



## Guidance

# Vicarious liability of a charity or its trustees

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## In general, for what are trustees liable?

Charity trustees have a variety of responsibilities which may carry liabilities. They will, in common with others responsible for the pursuit of aims in the community, be responsible for breaches of the law attributable to them in the conduct of their charity. For example, they will:

- be liable to the charity for breach of their trust or fiduciary obligations under trust or company law
- additionally be responsible generally for any breaches of the criminal law they commit
- also sometimes be liable under civil law to third parties either for breaches of contract or for infringement of another's rights

These guidelines consider some aspects of liability under civil law for infringement of another's rights. They do not concern breaches of trust law, company law, contract law, or criminal law.

## Liability for the actions or omissions of others

Charity trustees will be responsible for what they themselves have done or, in some cases, omitted to do. They may also be liable for the wrongful actions or omissions of employees, volunteers or others which they have sanctioned. Occasionally they will even be liable for the acts or omissions of employees and volunteers which they have not expressly sanctioned.

These guidelines concern the liability of a charity or its trustees not for its/their own actions but for those actions or omissions of other people acting in the course of the charity's pursuit of its aims where those actions:

- are a breach of the obligations imposed by operation of civil (rather than criminal) law upon persons generally
- cause damage to the interests of others
- give rise to a claim for compensation through the civil courts

Where the wrongful act or omission is occasioned by people acting in the course of a charity's pursuit of its aims, and that charity is a company, then the people occasioning the harm will be primarily liable and the company itself (rather than its directors) may be 'vicariously' liable. Where the charity is not a company but is an unincorporated body (such as a trust or an unincorporated association), then the charity trustees may be vicariously liable, though if they have acted properly they will be able to avail themselves of a right of indemnity from the assets of their charity.

This branch of the law is known as vicarious liability in the law of torts.

## What does the law cover in this area?

The law of torts provides remedies where there has been a deliberate or negligent violation of personal or property rights. Examples of this would be:

- the right to security of person
- the right to freedom of movement
- the right to non-interference with goods or economic and business rights
- the safeguarding of intellectual property and one's reputation

The general aim of the law is to compensate those who have suffered loss through the infringement of such interests by the conduct of others. The law operates so as to shift the loss from the innocent sufferer to the wrongdoer who is responsible. In doing so, it sometimes happens that, where the wrongdoer commits the tort in the course of someone else's business, the person responsible for that business is also made liable, even though not personally at fault.

Charity trustees will be responsible for what they themselves do. They can in some circumstances also be held liable for the failure to discharge some specific duties even though the discharge of these duties has been delegated to others. This is regardless of:

- whether harm was intended or there was negligence (strict liability)
- where they personally owe a duty of care so widely drawn that it cannot be discharged by properly selecting and supervising a competent agent to do it on their behalf (non-delegable duty)

Strict liability and liability as a consequence of delegating a non-delegable duty are outside the scope of these guidelines.

## What is vicarious liability?

The general rule is that charity trustees will be responsible for:

- their own conduct
- the conduct of others which they have authorised or ratified
- conduct which though neither authorised nor ratified takes place in the course of a business which they conduct and where there is a close connection between the conduct and what the wrongdoer was employed to do (this last is known as vicarious liability)

Vicarious liability arises where the wrongful action or omission is not primarily attributable to the charity or its trustees themselves personally but the law nevertheless holds them liable for the misconduct of those whom they control.

## Who is 'controlled' in this sense ?

It is important to be clear as to who falls within the category of people whom the charity or its trustees 'control'.

This certainly includes employees of the charity. This term is used in this context to cover those employed in the running of the charity, for example office workers, administrators, key workers etc., that is, those people whose engagement, work and control over the way in which they do it are the responsibility of the trustees. In this guidance we refer, for the sake of convenience, to 'employer' and 'employees'.

This category may also include people who are not actually employees. For example, though there may be no or little payment made, it may also include volunteers who are assigned a task or role by the charity or its trustees where the charity or those trustees retain control of the actual performance of the work. That is the case where the charity or its trustees are responsible for:

- the selection of the volunteer
- the control of how the task or role assigned is done
- suspending or terminating the arrangement

It will not usually include people who, whilst doing work for the charitable enterprise, are not liable to be controlled by the charity trustees in the actual exercise or performance of that work ('independent contractors').

