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**THE CANADIAN INSTITUTES  
7<sup>TH</sup> NATIONAL SUMMIT ON INSTITUTIONAL  
LIABILITY FOR SEXUAL ASSAULT & ABUSE**

**Toronto – February 19, 2007**

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**Abuse Policies – A Proactive Approach to  
Vicarious Liability for Non-Profit  
Organizations**

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**By Mervyn F. White, B.A., LL.B.**  
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**ASSESSMENT AND APPORTIONMENT OF  
VICARIOUS LIABILITY UPON NON-PROFIT  
INSTITUTIONS**

- In the 2005 decision in *Blackwater v. Plint*, the Supreme Court of Canada held the United Church of Canada (the “Church”) and the Government of Canada jointly vicariously liable for the conduct of a dormitory supervisor who sexually abused children entrusted to the Church’s care
- In doing so, the Supreme Court clarified when and how vicarious (no-fault) liability will be imposed and apportioned upon non-profit organizations

**WHAT IS VICARIOUS LIABILITY?**

- **The doctrine of vicarious liability imputes liability to an employer or principal of a tortfeasor, not on the basis of fault of the employer or principal, but on the ground that as the person responsible for the activity or enterprise in question, the employer or principal should be held responsible for loss to third parties that result from the activity of the enterprise**
- **Public policy considerations weighs heavily in imputing liability on this basis –i.e. who gains from the enterprise that gives rise to the loss should pay for damages sustained**

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***De facto* Control and Vicarious Liability**

- ***Blackwater v. Plint* involved a former student of the Alberni Indian Residential School (the “School”) who was physically and sexually abused by Plint, a former dormitory supervisor**
- **The School was operated similar to other Native Residential Schools in Canada, whereby the Government of Canada prescribed the curriculum, appointed or approved the appointment of staff, financed, inspected and provided general oversight at the School**
- **The Church supplied staff, provided religious instruction, contributed to the operational costs and undertook the day-to-day management of the School**

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- **In its decision, the Court held that the Church exerted sufficient control over the operations of the School that gave rise to the wrong to be found vicariously liable for the conduct of the dormitory supervisor**
- **Notwithstanding that *Blackwater v. Plint* involved instances of abuse which took place in a residential care facility, the principles outlined in the decision still have implications for non-residential facilities and non-profit organizations that supervise, care for or exercise control over children or other vulnerable persons**

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**WHEN WILL AN EMPLOYER BE MORE LIKELY TO BE HELD VICARIOUSLY LIABLE?**

- **Blackwater v. Plint confirms that vicarious liability may be imposed where there is sufficient nexus between the conduct authorized by the employer and the wrong committed by the employee or agent**
- **Moreover, vicarious liability can be imposed even though the wrongful act may be contrary to the desires and policies of the non-profit organization**

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- **The Courts may determine that there is sufficient nexus between the conduct authorized by the employer and the wrong, and parties may be more or less vicariously liable for a wrong depending on the following circumstances:**

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- **The opportunity afforded by the employer’s enterprise for the employee to abuse his power**
- **The extent to which the wrongful act furthered the employer’s interests**
- **The extent to which the employment situation created intimacy or other conditions conducive to the wrongful act**
- **The extent of power conferred on the employee in relation to the victim**
- **The vulnerability of potential victims**

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### **APPORTIONMENT OF VICARIOUS LIABILITY**

- **More than one party may be vicariously liable for the actions of a single tortfeasor**
- **If more than one party is vicariously liable for the act of a single tortfeasor, the responsibility of the parties may be apportioned equally**

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### **REJECTION OF DOCTRINE OF CHARITABLE IMMUNITY**

- **In *Blackwater v. Plint*, the Court rejected the existence of the doctrine of charitable immunity**
- **Non-profit status does not automatically exempt organizations from liability**
- **Charitable status will not exempt organizations from being held liable for the conduct of its employees**

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- **No special treatment for non-profit organizations regardless of the good works they do**
- **The Court concluded that the doctrine of charitable immunity is problematic, as exempting institutions from liability by virtue of their non-profit status would not motivate organizations to establish and implement safeguards to protect children entrusted to their care from sexual abuse**

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**IMPLEMENTING SAFEGUARDS TO PROTECT CHILDREN AND OTHER VULNERABLE PERSONS FROM ABUSE**

- **In light of the ruling in *Blackwater v. Plint*, non-profit organizations that supervise, care for, host and/or sanction activities for and involving children and vulnerable persons should be proactive in implementing safeguards to prevent and detect abuse**
- **Such safeguards should enhance the possibility of preventing and detecting child abuse, as well as minimizing the likelihood that a non-profit organization will be held vicariously liable for the conduct of an offending employee or volunteer**

