

A Framework for Assessing Vicarious Liability: Guidelines Set Out in Two Supreme Court of Canada Decisions

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PUBLICATION NOTE: This Article was published shortly after the release of the two below-mentioned decisions. While case law has since expanded on these concepts, these seminal cases remain important guides to any analysis on the issue.

Vicarious liability is one of the few instances where an organization which is not at fault may still be held liable for an incident. As a matter of policy, an organization will be held liable, under certain circumstances, for their employee or volunteer's actions. The Supreme Court of Canada considered the doctrine of vicarious liability in the context of two sexual abuse cases involving employees. The Supreme Court of Canada decisions in *B. (P.A.) v. Curry*, [1999] S.C.J. No. 35 and *T.(G.) v. Griffiths*, [1999] S.C.J. No. 36 provide important guidelines to be used in assessing whether an organization will be vicariously liable for its employee/volunteer's actions.

An employer will be held vicariously liable for the acts of an employee or volunteer in two circumstances: (1) where the employee's actions were authorized by the employer; and (2) where the employee's unauthorized acts are so connected with his or her authorized acts that they can be characterized as modes of conducting the employer's business. Finding liability in the first instance is merely a matter of establishing whether the act was authorized. Where it is clear that the act was unauthorized, the court's task is a bit more complicated.

Where the employee's acts are unauthorized, the court must first look at previous cases decided on similar facts. Where the previous cases are inconclusive, the court must go on to consider the policy that underlies the doctrine of vicarious liability. The policy can be summarized as: (a) providing a remedy for the harm committed, and (b) to deter future harm. The policy is bolstered by the "enterprise risk" created by the employer -- that is the extent to which the employer's enterprise has introduced or aggravated the risk that such a harm would happen.

In order to find liability on policy grounds, a strong connection must be established between the employee's authorized and unauthorized acts. Relevant factors in reaching this conclusion include: (a) the opportunity given to the employee by the enterprise to abuse his or her power; (b) the extent to which the unauthorized acts may further the enterprise's aims; (c) the extent of power conferred on the employee in relation to the victim; (d) the extent to which the act was related to friction, confrontation or intimacy inherent in the employer's enterprise; and (e) the vulnerability of the potential victims. The fact that the unauthorized acts took place while the employee was working, or on the employer's property, is an insufficient connection on its own.

The Supreme Court of Canada was clear that an exemption from vicarious liability is not available to non-profit organizations. That said, the majority in *Griffiths* did indicate that the policy reasons for imposing vicarious liability are weakened in such circumstances, indicating that there may be a higher standard in establishing a strong connection where a non-profit organization is involved.

The facts of the case before the Supreme Court of Canada in *Curry* involved the sexual abuse of a boy living in a residential facility run by the Children's Foundation, a non-profit organization. The abuse was perpetrated by one of the Foundation's employees who was authorized to act as a parental figure for the boy, and specifically to care for the child in doing everything a parent would do. The employee's tasks included general supervision, as well as bathing and tucking in at bedtime. The Foundation was held to be vicariously liable.

Right on the heels of the *Curry* decision the Court released its decision in *Griffiths*. This case involved the sexual abuse of children by a Program Director at the Boys' and Girls' Club, a non-profit recreational group for children. The Program Director developed relationships with his victims at the Club; however, all but one of the incidents of abuse took place off the Club premises and outside of his work hours. The Program Director was authorized to act as a mentor to the children but it was not part of his job to be alone or in close physical contact with the children. In a split decision, the Supreme Court of Canada held that the Club was not liable for the Program Director's unauthorized acts. The fact that the Court split in reaching this decision demonstrates the difficulties in applying the test which was set out in *Curry*.

These Supreme Court of Canada decisions in *Curry* and *Griffiths* do not provide any easy answers. The split-decision in *Griffiths* demonstrates that the difficulties in predicting the outcome of cases based on vicarious liability will continue. That said, the decisions provide a useful framework in which to consider cases involving vicarious liability and clarify the policy reasons which underpin this complicated doctrine.