

The Information Age of Vicarious Liability

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The Information Age of Vicarious Liability

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Board members, executives, and managers assume personal liability for compliance and prevention efforts.

Executive Summary

The information compliance and prevention environment has never been more intense. Over 350 million personal records have been lost or stolen from businesses, schools, government agencies, and other organizations within the past five years. Executives in entities of every size are discovering that they are not only unprepared to assess the full scope of risks and legal requirements, but that they are also left with *personal liability* for the shortfalls of their Identity Theft Prevention Programs.

Dr. John White, the Criminal Justice Program Coordinator at Martin Methodist College, cautions executives about their vicarious liability when it comes to managing information compliance and prevention issues. Furthermore, he makes a strong case for “how” to protect the entity, as well as, the individual executive.

What is Vicarious Liability?

“The doctrine holds the employer accountable for any harmful act or negligence on the part of an employee as it relates to any persons with whom the employer owes a duty of care.”

When considering the approach adopted by the Federal Trade Commission’s (FTC) Red Flags Rule it would be prudent for administrators and policymakers to bear in mind that the level of personal responsibility they carry is one of serious import for them as individual persons because of a legal concept commonly known as, vicarious liability. By this doctrine policymakers and administrators are distinct from the organization in which they function and carry their own, personal legal liability vicariously.

As a matter of explanation, vicarious liability is a widely accepted legal doctrine that imposes tort liability, or legal responsibility, upon one person for the actions or negligence of another, with whom that person has some sort of special relationship. The more common types of these relationships are; parent/child, employer/employee, or owner/user. For our purposes we focus upon the relationship of employer/employee.

Vicarious liability arose from the doctrine of respondent superior, a Latin phrase meaning "let the master answer." The doctrine has its roots in seventeenth-century English law defining the legal liability of an employer for the actions of an employee. The doctrine holds the employer accountable for any harmful act or negligence on the part of an employee as it relates to any persons with whom the employer owes a duty of care. For the doctrine of respondent superior to apply, the employee's negligent or harmful act(s) must occur within the scope of their employment.

Vicarious liability encompasses harmful actions, commissions, as well as negligence, omissions, on the part of the employer. Hence it is not only what an administrator, or their employee, did that could bring about liability on their part but also what they should have done or did not do, if that omission of action has a direct casual link to the harm or injury caused.

“A sound, well researched policy is the first step in liability limitation . . .”

Therefore the question, as it regards vicarious liability as courts have defined it, is not only what the administrator knew but what the administrator should have known to execute the proper level of care in relation to the injury or harm caused. As it concerns the Red Flags Rules, negligence could result from what a board member or administrator should have known about the operations of the organization, as opposed to what actually was known because the FTC has targeted policy and its implementation as one of the foci of its enforcement strategies.

A sound, well researched policy is the first step in liability limitation but it must be pointed out that proper implementation and continual monitoring are also essential. If an employee(s) abandons the organization’s policy during daily operations, even without the administrator’s knowledge, and begins what courts refer to as “customs or practices” that are different than the original written policy, then the “customs and practices” essentially becomes the policy of the organization and that is where liability can be assessed.

The “Should Have Known” Standard

In law suits there are various types and levels of standards of care. If a defendant is found to have not satisfactorily attained the standard of care expected by the court in their case they stand a good chance of losing the case and being found liable for damages.

“Recklessness means that the manager, even if they made efforts to assess the management environment, was not diligent enough in their assessments.”

The “should have known” standard is not an uncommon measure of liability in tort actions at trial. This standard holds administrators liable not only for what they knew at the time of the event that brought about the law suit but what they should have known. As the U.S. Supreme Court commented in *Ernst & Ernst v. Hochfelder*, “[i]n certain areas of the law recklessness is considered a form of intentional conduct for purposes of imposing liability for some act.” Recklessness means that the manager, even if they made efforts to assess the management environment, was not diligent enough in their assessments. For instance, the “should have known” standard of care is commonly found in sexual harassment liability tort actions.

“Based upon this standard, administrators would be well advised to be very diligent in making themselves aware of all aspects of their management environment.”

Based upon this standard, administrators would be well advised to be very diligent in making themselves aware of all aspects of their management environment. The length of time in a management position does not seem to be a very good defense as can be seen in *Brandon v. Holt*. In this case the federal trial court held that the Director of Memphis Police was liable even though he had only been in office some six months at the time the event occurred that brought about the tort action. He thereby had no actual knowledge of the disciplinary record of the officer involved, but the court held him to the standard of what he should have known.

The “Good Faith” Exception

“This[reasonable effort] requires not only the investment of time and research but the expertise relevant to the issue at hand.”

“Relying upon non-specialist, or limited skilled personnel, to asses complex management issues brings future tort liability to the level of a simple gamble.”

The “Good Faith” exception, which eventually saved the Director of Memphis Police on appeal, can only be availed upon demonstration of the reasonableness of the efforts the manager made in attempting to make themselves knowledgeable of the aspects of the management environment relevant to the issue at trial.