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- **The goal of such policies is to:**
  - **Create an enhanced sense of vigilance which may deter unwanted persons from working or volunteering**
  - **Educate staff as to what they should look for in order to reduce risks in advance**
  - **Set up reporting networks to ensure that damages, if they happen, are limited in scope**

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### **CHILD ABUSE POLICY: A PROACTIVE APPROACH**

#### **1. Structure and Content of Policy**

- **A written Child Protection Plan/Child Abuse Policy (“Policy”) is one of the safeguards that can be implemented by non-profit organizations in order to protect children and vulnerable persons**
- **Such a Policy should underscore the dignity and worth of all children and vulnerable persons and clearly state that abuse of children and vulnerable persons will not be tolerated by the non-profit organization**

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- **The Policy should be made available to and thoroughly reviewed by all employees and volunteers who will have contact with children or vulnerable persons—have them sign an acknowledgement that they have read it and tie a breach of it to grounds for termination**
- **The Policy should be reviewed and updated periodically to ensure that procedures are updated and/or clarified from time to time, and the Policy maintains its relevance to applicable provincial child protection legislation—ensure that all employees and volunteers are provided with copies of updated policies and are required to sign acknowledgement**

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- **Ensure that the Policy provides an appropriate reporting regime with individuals named to take reports and act upon them**
- 2. Hiring and Screening Procedures**
- **Non-profit organizations should rigorously pre-screen all potential employees and volunteers who will have direct contact with children or vulnerable persons**
  - **Pre-screening should include, but not be limited to, requiring a written application, reference checks, an in-person interview, as well as criminal reference checks from all prospective employees and volunteers**

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- **Regular re-application should be required, or at least, regular criminal record checks should be undertaken**
- **Employees and volunteers should be required as part of their employment to immediately self report allegations or charges/convictions of abuse etc. made against them**

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- **Employers should not be afraid to terminate employment if abuse is suspected and should not employ where there is reports of abuse in the past –it is better to err on the side of caution**
- **No exceptions should be made for any employee or volunteer regardless of their position, or length of tenure with the non-profit organization**
- **Making exemptions would detract from the effectiveness of the Policy–can’t be window dressing**

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**3. Supervising Procedures**

- **Once selected and approved for working with children or vulnerable persons, employees and volunteers should be trained, monitored and supervised**
- **At the outset, employees and volunteers should be apprised of the specific roles they are expected to play, what constitutes appropriate disciplining of and rapport with children or vulnerable persons and the importance of adhering to the non-profit organization’s code of conduct, policies and guidelines**

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- **Pre-screening, training and supervision of employees and volunteers are imperative given that *Blackwater v. Plint* clarifies that a non-profit organization is more likely to be found vicariously liable for the conduct of an offending employee and/or volunteer who has direct contact with children**

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#### **4. Child Abuse Reporting**

- **In addition to pre-screening, monitoring and supervision of employees and volunteers, it is vital that a Policy includes child abuse reporting requirements and procedures. The requirements and procedures in Ontario are dictated for the most part by the *Child & Family Services Act* (the “Act”)**

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#### **a) Duty to Report**

- **The Act provides that a person with reasonable grounds to suspect that a child is in need of protection has an ongoing duty to report their suspicions**
- **The Act provides an extensive list of conditions under which a child will be deemed to be in need in of protection, i.e. conditions that constitute child abuse and neglect**

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- **Teachers, operators and employees of a day nursery, as well as religious officials are expressly named in the Act as part of a group of professionals for which non-compliance with the reporting requirements may lead to special penalties**

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**b) To Whom/What Agency should the Report be made**

- **The Act requires that suspected child abuse should be reported to the Children's Aid Society ("CAS")**
- **The requirement to report child abuse takes precedence over any other agreements made between the employee/volunteer and the non-profit organization**
- **Any person making a report of suspected child abuse to the CAS is guaranteed confidentiality**

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**c) Other Reporting Issues**

- **The duty to report suspected child abuse cannot be delegated**
- **Section 72 of the Act requires that any person obligated to report a child in need of protection should make the report directly to the CAS and not rely on another person to make the report on their behalf**

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- **This means that where a non-profit organization has a policy that requires that incidents of suspected child abuse should be reported internally, such an internal policy is encouraged for internal due diligence reasons so that the non-profit organization may be able to take proactive steps to protect the child**
- **However, such an internal policy does not absolve the legal obligation to report suspected child abuse directly to the CAS so that the matter can be investigated**

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**d) Quorums, Internal Investigation and Sanctions**

- **The policy would outline the internal investigation process that will be implemented after an allegation of child abuse, the quorum of persons that will conduct an internal investigation and the remedies and sanctions that will be imposed on the accused prior to and following the internal and external investigations**
- **Remedies could include suspension with/without pay, removal of the accused from the premises, or denied access to the organization’s premises**

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