. Her

68 *Oblates*, *ibid* at para 48. This is an odd assertion if any shred of the enterprise risk underpinnings of *Bazley* still exists in Canadian tort doctrine. If the residential setting did confer power on Saxey in relation to child residents, and such power enhanced the risk of the abuse that, in fact, materialized, vicarious liability should follow.

69 *Ibid* at para 30 [emphasis in original].

analysis methodically exposed and contradicted significant misrepresentations both by the Court of Appeal and by the Binnie majority of the trial judge's findings of fact and of law. She also directly challenged the majority's abstractions about Saxey's job-related power and about EB's vulnerability to Saxey within the residential school context. The second paragraph of her analysis emphasized these power dynamics as follows:⁷⁰

These events occurred in the context of a residential school, where children were forcibly removed and segregated from their families to facilitate the obliteration of their Aboriginal identity. Few environments could be more conducive to enhancing the vulnerability of children.⁷¹

She endorsed the trial judge's emphasis on the complete obedience to all staff required of the children, and linked it to the "power structure" of the enterprise where discipline was "strict and harsh," order was maintained "largely through fear and the threat of punishment," and students' daily experience included "physical and emotional violence, deprivation, belittling, and intimidation."⁷² She affirmed the trial judge's understanding of the operational characteristics of the school in giving all employees, including a mere "odd-job" man, power over young children whom the school also disempowered and rendered vulnerable through isolation and intimidation designed to condition them to obey all staff members. In short, even if members of the majority of the final appellate court in the country were uninterested in informing themselves of what is well-documented and relevant to determining links between institutions and abuse, it had squarely before it a trial judgment and a dissent insisting on these links and pointing to legal and social science authorities to substantiate the trial and dissenting rulings. Yet the majority preferred to pronounce on tort policy generally and on the "fairness" of the trial outcome specifically swaddled in privileged ignorance and innocence.

In *Oblates*, as in the other eight institutional abuse cases decided since 1999, the majority devoted little or no attention to the history, nature, and dynamics of the institutional enterprises where children

70 Part I of Abella J's opinion, entitled "Background," begins with a ten-paragraph review of the *Bazley* framework and of the trial judge's core reasoning. Part II, entitled "Analysis," commences at para 71. The quoted passage is at para 72.

71 *Ibid* at para 72, citing three authorities on institutional abuse, including the *RCAP Report* and *Restoring Dignity*, *supra* note 20.

72 *Oblates*, *ibid* at para 81.

were abused. The enterprise of the residential schools was thereby judicially rendered innocent. Its defining power inequalities were erased. Its employees' job-related authority and power were utterly dissociated from the cultural supremacism of the enterprise and from the routine physical, psychological, spiritual, and cultural violence intrinsic to implementation of the enterprises' goals. The floodgates argument underlying the refusal to hold a church institution vicariously liable for predation by an odd-job man betrays an unreflective identification with dominant interests. The majority emphatically asserted that it would be going too far to hold the church liable for Saxey's abuse of EB because that would mean residential school operators would be liable for abuses of children by any employee, however lowly in institutional rank. Such an outcome was declared "unfair" without explanation. But from whose point of view and why would that outcome be unfair? The schools were established to destroy Aboriginal identity in order to reduce governments' fiscal obligations to First Nations communities and to facilitate settler expansion. The effective beneficiary was taxpayers. Why should the enormous costs borne by a very small community of a deeply, destructive government-sponsored cultural experiment not be spread among the vastly larger community of taxpayers? Likewise, why should the churches who took public funding to indoctrinate new souls be immunized from the harms they caused on a massive scale? When government and the churches have actually reached settlement agreements entitling every survivor to automatic compensation for the harms done,⁷³ why is judicially imposed institutional liability "unfair"? Why does the court presume fairness to taxpayers trumps fairness to the lost generations of Aboriginal children?

My answer is that the socially marginalized and racially devalued plaintiffs in these cases were (mis)treated by strong majorities of the Supreme Court of Canada the way they were (mis)treated within institutions dedicated to reprogramming such children. Never truly seen, heard, or credited with their full humanity, their needs and welfare were eclipsed by privileged imaginings and subordinated to dominant material interests and policy goals. Their vulnerability, its exploitation, and the devastating individual and multi-generational damage done counted less than judicial endorsement of the innocence of power holders and their (our) institutional instruments of domination. The court had ample opportunity to develop a modern doctrine to achieve

73 For details of the settlement agreement, see online: <<http://www.residentialschool-settlement.ca>>.

Bazley's two goals — effective and just compensation for tens of thousands of victims of institutional and institutionalized inequality and abuse, and deterrence of institutional recurrences through preventive institutional interventions. Instead, the court rationalized a blend of laissez-faire legalism and utilitarianism propped up by myths about isolated deviants operating independently of their social, economic, and racial contexts. Where the damages were greatest and most widespread, the court found policy reasons to immunize individual institutions from liability.

