

An Update on Vicarious Liability for Certified Nurse-Midwives/Certified Midwives

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The unique placement of midwives in the health care industry prompts renewed consideration of vicarious liability. Generally, vicarious liability is the liability of an employer for an employee's actions. A review of recent case law over the past decade shows limited case activity and indicates that the certified nurse-midwife/certified midwife (CNM/CM) roles do not create vicarious liability risks different from any other employee/agent. The lack of case law signals a lack of dispute over vicarious liability, not a lack of liability. Absent unique statutory provisions, which may be in effect in a minority of states, an employer of a CNM/CM is as liable for the midwife's negligence committed in the scope of their employment as employers are generally liable for an employee's negligence. When there is no employment/agency relationship, vicarious liability does not apply. A collaborative practice agreement is a good example of a nonemployment arrangement. Proper contractual documentation of relationships and comprehensive professional liability coverage are necessary to manage this form of liability. *J Midwifery Womens Health* 2007; 52:153-157 © 2007 by the American College of Nurse-Midwives.

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INTRODUCTION

Vicarious liability is a legal responsibility for the acts or omissions of another. Most commonly, it is the liability an employer has for an employee's actions. In legal terms, vicarious liability is a principal's liability for an agent's damages caused by a breach of some established duty or failure to follow through with contractual obligations.¹ A *principal* is a person or entity that embarks on a course of action, in part, using other individuals to accomplish this task. Those other individuals are *agents*. This article will help health care practitioners distinguish vicarious liability from legal liabilities in general, and will discuss how vicarious liability applies to midwifery practice. Exceptions to the general rules of vicarious liability, such as acts outside the scope of employment, are discussed. The use of proper documentation in contracts, such as collaborative practice agreements, can help limit the liability risks and clarify nonemployment or nonagent relationships.

BACKGROUND: GENERAL LIABILITY ISSUES

There are two common forms of general legal liability, or ways in which responsibility for damages may arise. The first is an action in *tort*. A tort is a legal wrong. For example, professional malpractice is a tort action, whereby a professional has assumed a particular duty, breached that duty, and that breach caused damages to the plaintiff. The second area for legal liability is a breach of an obligation that arose through the contractual relationship between the parties. In this case, a promise was made for due consideration and that promise was

broken, resulting in damages to the promisee. This area is less commonly applied to professional liability but is occasionally applicable.

VICARIOUS LIABILITY

Vicarious liability is the assignment of financial responsibility to someone other than the employee or agent for the damages that result from the employee's or agent's actions. These damages may be the result of a tort action or from a breach of contract action on the part of the employee or agent. An example of a situation involving vicarious liability is when the employer is sued directly for the wrongdoing of the employee. Another is when both the employer and the employee are sued, but only one set of damages is awarded, and the employer, who was not directly involved in the situation at all, pays the employee's assessed damages. For example, if a construction worker drops a brick on a neighbor's car, breaking the windshield, the car's owner can sue the worker, the employer, or both for the damaged windshield. Vicarious liability allows the injured party (i.e., the plaintiff) the opportunity to search for the "deep pocket."

Liability applies to entities (such as corporations) and individuals. An employer or corporation can be sued directly for failure to properly safeguard against the risks that are predictable in its enterprise, and an employee can be sued for failure to follow an applicable standard of care. For example, a clinic has no standard procedure for dealing with abnormal laboratory results and a PAP smear result that reports squamous cell carcinoma is simply placed in the chart without any other response. The CNM/CM then sees the patient without a chart review and misses the pathology report. The plaintiff may sue the CNM/CM for her or his own malpractice and

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may also sue the clinic for failing to establish proper procedures for handling laboratory reports.

Vicarious liability is a unique situation. It is based on a direct connection between the person who committed the wrong and the employer or principal for whom the person was working. In this case, the entire liability for the deeds of the employee may be applied to the employer as well. There is really no difference between the interrelationship in employment or in a principal/agent situation. The law is not concerned that the actor is being paid for his or her actions, but rather that the actor is working on behalf of and under the control of the employer/principal.