## For what is an employer responsible?

The legal principle in this area of law is that wrongful conduct on the part of an employee in the course of his employment giving rise to a claim by an injured party may be attributable to the charity or its trustees in the course of their enterprise. This may be so even if the charity trustees have not authorised the specific wrongful conduct giving rise to the claim.

Some justify this on the basis of the principles of fair compensation for victims and deterrence of harmful conduct. It is said that employers are better resourced to stand or insure against the loss (and possibly recoup it from future income) and should be given every incentive to maintain very high standards. The principle of vicarious liability, it is said, provides a just and practical remedy to people who suffer from wrongs done by an employee in that it improves the victim's chances of recovering compensation from a solvent defendant. The employer, after all, on this view, comprises a body pursuing aims in the community in furtherance of its purposes and such pursuit carries with it certain risks and it is therefore thought fair that it should be held liable if those risks ripen into losses (and thus be encouraged to maintain the highest standards and rigorous procedures to guard against them).

## What is meant by in the course of employment ?

It is also important, in trying to determine for what employee misconduct employers may be held responsible, to understand what is meant by 'in the course of his employment'. This means that the wrongful conduct is either:

(a) authorised by the employer or

(b) a wrongful and unauthorised way or mode of doing something which is authorised as part of the job or task or role for which the employee is employed (taking into account the full context and all the circumstances of that job and of the wrongful conduct giving rise to the claim)

An employer is liable not only for employee acts which he has authorised but also for conduct which he has not authorised - and even occasionally for conduct which he has specifically forbidden his employees to engage in - if that conduct is so connected with authorised acts that it may fairly be regarded as a way (although an improper way) of doing them. This means that an employer is liable:

- not only for what the employee must be taken to have been authorised to do as part of his or her job: but also
- for how the employee actually goes about doing it

This is so even in those cases where the specific manner of performing the given role is not in any way approved of or sanctioned by the employer and where the way the employee goes about doing it amounts to deliberate self-indulgence and self-gratification on his part and even where it also amounts to criminal conduct.

## A 'close connection' test

These matters may be clarified by focussing on:

- the task or role or duty which the employer has assigned to the employee, which has given the opportunity for the misconduct
- the actual misconduct giving rise to a claim

If there is a close connection between the nature of the employment (to which you should take a broad approach) and the particular wrong done, then the employer will be vicariously liable for the loss caused by the misconduct of the employee. If, however, the unauthorised and wrongful conduct is not so closely connected with what the employer must be taken to have authorised the employee to do as to be a way of doing it, then the employer is not responsible. An employer is not responsible for an independent act of the employee going outside the course of his employment.

The distinction is best explained by examples.

### Example 1

One example is of an individual employed as a police officer who happened to discover that a woman appeared to be illegally in this country. He used the knowledge to extract sexual favours from the woman in exchange for his not reporting her to the authorities. In such a case he would have unlawfully interfered with her rights to security of her person and be liable to pay her compensation. However his employers would not normally be liable (unless of course they themselves were at fault in some way by, for example, failing to supervise him properly). Discharging the role and duties of a police officer does not materially increase the risk of sexual assault upon immigrants.

### Example 2

Contrast that with the example of a body fully responsible for the residential care of vulnerable children which employed (amongst others) an individual to discharge its duty of care on its behalf. The employee used the opportunity his employment gave him to abuse some of the children. The abuse, as well as being a crime, was also a serious breach of obligations owed under civil law generally not to assault or molest people and to take reasonable care not to injure them, giving rise to an action for compensation in the civil courts for the loss suffered by the victim from the wrongdoing.

The wrongdoer himself was clearly responsible (but unlikely to be able to meet any compensation claim). Was the employing body also liable?

Plainly the employing body had not authorised or ratified the abuse (and had not in this case failed to maintain reasonable standards in selecting and supervising its employee) and so could not be held primarily liable. What about vicarious liability?

In a previous case - now over-ruled - a view had been accepted that abuse was not an improper mode of performing authorised acts and duties on behalf of an employer. Rather it was the contravention of the duty of care owed to the children and was an independent act outside the course of his employment for which the employer was not responsible.

It is now clear - from a judgment of the House of Lords - that in such a case the employing body (even though not itself at fault) would be held vicariously liable for the wrong done to the children. That is because there is a close connection between the employment and the wrong done.

