

 **Employment News**

This is a summary of employment matters of interest to the business community, from a litigator's point of view.

We welcome your questions and comments.

Editors**Larry Banack**

Telephone

416-977-8353

Nancy Shapiro

TeleFax

416-977-3316

EMPLOYER VICARIOUS LIABILITY FOR WORKPLACE ABUSE AND VIOLENCE

More and more employers are being targeted for their deep pockets and insurance policies when employees commit tortious acts no matter how tenuously those acts are connected to the employer and the duties the employee was hired to carry out. In attempting to impose this liability the plaintiff most often relies upon the principles of "vicarious liability".

In 1999, the Supreme Court of Canada in the case of *Bazley v. Curry* set out the applicable considerations for the imposition of vicarious liability on an employer for the actions of an employee. The test that was established by the court in that case can be summarized as:

"whether there is a connection or nexus between the employment enterprise and the wrong that justifies imposition of vicarious liability on the employer for the wrong in terms of fair allocation of the consequences of the risk and/or deterrence."

However, the mere opportunity to commit the wrongful act will not in and of itself be sufficient. The employment must not only create the opportunity, it must enhance the risk, in the sense of significantly contributing to it.

In considering whether the threshold standard for imposing liability is met, the Court identified five factors for consideration:

1. the opportunity that the employer afforded the employee to abuse power;
2. the extent to which the wrongful act may have furthered the employer's aims;
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 the potential victim to the wrongful exercise

of the employee's power.

The policy behind the imposition of liability on employers is two-fold: 1) the desire to compensate the victim; and 2) deterrence (often the employer is in the position to prevent or reduce the risk of wrongful conduct from occurring).

Notwithstanding these broad policy considerations, surprisingly, the imposition of vicarious liability on employers has not dramatically increased. This is presumably as a result of the restriction requiring more than mere opportunity.

In March 2001, the British Columbia Court of Appeal decided three separate cases dealing with these issues. In these decisions, it held: 1) a school board was not responsible for sexual abuse of students by a janitor; 2) a school board was not responsible for sexual abuse of a student by a teacher; and, 3) the Crown was not responsible for sexual abuse of a child by a foster parent.

That Court weighed not only the factors described by the Supreme Court of Canada in *Bazley v. Curry*, but also considered whether the employers had been "negligent" in their own right. Finding there to be no employer negligence in any of the cases, the Court declined to impose liability on the employer.

Accordingly, while negligence is a separate, independent tort, it appears to have become a consideration in the imposition of vicarious liability. That is not to say that negligence will never be imposed without a finding of vicarious liability, or vice versa, but merely that the courts appear to be considering them together.

Vicarious liability has most frequently arisen in cases involving abusive or violent conduct by supervisory personnel of fellow employees. In those cases the likelihood of the employer being found negligent also dramatically increases.

Abuse and violence in the workplace will not usually be sufficiently connected to employment to attract liability of employers to third parties. This is because in most instances, it will not be possible to conclude that the employer did anything more than create the mere opportunity for the incident to occur. Conversely, liability for acts of supervisory personnel is commonplace.

Accordingly, the best way to protect against vicarious liability is to engage in due diligence through proactive policy implementation and strategic prevention. Employers must be aware of the risks associated with a failure to implement adequate policies and procedures. These issues should regularly be discussed between lawyers and clients.