To accomplish this, managers would be well advised to make every effort reasonably available to them to familiarize themselves with all aspects of each issue from which a tort action might arise. This requires not only the investment of time and research but the expertise relevant to the issue at hand. Therefore, the investment of time and personnel in investigating a management issue might all go for naught if inexperienced or amateurish personnel were the source of the manager’s operative information. The Trier of fact might determine such sources were insufficient to establish a reasonable basis of executive knowledge and still hold the manager liable for what he or she “should have known”. Relying upon non-specialist, or limited skilled personnel, to asses complex management issues brings future tort liability to the level of a simple gamble. To have good intentions is an admirable trait in a manager but we all know which road is paved with good intentions.

Damage and Liability

In discussing liability it is prudent to point out that, in liability suits, there are two distinct types of damages that can be sought by the plaintiffs; compensatory and punitive, and that these damages may be sought simultaneously in the same suit.

“Although compensatory damages are limited to verifiable costs, punitive damages have no limits and are the exclusive discretion of the jury.”

Compensatory damages are restitutions for any and all losses suffered by the plaintiff. These can include any loss of monies, salary, benefits, properties, costs associated with repairing injuries, medical costs, medicines, therapies, rehabilitations, counseling, or any other reasonable costs associated with the initial injury including, in some instances, claims of pain and suffering, whether mental or physical. It is not uncommon in some law suits for spouses of the plaintiff to enter into the claims against defendants for damages via claims of loss of consortium.

Punitive damages are damages that can be assessed by a jury for the sole purpose of punishing the defendant. Although compensatory damages are limited to verifiable costs, punitive damages have no limits and are the exclusive discretion of the jury.

“It should also be acknowledged that legal costs may accrue to the individual against who a suit has been brought because an organization’s legal counsel owes allegiance to the corporation first and foremost.”

Damages assessed by a jury may be appealed to a higher court, at the expense of the defendant, but that does not guarantee that there will be any reduction in the jury’s decision. Also, it should be pointed out that any person against who a jury has assessed damages in a suit cannot bankrupt on those damages. The court may employ any resource, including seizing and auctioning off personal properties, to satisfy the assessment. Failing that, they may place liens against any and all future earnings of the defendant until the total amount of the damages have been satisfied.

It should also be acknowledged that legal costs may accrue to the individual against who a suit has been brought because an organization’s legal counsel owes allegiance to the corporation first and foremost. This could result in individuals securing legal representation on their own and at their own expense. This is an issue that should be explored with legal counsel before any legal actions have been initiated.

A Real Life Example . . .

A way to make a point in this regard:

“It could mean the difference between losing everything you have now, or ever will have, and living life in relative comfort.”

I have developed a technique of getting my point across to students (both academic and professional) by using this example. \$20,000 is a very small settlement for a law suit of any type of liability these days. Usually they are for tens of thousands of dollars or hundreds of thousands. Having made this point, I ask my audience, so when was the last time you heard of a suit being settled for only \$20,000? They collectively shake their heads.

I continue, OK, now imagine this, where you would you, right now, if you had to, come up with \$20,000? Go to the bank? Take out a loan? What bank is going to loan you \$20,000 to pay off a law suit? So, where would you come up with \$20,000? But remember, you must do it right now because courts don't wait. They want the settlement paid immediately, so again I ask you, where would you scrape up \$20,000 in hard cash right now if you had to?

It usually makes an impression. Then I add what if it was \$100,000? They are usually bewildered by this point. And that is when I make my point, this is why understanding how to limit your liability is so very important to you. It could mean the difference between losing everything you have now, or ever will have, and living life in relative comfort. Which do you want to do?

Conclusion

“Organizational policymakers defensible liability rests upon exhaustive, diligent research that is translated into practical policy measures . . .”

In conclusion, there is no such thing in the American legal system as being “law suit proof.” This is a fantasy entertained by some but which has no truth in reality. The only persons enjoying what is known as “total immunity” are a very small number of people within the judicial system, such as judges, who are essential to the function of the system. Everyone else must rely on reasonable policies and practices that carry through with expectations of care and diligence anticipated of their position and function. Organizational policymakers defensible liability rests upon exhaustive, diligent research that is translated into practical policy measures that are carried out on a habitual basis within the organizations daily operations.

About the Author

Dr. John White is a professor and the Criminal Justice Program Coordinator at Martin Methodist College in Pulaski, Tennessee.

Education:

BS: Law Enforcement; University of North Alabama

MCJ: Criminal Justice; Middle Tennessee State University

Ph. D.: Public Administration; Tennessee State University

Professional Experience:

1969 – 1972: Reserve Police Officer Vallejo Police Department, Vallejo, CA

1971: Deputy Sheriff, Alameda County Sheriff's Dept. Oakland, CA

1972 – 2000: Police Officer Pulaski Police Dept. Pulaski, TN

1987 – 1991: Governor's appointment, board member Tennessee Peace Officer's Standard and Training Commission

1986 - Co-founder and past President; Tennessee Law Enforcement Training Officers Association

Public Service:

1999 – 2003: Giles County Commission; dist. 7

2000 - 2003: Chairman of the Giles County Commission

Teaching Experience:

Cumberland University; undergraduate and graduate schools

Athens State University

Martin Methodist College

Columbia State Community College

Tennessee Law Enforcement Training Academy

Special guest lecturer various training schools and sessions

Program Coordinator Criminal Justice degree Martin Methodist College

Director of Security Martin Methodist College

Courtroom Experience:

1971 – 2009: Testified in local, state and federal courts in both criminal and civil cases

1985 – 2000: Participated in several liability suits in federal court