The circumstances in this particular example show that the employing body had entrusted the care of children (to whom it owed a duty of care) to the employee and that the abuse took place while the employee was engaged in his duties at the time and place demanded by his employment. The position for which the employee was engaged involved close personal contact with the children. He had general supervision of all aspects, including intimate aspects, of their domestic care. There was thus such a very close connection between the employment and the wrong done that the court held it fair and just that the employers be held responsible for the loss caused by the wrong, even though they did not know of the misconduct and were not at personal fault either in employing or in supervising the employee.

### What is a close connection?

It is not always easy to tell the difference between an unauthorised way of engaging in authorised conduct (for which even faultless employers will be responsible) on the one hand and independent acts of wrongdoers (for which they will not) on the other. This is a difficult question which can only be satisfactorily answered after having considered all of the relevant circumstances of the particular case.

A broad approach should be adopted in determining what is the scope of the employment (not concentrating too closely upon the particular acts involved in the misconduct). It is not, however, sufficient simply that the employment provided the wrongdoer with the opportunity to indulge in the wrongful conduct. Nor will it just be a question of asking whether the misconduct happened at a time and a place connected with the employment. The actual nature of the employment will have to be considered in relation to the wrong and it will have to be shown that the wrong is closely related to the work the employer is conducting or what the employee or volunteer has been asked to do. Factors such as the opportunity the employment gives to the employee to abuse his power or do harm and the vulnerability of potential victims may be relevant in some cases.

### Do the charity trustees then have to bear the loss themselves?

Charity trustees may find themselves held liable for the defaults of employees. If they are liable, they will have to meet whatever sum the court awards in compensation. That sum cannot be limited by the charity trustees or the Charity Commission. However, the charity trustees should not normally have to bear any loss themselves, unless they have somehow been at fault or have breached some duty which they owe.

Where the charity is incorporated and is held liable, compensation will be payable from its corporate assets.

Where the employing body is a group of individuals (for example, a body of trustees or the executive committee of an unincorporated association), they will be sued as individuals but will have a right to be indemnified out of the assets of their charity in respect of liabilities, costs and expenses if it can be shown that they have been properly incurred in connection with the due performance of their duties and the proper exercise of their trusts and discretions (see s31(1) **Trustee Act 2000**). If charity trustees have acted in this and other matters reasonably and with due diligence and in accordance with their powers, they will have such an indemnity from the assets of their charity. So, where an employee or volunteer has been properly selected and reasonably supervised in the tasks or duties they are carrying out in furthering the objects of the charity, the trustees will have no difficulty in establishing their right to an indemnity since vicarious liability is an inescapable incident of the relationship of employer/employee.

Trustees may be personally liable if the assets of the charity are not sufficient to meet the indemnity. But only the people who are trustees at the time the tort was committed can be made liable in this way, unless successor trustees accept the liabilities of their predecessors.

## What considerations should charity trustees bear in mind?

Cases where losses are suffered or individuals are harmed by the action of charity employees can be extremely damaging. The high ideals of the employing charity will be seen to have been betrayed. Often there may be great public sympathy with the victim. The wrongdoer who is primarily responsible may not be able to meet a compensation claim. He may not have substantial assets or may even be in prison. The employing charity itself may not be at fault. Indeed the charity trustees may be appalled by the behaviour of its employee. Where the employing body is a charity, it does good work in the community without expectation or motive of profit. It does not exist to make profits or to advance its economic interest. It depends upon grants and public generosity and thus is not well placed to absorb or spread the cost of liability. It may be felt unjust that bodies mainly funded by grants and donations should be made responsible when through no fault of theirs an unscrupulous employee or volunteer abuses his position. On the other hand, from the point of view of the victim, the body, however well-meaning and well-run, was responsible for bringing about the circumstances which enhanced the risk of the misconduct occurring. This body should thus be responsible for the harm that occurred. Charities should be motivated to take all possible precautions.

Certain types of charities will clearly run more risks than others. Particularly difficult will be those charities whose work involves vulnerable people in say schools, prisons, nursing homes, old people's homes, geriatric wards, and other residential homes for the young or vulnerable and in boys' and girls' clubs, day centres and classes.

Charity trustees will need to have:

- effective vulnerable persons policy in place which is observed and enforced (where there is a possibility of personal dealings with vulnerable people)
- in all cases, imaginative and efficient administration and supervision designed to reduce any risk to the community which the pursuit of the charity's purposes may involve - to reduce accidents and intentional harms
- suitable insurance
- where they charge for services, an awareness in setting them that they may have to fund the payment of compensation to victims of employees' wrongs