

Employers Beware! New Test for Vicarious Liability

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The Supreme Court of Canada recently endorsed a new test for awarding damages for an employer's vicarious liability for sexual assaults of an employee that raises concern for employers.

Prior to *Bazley v. Curry* (the "*Children's Foundation case*"), courts would only hold an otherwise "innocent" employer financially accountable for employee wrongdoing if that wrongdoing fell within the "scope of employment". That wrongdoing fell within the "scope of employment" if either (a) it was authorized by the employer; or, (b) the unauthorized acts are so closely connected to the acts authorized by the employer that it may rightly be regarded as a mode—although improper mode—of doing what was authorized. This test was used in vicarious liability cases for over 50 years.

In the *Children's Foundation case*, the plaintiff, a victim of the sexual assaults of a caregiver/employee of a group home residence, sought to recover damages from the Children's Foundation as the employer of the assailant.

Both sides agreed the sexual assaults were unauthorized. The chambers judge held that the assaults, committed while tucking the plaintiff into his bed, an authorized act, were improper modes of the authorized act. The employer was thus liable for the employee's wrongdoing. This decision eventually made its way up to the Supreme Court of Canada.

The court developed a two-step test for imposing vicarious liability when an employee's unauthorized act is sufficiently connected to the employer's enterprise. The first step is to look for case law to help decide the issue. Courts do this as a matter of practice. If precedents are not instructive, then the courts should consider the broad policies of fair compensation and deterrence when deciding whether the employer should pay for its employee's wrongs.

The key question becomes: Is the employee's wrongful act sufficiently related to the authorized act? If yes, then it would be fair to award a judgment against the employer for the employee's unauthorized actions. The Court stated that "[i]t must be possible to say that the employer significantly increased the risk of harm by putting the employee in his or her position and requiring him to perform the assigned tasks." Simply put, if the employer can afford to create this risk, it should be prepared to pay for the damage resulting from it.

The employment must somehow *materially enhance* or *significantly contribute* to the risk before a court will hold the employer financially responsible for the wrong. The time and place of the wrong, without more, tend only to show that employment provided the employee the bare opportunity to commit the wrong. Judges may consider a variety of factors including:

(a) the opportunity given the employee to abuse his or her position of power;

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(b) the wrongful act furthering the employer's aims (A barroom bouncer assaulting an unruly patron while maintaining a quiet establishment.);

(c) the wrongful act is related to friction, confrontation or intimacy inherent in the employer's enterprise (The doctor examining patients without a nurse present.);

(d) the employee's power in relation to the victim of the wrong (Teachers, doctors, police officers are a few examples of "power positions".);

(e) the vulnerability of the potential victims (Children, the mentally and/or physically challenged, the elderly, and new immigrants.);

sense approach is approved. The court called for sensitivity to fair and just compensation and deterrence while condemning a mechanical application of this test. Special attention to power imbalances were called for in cases of child abuse. Trial judges now wield a great deal of discretion in determining whether to hold the employer accountable for its employee's unauthorized wrongful act. As a result, each case may be so fact specific that it will become difficult for defence counsel to rely on reported cases in support of their client's arguments.

In the *Children's Foundation* case there was neither negligence in the employer's hiring practices nor in its supervisory practices. The employee abused the child in his care and hid the events from others. Despite acting reasonably, the employer was found to be responsible for the abuse. The Supreme Court is requiring an employer to be a "super" supervisor going above and beyond the standard of reasonability in assuring that it has taken all possible measures to minimize the risk of harm. The message to employers is that they will be held to a higher standard of care when vicarious liability is at issue.

A companion decision highlights the uncertainty of *Children's Foundation* case test. In this second case the court was divided. Three judges found the Boy's and Girl's Club of Vernon, B.C. liable for an employee's sexual assault of two Club members. The remaining four justices held that the club was not vicariously liable. Those judges weighed many of the same factors as described above, but came to the opposite conclusion. This split in the court demonstrates the uncertainty the defendant employer faces should such cases go to trial.

Trial judges may now have the tool to make employers the public's insurer against the unauthorized and wrongful acts of their employees. Employee supervision and discipline policies should be reviewed to ensure that risks of employee abuse are minimized to the greatest extent possible. The courts' use and understanding of this new test will take time to develop. Employers and lawyers alike will need to see how particular judges interpret this new test in order to assess the costs associated with defending a vicarious liability claim at trial or settling to avoid the uncertainty. Until then, employers and lawyers alike must turn their minds to risk reduction initiatives and honing defences to the policy driven arguments plaintiffs will raise in support of their vicarious liability claims.

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