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Vicarious Liability: For Whom are You Legally Responsible and When?

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Overview

- Legal Liability for Negligence
- What is Vicarious Liability?
- When Does Vicarious Liability Apply?
- Risk Management Strategies



Elements of Liability in Negligence

1. Duty of Care: Health professionals owe a duty of care to the patient.
2. Standard of Care: Health professional must breach the standard of care established for conduct.
3. Harm: Patient must suffer loss or injury.
4. Causation: Conduct of health professional must be the cause of loss or injury.



What is Vicarious Liability?

- Vicarious liability is not an independent tort.
- “Vicarious liability describes the event when the law holds one person responsible for another because of their relationship.”

- *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, 2001 SCC 59 at para 2



Policy Considerations

- 1) “Provides a just and practical remedy to people who suffer harm as a consequence of wrongs perpetrated by an employee.”
- 2) “Deterrence of future harm.”

- *Sagaz*, paras 31-32



The Test

To prove vicarious liability, one must establish that:

- 1) the **relationship** between the tortfeasor and the party against whom liability is sought is sufficiently close; and
- 2) the **wrongful act** (tort) is sufficiently connected to the tortfeasor's assigned tasks.



1) The Relationship: *Employee vs. Independent Contractor*

- No Universal test
- Primary question: “Whether the person who has been engaged to perform the services is performing them as a person in business on his own account”



1) The Relationship: *Employee vs. Independent Contractor*

- Factors to Consider (*Sagaz*):
 - The level of control the employer has over the worker
 - Whether the worker provides his or her own equipment/staff
 - Degree of financial risk taken by the worker
 - Degree of responsibility for investment and management by worker
 - Worker's opportunity for profit



Examples: *Nurses Practicing at Hospitals*

- A hospital is vicariously liable for employed nurses
- Settled law in Ontario
 - *Yepremian v Scarborough Hospital*, ONCA, 1980



Examples: *Physicians Practicing at Hospitals*

- Generally speaking, physicians are considered independent contractors
- Factors to consider:
 - Control over clinical decision making - *Lalond v Fabian*
 - Compensation (OHIP) – *Purtell v Royal Ottawa Hospital*
 - Benefits



- Where a physician is an independent contractor, a hospital is NOT vicariously liable
- However, Hospital has an independent obligation to ensure a physician who is granted appointment and privileges at a hospital is qualified/competent



“patients engage and pay their doctor (usually through medicare plans) and have the power to dismiss them. The hospital does not employ the physicians nor are they carrying out any of the hospital’s duties to the patient. They are granted the privilege of using personnel, facilities and equipment provided by the hospital but this alone does not make them employees. They are independent contractors who are directly liable to their patients, and the hospital is not vicariously liable for their negligence.”

- Ellen Picard & Gerald Robertson, *Legal Liability of Doctors and Hospitals in Canada*, 4th ed (Toronto: Thomson Canada Limited, 2007) at 478



Examples: *Physicians Practicing at Private Clinics, Residents at Hospitals etc.*

- Depends on the specific facts
 - Contract
 - Remuneration
 - Benefits
 - Level of Control



2) The Act

- Wrongful act must be sufficiently related to conduct authorized by the employer
- Must be “a significant connection between the creation or enhancement of risk and the wrong that accrues therefrom”
 - *Bazley v Curry*, [1999], 2 SCR 534 at para 31
- 5 factors to consider



5 Factors

- 1) The opportunity that the enterprise afforded the employee to abuse his or her power;
- 2) The extent to which the wrongful act may have furthered the employer's aims (and hence be more likely to be committed by the employee);



- 3) The extent to which the wrongful act was related to friction, confrontation or intimacy inherent in the employer's enterprise;
- 4) The extent of power conferred on the employee in relation to the victim; and
- 5) The vulnerability of potential victims to wrongful exercise of the employee's power.



Emerging Issues

- Breach of privacy tort (intrusion upon seclusion) or “snooping cases”
- Courts in Ontario have not yet concluded whether health institutions are responsible for this conduct by employees



Risk Management Strategies

- Clarify Relationships
 - Employment or Independent Contractor Agreements
 - Delineated job descriptions
 - Indemnification from independent contractors for whom you may be found to be vicariously liable
 - Acknowledgement and waiver with respect to care provided by a third party



Risk Management Strategies

- Ensure Safe Workplace
 - Minimize risk of negligence with proper supervision (for employees) and maintaining premises and equipment



Risk Management Strategies

- Clarify expectations around Workplace Culture and Professional Obligations
 - Be clear that organization does not condone or sanction improper conduct
 - Policies and education around quality of care, protection of privacy and harassment



Questions?

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