



Risk Management Considerations for Abuse & Vicarious Liability

Organizations that are involved in one form or another in the provision of care and services geared to children and other vulnerable persons are susceptible to allegations of vicarious liability for sexual assault or abuse. The Supreme Court of Canada's decision in *Bazley v. Curry* (1999 CarswellBC 1264) had a profound impact on all public and non-profit organizations that provide children's services and programs.

Bazley v. Curry involves a non-profit Children's Foundation that provides treatment to emotionally troubled children. The Foundation hired Curry, a pedophile (an unknown fact to the Foundation at the time), to work in one of its homes. The Foundation's employees were to do everything a parent would do, from general supervision to intimate duties like bathing and tucking in at bedtime. After investigating a complaint, the Foundation discovered that Curry had abused a child in its care. The Foundation discharged him. Curry was convicted of 19 counts of sexual abuse. Curry passed away, and the respondent child sued the Foundation for compensation for injuries suffered while in its care. The court found that the Foundation created a special environment of intimate private control that materially enhanced the risk of abuse.

There has been discussion and controversy about an organization being vicariously liable for acts of sexual abuse committed by its employees, since such acts are clearly not sanctioned and are outside the scope of their duties and employment.

This decision, along with other Supreme Court cases, such as *Jacobi v. Griffiths* (1999 CarswellBC 1262), essentially make an organization vicariously liable for an employee's acts, whether sanctioned non-profit or not, if the organization introduced or created the risk or opportunity for the abuse to occur. Further, it was decided that nonprofit organizations are not exempt from vicarious liability. In *Bazley v. Curry*, the judge stated: "I conclude that the case for exempting non-profit institutions from vicarious liability otherwise properly imposed at law has not been established. I can see no basis for carving out an exception from the common law of vicarious liability for a particular class of defendants, non-profit organizations. The record before us does not support crafting such a status-based exemption from liability, and I am unconvinced that such a course would be appropriate. The Court's task is to clarify the general legal principles that govern vicarious liability. The common law backdrop thus established it is for the legislature to consider whether relief should be granted to limit the legal exposure of non-profit organizations to prosecution for sexual abuse".

Protecting Your Organization

We see instances of abuse committed by employees and volunteers of youth organizations, sports associations, schools, day cares, nursing homes, churches and group homes. Organizations that fail to properly secure the safety of the population within their care are held accountable by the legal system, the population they serve and the community. They are faced with expensive litigation, damage to their

reputation and a decline in charitable donations. Abuse is costly in many ways. Organizations can protect themselves by adopting and implementing risk management practices to help guard against abuse.

A. Stringent employee/volunteer screening procedures including:

- Police background checks.
- Checking all employment references.
- Confirming volunteer work history.
- Verifying educational qualifications.
- Instituting probationary periods.
- Providing written employment application forms.
- Performing regular performance reviews.

B. Having a written policy that includes:

- A mission statement.
- Complaint procedure.
- Investigation protocol.
- Discretionary action.
- Confidentiality of information.
- Signatory page.

C. Staff Training.

The best way to prevent and respond to abuse is to have well-trained, sensitive and dedicated staff. Let staff know that reporting suspected cases of abuse is everyone's responsibility. Most provinces have legislation which mandates that abuse against children be reported, such as the *Child and Family Services Act*, RSO 1990 in Ontario and the *Children and Family Service Act*, SNS 1990 in Nova Scotia. Don't place employees in positions of trust and responsibility without providing the training they require. If you are unsure of whether you are legally bound to report something, refer to the *Mandatory Reporting Act*.

D. Defined procedures to protect whistleblowers.

Constructive whistleblowing protects the organization by increasing transparency, giving the organization early indications that something is wrong, and fosters a work environment that holds all employees accountable. It

is best to learn early of any unlawful practices from your employees rather than from a regulatory body or the media.

E. Implement and follow your policies and procedures.

F. Document all incidents, allegations, complaints, investigations and disciplinary actions taken.

Develop template forms that allow you to document the abuse incident and retain these forms in the event of an investigation.

G. Review the design of your premises.

Identify areas within your facility that are open and provide easy access for potential abusers. Look for ways to redesign these areas.

H. Require that all visitors report to reception, wear ID badges, and be escorted through the premises by a staff member.

I. Don't forget to train any contractors as well.

Be sure that anyone contracted to do work at your facility has gone through training and is aware of proper policies and procedures involving suspected abuse.

Practicing risk management controls should continue during an investigation of suspected or alleged wrongdoing by one of your employees or volunteers, and after a third party claim is presented. Established protocols and standardized procedures will ensure that objectivity and proper focus is maintained throughout these difficult and sensitive times.

All organizations involved in the care of children and other vulnerable persons need to have very specific policies and procedures in place regarding employee conduct and relationships with those in their care to avoid the creation of risk or introduction of higher risk opportunities and the potential for sexual abuse or abuse of trust and power. Where such a risk cannot be avoided or eliminated, conscious control mechanisms must be instituted to limit or reduce these opportunities for abuse.