



www.cnps.ca

Canadian
Nurses
Protective
Society

Vicarious Liability

Many employers use both employees and independent contractors to provide health care services to the public. If an employer-employee relationship exists, employers are normally held legally responsible for the wrongful actions of their employees because of a doctrine called vicarious liability. This principle does not usually apply to independent contractors. Nurses should therefore be aware of their employment status and who may be legally responsible if a lawsuit is initiated.

What is vicarious liability?

Vicarious liability is a legal doctrine that applies in situations where the law holds the employer legally responsible for the acts of its employees that occur within the scope and course of their employment.¹ Because of this legal principle, if an employee is found liable in a civil lawsuit, the employer is generally ordered by the court to pay the monetary amounts called damages. Most often, the employer's liability insurer defends the court case and covers the payment of the legal fees, court costs and damages.

Why should my employer be accountable for my wrongdoing?

Historically, the British courts held a master accountable for a servant's conduct because of the master's control over a servant's work duties² and because a master generally had the funds to cover the costs of a lawsuit. Similar reasoning is applied by contemporary Canadian courts because employers continue to exercise significant control over workplace activities and entrust employees with specifically assigned roles. Today's courts also impose liability on the employer as an incentive for employers to monitor and control their employees' conduct.

How do I know if I am an employee?

The courts use a "control" test to determine if you are an employee.³ Factors that a court may consider include:

- a fixed salary with routine deductions;
- ownership of equipment and supplies by the employer;
- requirements to follow the employer's policies and procedures;
- reporting requirements (e.g. to a supervisor);
- restrictions on whom you provide services to; and
- verbal or written agreements indicating an employer-employee relationship.

In the majority of cases involving nurses, the courts have found the nurses are employees.⁴ For example, in *The Sisters of St. Joseph v. Fleming*, a patient sustained injuries as a result of a diathermy treatment applied by a hospital nurse. The court found that the nurse's employer, the hospital, was liable for the nurse's negligence because the hospital had control over the equipment used and the treatment performed.⁵

Professional
Liability
Protection
for Nurses
by Nurses



www.cnps.ca

**Canadian
Nurses
Protective
Society**

*Professional
Liability
Protection
for Nurses
by Nurses*

Will vicarious liability always apply?

No. You must be acting within the scope of your employment for this principle to apply.⁶ The courts find that an act falls within the scope of your employment if it is either a wrongful act authorized by the employer, or an unauthorized mode of doing an act authorized by the employer.⁷ This means that the employer will probably be held responsible for what an employee is authorized to do and how the employee does it. Independent ventures such as assisting at a health fair or working as an independent contractor would not be included.

In some situations, even where there is an employer-employee relationship, the law is unclear. For example, in sexual assault cases, court decisions have gone both ways. In a recent case the owner of a residential care facility was found vicariously liable for sexual assaults committed by an employee against a client.⁸ These acts were found to be within the scope of employment because the employer authorized the provision of physical care and that authority was abused. The outcome was different, however, in *D.C.B. v. Boulianne*.⁹ That court concluded that vicarious liability did not apply to a sexual assault when the acts were contrary to the obligations and expectations of the job and the prescribed code of ethics.

How can I protect myself?

- Obtain written confirmation of your employment status and professional liability coverage.
- Notify your employer immediately if you are sued or if you are involved in a situation that may result in liability.
- If the employer's insurer defends a claim against you, cooperate with the insurer and the lawyer representing you.
- Independent contractors should contact their insurer, if they have one, and CNPS® to discuss their existing liability protection.

Following these steps could save you from potentially devastating personal costs if you are sued. If you have further questions please call CNPS® at 1-800-267-3390.

-
1. J.G. Fleming, *The Law of Torts*. (Agincourt: Carswell, 1983) at 348.
 2. *Ibid.*, at 338.
 3. I. Christie, *Employment Law in Canada*. (Toronto: Butterworths, 1980) at 18.
 4. *The Sisters of St. Joseph of the Diocese of London v. Fleming*, [1938] S.C.R. 172 (S.C.C.); *Kielley v. General Hospital Corp. et al.*(1995), 125 Nfld. & P.E.I.R. 236 (S.C.T.D.), appeal dismissed (1997), 150 Nfld. & P.E.I.R. 163 (Nfld. C.A.).
 5. *Ibid.*, [1938] S.C.R., at 214.
 6. *Ibid.*, at 190.
 7. *Salmond and Hueston on The Law of Torts*, 18th ed. (London: Sweet & Maxwell, 1981) at 437.
 8. *B. (P.A.) v. Curry*, [1995] 10 W.W.R. 339 (B.C.S.C.), appeal dismissed [1997] 4 W.W.R. 431 (B.C.C.A.), leave to appeal to S.C.C. granted [1997] S.C.C.A. No. 286.
 9. *D.C.B. v. Boulianne et al.* Unreported, October 25, 1996, No. 06624 (B.C.S.C.).

N.B. In this document, the feminine pronoun includes the masculine and vice versa except where referring to a participant in a legal proceeding.

**50 Driveway
Ottawa ON
K2P 1E2**

**info@cnps.ca
www.cnps.ca**

**Tel (613)237-2092
or 1 800 267-3390
Fax (613)237-6300**

THIS PUBLICATION IS FOR INFORMATION PURPOSES ONLY. NOTHING IN THIS PUBLICATION SHOULD BE CONSTRUED AS LEGAL ADVICE FROM ANY LAWYER, CONTRIBUTOR OR THE CNPS. READERS SHOULD CONSULT LEGAL COUNSEL FOR SPECIFIC ADVICE.
