

VICARIOUS LIABILITY

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1. **WHAT IS VICARIOUS LIABILITY?**

“Vicarious liability” arises when a Court decides an employer must pay for damages caused by an employee, even though the employer may not have done anything wrong. Courts may impose vicarious liability on “innocent” employers simply because employers can often afford to compensate the innocent victims.

2. **IS VICARIOUS LIABILITY NEW?**

No. For a long time, employers have been responsible for damage their employees negligently cause so long as the employee’s action are part of their employment. For example, the employer would likely be vicariously liable for damage caused by a bus driver who has an accident.

What *is* new is holding employers responsible for things employees deliberately do, often with criminal intent. In 1999, the Supreme Court of Canada (“SCC”) held that an employer, the Children’s Foundation, was vicariously liable for its employee’s sexual assaults upon a young child in its care (*Bazley v. Curry*).

3. **ARE CHARITIES AND NON-PROFIT ORGANIZATIONS TREATED DIFFERENTLY?**

The Children’s Foundation and the Boys’ and Girls’ Club of Vernon (*Jacobi v. Griffiths*) asked the SCC to exempt non-profit organizations from vicarious liability. The SCC said no.

4. **WILL A CHARITY OR NON-PROFIT ORGANIZATION ALWAYS BE LIABLE FOR EMPLOYEES’ INTENTIONAL MISCONDUCT?**

No. The Children’s Foundation was vicariously liable because it “created” the “risk” by giving its employee parental control over the young child in its care, including bathing and putting the child to bed.

However, the Boys’ and Girls’ Club of Vernon was *not* vicariously liable for an employee’s sexual assaults upon teenaged members of the Club. The Boys’ and Girls’ Club intended its employee to encourage its members to partake in public activities. There was no “job created authority” to be intimate with the members. The connection between the risk created by the employer and the misconduct must be a strong one.

5. **IS YOUR ORGANIZATION SAFE FROM VICARIOUS LIABILITY BECAUSE YOUR “EMPLOYEES” ARE VOLUNTEERS?**

No. In the Children’s Foundation case, the SCC said that there is no distinction between the employment of volunteers and paid employees.

Other relationships will also not escape vicarious liability. In the recent case of *M.D. (Guardian ad litem of) v. B.C.*, the Province of British Columbia (Ministry of Children and Families) was held vicariously liable for an assault by a foster parent when she shook an infant in her care, even though the foster parent was not a traditional employee. Given the “direct control” exercised by the Ministry over the foster parent, and the fact the shaking took place in the course of her duties - even though it was against Ministerial policy - the foster parent was to be treated as though she was an employee.

6. **CAN A PROVINCIAL ORGANIZATION BE HELD VICARIOUSLY LIABLE FOR THE ACTS OF AN EMPLOYEE OF A LOCAL ORGANIZATION, OR VICE VERSA?**

Yes. The Court is not interested so much in who issues the T4 slip, but who exercises knowledge and control over the employee in question. Furthermore, there is nothing to prevent two organizations from being treated as employers at the same time. In the 1999 decision of *M. (F.S.) v. Clarke*, the federal Crown and the Anglican Church were *both* found vicariously liable for a dormitory supervisor's sexual assaults upon a young child resident in an Indian Residential School.

7. **WHAT CAN BIG SISTERS DO TO PREVENT VICARIOUS LIABILITY?**

The bad news is that, once there is employee misconduct, organizations may be vicariously liable no matter how vigilant they have been. The good news is that safety measures can be taken to protect the vulnerable and also help to prevent the opportunity for employee misconduct to arise in the first place. Here are some examples:

When hiring new staff or taking on volunteers, check personal references, inquire into gaps in work and educational history, speak with former employers and conduct a criminal record check. To the extent possible, do the same for existing employees and volunteers. Keep a record of what you do and what you learn; Consider whether high-risk activities provide sufficient benefit to justify the potential liability; Adopt a Code of Conduct identifying prohibited conduct by staff and volunteers with each other and with Little Sisters, including examples; Establish written complaint procedures; mandatory reporting requirements; a description of the consequences for misconduct; and the provision of support services for victims; Educate ALL staff and volunteers about the policy and procedures and ensure they are aware of any legal obligations to report and prevent suspected abuse; Once policies and procedures are put in place, ensure that they are strictly followed; and Regularly in-service your staff and volunteers: experience tells us that the more often these issues are addressed, the more effective the prevention of misconduct.