

## Do You Know What Your Employees Are Doing?

The past several years has seen a spate of news stories involving claims of sexual abuse of children and clients by those charged with their care. The media have provided a steady stream of stories detailing this unpleasant topic. Soon after the first news story appears, the courts are called on to determine the fault. In previous columns, I have commented on two British Columbia cases which required the courts to say whether a non-profit employer should be liable for damages where there was no direct fault on the part of the employer for the wrongful acts.

In June, the Supreme Court of Canada released its two sets of judgments in the *Boys' and Girls' Club of Vernon* and the *Children's Foundation* cases. These two cases deal with the difficult question of whether a non-profit organization should be liable for the improper actions of its employees in situations of sexual abuse. Both cases are appeals from British Columbia. The justices of the Supreme Court of Canada wrote three reasons for judgment: one unanimously setting out a new statement of the law, then two more in a four-to-three decision saying how the first judgment should be applied in the second case.

When the *Children's Foundation* case was first decided in the BC Supreme Court in 1995, counsel for the people bringing the complaint said that while the case did not make new law, it was very significant because – until the *Children's Foundation* case was decided – the courts were reluctant to find intentional criminal acts to be within the scope of a person's employment. The same lawyer suggested that the case imposed a greater burden on the employer to carefully supervise what employees do. The more the employer facilitated the employee being in a delicate situation, the more careful that employer had to be (*The Lawyers Weekly*, No. 12, 1995).

When these cases were first brought to court, the law was that an employee's wrongful conduct fell within the scope of employment in two situations. One was where the act performed was authorized by the employer. The other situation was where the act was unauthorized but was so connected with what the employer did require that it was simply a way of doing what the employer authorized employees to do. At trial and through the two levels of appeal, the legal question was whether this traditional law of *vicarious liability* would apply.

So what is the law now? First, the Supreme Court of Canada was explicit that there is no special treatment for non-profits. Instead a revised formulation of vicarious liability is to be the basis for finding fault – for profit and non-

profits alike. Vicarious liability is really no-fault liability because an employer is legally responsible for the wrong doings of its employees. This is so even for unauthorized acts, provided those deeds are so closely connected with approved acts as to be considered a way of doing what the employee was hired to do – although an improper way. Vicarious liability is no-fault liability because an otherwise innocent employer is responsible for the wrongful actions of an employee against an innocent victim.

The Supreme Court established that the test for vicarious liability for an employee's sexual abuse of a client should focus on whether the employer's enterprise and empowerment of the employee materially increases the risk of the sexual assault and hence the harm. Moreover, because of the peculiar exercises of power and trust that pervade child abuse cases, special attention must be paid to the presence of a power or dependency relationship, which on its own often creates a considerable risk of wrongdoing.

When this reasoning was applied in the second decision, a majority of four justices found that the mere opportunity to commit an assault is not a sufficient reason to impose no-fault liability. Even where the job-created opportunity is accompanied by privileged access to the victim, the justices said that there is not necessarily a sufficiently strong connection between the type of risk created and the actual assault that occurred. To have a strong connection between the employment and the assault, there must be a combination of job-power and job-created intimacy.

In light of these decisions, the risk management task for non-profits is clear. First, determine the scope and nature of the authority granted to employees, volunteers, and anyone whom the organization authorizes to do work on its behalf. Then, judge whether any likely harm is so closely connected to the exercise and nature of the authority which the organization has granted that heightened standards are required. Pay particular attention to those situations which the Court describes as having job-intimacy; the kind of personal relationship which a child might find at home characterized by attentive care, dependency, and reliance on adults.

While the Supreme Court's decisions raise a number of short-term practical difficulties for non-profit organizations dealing with clients potentially at risk, as those agencies try to meet these new standards, the reasoning of these cases is sound and the guidance clear. Non-profit organizations must carefully screen employees and volunteers and then the actual organization's operations and its workers *must* be carefully monitored. In the words of trial counsel for the victims in the Children's Foundation case "... where you have counselors dealing on an intimate basis with behaviorally disturbed young children, you had better recognize that there is a high prospect of something going wrong and you had better have a very careful system in place to guard against it. (*The Lawyers Weekly*) The Supreme Court of Canada agrees.

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