The Significance and the Impact of the "Christian Brothers" Case

An April, 2000 decision of the Ontario Court of Appeal, affirmed by the Supreme Court of Canada in November of 2000, when the Supreme Court refused to hear an appeal, is still causing alarm in charitable fundraising and management circles. In Re Christian Brothers of Ireland in Canada (2000), 47 O.R. (3d) 674, we have, arguably, one of the most significant charity-law decisions in recent years. The potential ramifications for charities, particularly large ones with significant endowment funds, for fundraisers and for advisors to these organizations are significant. This brief article proposes to examine the origin of these issues, briefly analyze the law, suggest some ramifications of the decision for charities and suggest some possible solutions.

Origins

The Ontario Court of Appeal decision arose from a lower court judgment where the issue was the exigibility (demandability) of property *held in trust* by the Christian Brothers of Ireland in Canada (hereinafter referred to as the "Christian Brothers"). Whether this charitable property, this trust property, was to be made available to compensate the creditors of the Christian Brothers, was the question to be decided.

The creditors were survivors of sexual abuse (classified as "torts", or, civil wrongs, when the plaintiffs sued) perpetrated against them by employees at the Mount Cashel Orphanage in Newfoundland. While the Christian Brothers had assets of approximately $4 million, it had tort judgments against it totaling well over $35 million, resulting in its winding-up under the federal Winding Up and Restructuring Act. This point is significant as the Court's ruling is *somewhat* limited in that it applies explicitly to groups that go bankrupt. This limitation does make charities and their advisors rest somewhat easier; however, donation planning is still made more complicated by the decision. The "advisor of perfection" will still worry about the decision as being the "thin edge of the wedge". How much further will the courts go to attacking previously unassailable assets of charitable trusts?

The issue became whether two schools located in British Columbia, owned in trust by the Christian Brothers, were exigible (demandable) to satisfy the claims by the abuse sufferers, namely, some of the former residents of the Mount Cashel Orphanage in Newfoundland.

The lower court had made a ruling that distinguished between the corporate property of the Christian Brothers and property held in trust pursuant to a "special purpose charitable trust". The court held that the latter property would *not* be exigible while the general corporate property was so available to satisfy the claim. The Ontario Court of Appeal disagreed and held that *all* assets of a charity are available to satisfy the tort claims upon the winding up of a charity.

This decision appears to fly in the face of established trust law principles, namely, that a charity may hold particular property in trust for specific charitable purposes, distinct from its other property, and to misapply it would be a breach of trust. For the Ontario Court of Appeal to hold that the basic concepts of trusts should be applied differently for "special charitable purpose trusts" is unacceptable in many legal circles. Many have concluded, some reluctantly, that the Ontario Court of Appeal decision was motivated by political expediency (with the admittedly laudable goal of compensating sexual abuse victims) rather than by pure application of the settled law.

What is a Trust and When is a Trust a Trust?

Understanding the ramifications of this case should involve an understanding of the basic principles of trust law. Begin with the proposition that a trust exists when three "certainties" exist:

(a) certainty of intention (to create a trust);
(b) certainty of subject-matter (the assets involved);
(c) certainty of objects (here, the object of charity).

The Court distinguishes between a "precatory trust" and a "true trust". A precatory trust is defined as being not a real trust, but, "…an expression of the desire of the donor to have the funds used for a specific purpose without the creation of a true trust." Such donations would include donations designated for the general purposes of the charitable corporation (such as to general fundraising campaigns).

The lower court concluded that in order to qualify as a claim payable out of trust funds, the claim must relate to a wrong done only while the trustee was carrying out the specific purposes of the trust. The conclusion would isolate the British Columbia schools' assets from the claims of the Newfoundland students.

The Court of Appeal disagreed:

> "Because a charity is not immune from liability to those who have suffered wrong at its hands, either through its trustees, employees or other agents… the assets of the charity, be they beneficially owned or be they 'trust funds' are available to respond to those liabilities".

The Court of Appeal reviewed the law as it relates to charitable immunity (the 1866 British House of Lords decision in Mersey Docks, the 1926 Supreme Court of Canada decision in Nyberg, and the 1999 decision in Bazley and others) and concluded that a *charity has no immunity from liability to its tort victims.* In reviewing the Bazley decision, the Court of Appeal held as follows:

> "The Court considered and rejected the following submissions made in favour of immunity…
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> (1) that it is unfair to fix liability without fault on non-profit organizations performing needed services on behalf of the general public;
>
> (2) that non-profit organizations are less able to control and supervise the conduct of their agents, many of whom are volunteers…
>
> (3) that the practical effect of making non-profit organizations vicariously liable for the misconduct of their agents would make it difficult or impossible for such organizations to carry out their important work.

The Court of Appeal also held:

> "However, the law goes much further. The courts in England and Canada have fully considered the issue of whether the fact that the charity trustees hold the charity's funds in trust, means that those funds are required to be used only directly for the charitable purposes for which they are held and not…to compensate tort victims for wrongs done in the operation of the charity."
>
> The fact that [the funds of the charity] may be held on charitable trusts by the trustees, does not make those funds immune from execution."

The Court concluded that dividing the types of property of the trust into exigible and not exigible was artificial. "[T]he concept of attempting to relate the wrong done to the particular assets of the charity is fatally flawed, as well as being incompatible with the long-standing rule of charitable non-immunity".

Vicarious Liability

Another way to analyze the Christian Brothers case is to analyze it as David P. Stevens analyzes it in the Lawyer's Weekly (June 15, 2001) using the concept of vicarious liability.

Vicarious liability is the long-standing legal concept meaning indirect legal responsibility. It is the liability of a Principal (an employer) to compensate for harm caused by an Agent (an employee). A principal may be liable for the torts and contracts of an agent. It is a less controversial concept when an employer instructs an employee to perform an act for which the employer knows the employee has little or no training. In such a case, the employer is personally at fault and the employee is not.

The situation becomes cloudier when the employee alone is at fault. Vicarious liability holds the employer liable for harm caused by the tortious acts of an employee when those acts arose during the course of employment, even if the employer had given instructions to the employee to *not* act in a certain manner.

There are two principal justifications for this manner of thinking and analysis. First, employees generally have limited assets to pay for their wrongs. Second, there is an argument based on the notion that since it is the employer who is making a profit on the activity, that this profit-maker should also make good on the losses. In fact, this concept of vicarious liability has forced employers to insure themselves against such losses.

Recently, significant changes in the law of vicarious liability have occurred. Those changes were made by the Supreme Court of Canada in Jacobi v Griffiths [1999] 2 SCR 570 and Bazley v Curry [1999] 2 SCR 534. These cases reversed the settled law and held that an employee can also be liable for *intentional* torts.

The only understandable reason for vicarious liability is the employer's promise to the employee in the contract of employment to indemnify the employee for harms caused by the employee in the course of employment. The value of that promise is transferred to the plaintiff in a civil suit through the doctrine of vicarious liability.

The Court of Appeal in this case discusses vicarious liability in the following manner:

> "…the concept of vicarious liability is that the entire corporation is responsible to the victim for the wrong which has been done, although it may have been committed by only one person for whose actions that corporation is responsible. Judgment is obtained against the corporation. All of its assets are answerable for the judgment whether they are held beneficially or on trust for the charitable purposes of the corporation….
>
> When a corporation is a charity, this means that the charity ceases to carry out its charitable purposes. The obligation of the charity to use assets held on trust for one or more of the trust purposes also ceases as it may no longer carry on.
>
> If there is a surplus…then the assets can be applied … to another charity with similar purposes."

If the Christian Brothers case was truly about the doctrine of charitable immunity, concludes Stevens, then the only question was whether the trusts for schools in Vancouver *employed* the tortfeasors in Newfoundland. The employees in Newfoundland had nothing to do with the activities of the two trusts. So, vicarious liability cannot apply. That should have ended the matter, but it certainly did not do so. The real question was whether the charitable purpose trusts were really trusts. The court never answers that question!

A trust is *not* a legal person. A trustee has the power to bind a trust. If trust assets are to be exigible for torts, the tortfeasor must be connected to those assets through the trustee *as a trustee* in an employment contract. The court confuses the issue, Stevens submits. If the trustee is not connected to the tort as a trustee, through a contract of employment with the employee, then all the trustee is seeking is the reinforcement of the principle that innocent persons should not pay for the torts of others.

Courts are, in effect, altering the doctrine of vicarious liability to cover intentional torts by abolishing the charitable purpose trust. No one is arguing that the wrongdoers should not pay for their misdeeds. However, can it really make sense that innocents in Vancouver pay for the acts of Newfoundland pedophiles?

The inconsistency is to argue that general trust law applies and then to say that these basic elements should be applied differently for "specific purpose charitable trusts". Clearly, a political decision was made to compensate abuse victims rather than to apply trust law.

The Impact of the Decision

Justice Feldman, speaking for the Court limited the application of his decision to this sort of fact situation, namely where the following circumstances exist:

(a) there are claims by tort victims against a charity;
(b) the charity is being financially wound up;
(c) the charity is no longer operating;
(d) the general assets of the charity are insufficient to satisfy resulting judgments.

These limitations are obviously tailored to fit this fact situation. However, they do not provide comfort to charities and to their advisors who may be concerned that this sort of decision could lead to future ones where still other categories of trust monies become exigible.

Of course, the ramifications of this decision are wider still:

(a) there are heretofore untapped amounts of money available from larger charities with endowment funds;
(b) such lawsuits, if successful, could lead to the extinction of charities, especially churches;
(c) the ability of donors to create "specific purpose charitable trusts" will be thwarted;
(d) donations to larger charities will be questioned. Why should one give to a charity's endowment fund when one cannot be assured that the donation will not be available to satisfy legal claims of persons with claim against the charity, either based from events that occurred long in the past, well into the future, let alone in the present?

At a time when government financial retrenchment is occurring with respect to charitable financial support, it may turn out to be the case that government may have to intervene to maintain the financial viability or the very financial existence of certain charities in order to maintain the social services that they provide.

So, the question for gift planners and for charities becomes – In the aftermath of this decision, how can future charitable gifts be "credit-proofed"? While there are many answers to this question, some would include giving the donation to an intermediary to be held in trust for the charity (for example, a community foundation), or structuring a donation with a "condition subsequent" that would activate upon the wind-up of the charity, accompanied by a "gift-over" to another charity, or even by providing that the gift revert back to the donor. It should be evident that consulting one's legal advisor is even more important now.

The Supreme Court of Canada was given the opportunity to reverse the Ontario Court of Appeal decision in November of 2000, but it refused to hear the appeal. The effect of that action (or, inaction) is the affirmation of the Court of Appeal decision. A very rare second appeal is being contemplated by various charity groups and by the Canadian Bar Association. This page will keep you informed as to the status of that planned appeal.

This article is not intended as legal advice, or as an exhaustive review of the law in this area. It is written for informational purposes only for the membership of the Ottawa Region CAGP membership, and is not to be reprinted. Before any legal decisions are made, please consult with a legal professional.

Jeffrey H. McCully, B.A., LL.B.
Director-at-Large
Canadian Association of Gift Planners
Ottawa Regional Round Table