This transfer of liability from one person to another has a long-standing tradition in common law. The most familiar application is that of *respondeat superior*—the direct liability of an employer for the acts of their employee or of a principal for the acts of their agents. The rationale for vicarious liability is that the costs of an agent's errors should be borne by the enterprise. Vicarious liability assures that the financially responsible party will pay when damages occur. It is especially important when the benefits of the original endeavor that created the context in which the harm arose are used to fund the consequences.² A classic example taught at law schools is a case where an impoverished truck driver delivering a wealthy merchant's goods causes an accident. The victim of the accident could not hope to seek compensation from the poor truck driver, so instead, the victim seeks—through the theory of vicarious liability—compensation from the wealthy merchant.

The vicariously liable party has not committed any breach of duty to the plaintiff but is held liable because of the legal imputation of responsibility for another's wrongdoing. It is important to note that this kind of liability depends directly upon the existence of a relationship whereby the vicariously liable person is in control (or should be in control) of the actions of the wrongdoer, and the wrongdoer is acting at the behest of that other person.

Vicarious liability is distinct from other forms of liability. Vicarious liability is not to be confused with situations in which there is more than one defendant, each being sued for his or her own contribution to the damages. It is not uncommon when something bad happens that blame can be cast on more than one person. When a group of individuals each contribute to a mistake or error, or in some way cause harm to another, they each may be directly responsible for their share of the damage that occurred. If a team of health care providers are all

working together for the care of a single patient and that patient is harmed, each provider may be assigned some proportionate share of the total damages caused.

Midwifery's Interest in Vicarious Liability

Vicarious liability has been reviewed in midwifery literature.³ The concern arises because of the unique role of the CNM/CM. Their professional status in the health care community, heightened educational and professional roles, and association with the traditions of nursing all combine to place the CNM/CM in a "middle ground" between nurse and physician, leaving others in the health care profession unsure about where the liabilities lie. Disputes about liability arise about the differences between a collaborative practice and any direct employment relationship, between the CNM/CM and hospital, clinic, or medical practice.

Vicarious liability is an important topic for midwifery for two reasons: 1) others may be concerned as to whether or not they will be liable for the CNM's/CM's actions, and 2) CNMs/CMs need to understand when and how they may be liable for the deeds of others. These are not distinct concerns, but rather two sides of the same coin. Examining when and how vicarious liability applies requires looking at published legal disputes and how they were resolved by the higher courts.

A REVIEW OF REPRESENTATIVE CASES

When lawyers conduct a review of the case law, they are not reviewing all of the cases that have impacted individuals throughout the country. What they are reviewing are those few cases that were appealed to a higher court after the trial, those in which the litigant contends that a trial error occurred. These are termed "reported cases"; routine trial results are not reported in the case law. Only those situations that represent new and unique issues are likely to be reported. Numerous cases may have been tried, but only a few reported wherein the outcome of the trial was disputed. Cases settled before the conclusion of the dispute are not reported in the case law.

This article examines recent reported cases as examples of the various considerations about vicarious liability. The focus was on articles that occurred after the 1994 Jenkins article⁴ published in this *Journal*. Published cases underwent a comprehensive case review using the LEXIS/NEXIS research system, which allows for systematic searches of databases relating to professional liability, liability reporters, compilations of case law, and database searches of reported cases nationwide over the past 12 years, including investigation as to how those cases were or were not treated by subsequent authorities (commonly called "shepardizing") and a review of secondary authorities (such as restatements). All representative cases found in this review are cited below. The term "nurse" is used specifically as referenced in the

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cases and may apply to nurses in any specialty or with undisclosed specialized licensure or certification. The term “CNM” applies only to those instances where the case specifically designated the individual as a CNM. No cases relating specifically to CMs were found.

The Agency or Employment Relationship

In *Whitmeyer v. Power*, the defendant hospital was being sued under the theory of vicarious liability for a CNM’s allegedly botched repair of a perineal laceration that occurred during a birth attended by the CNM.⁵ This case is an excellent example of why the relatively simple concept of vicarious liability can appear so confusing. The appellate court found that the plaintiff had failed to show that the CNM was an employee or agent of the hospital. However, the appellate court left it to further litigation to determine whether or not the hospital could be sued for its own failures under the corporate negligence doctrine.⁶ The CNM was accused of an act of malpractice. The hospital was then sued under two completely separate theories. The first was vicarious liability. The hospital was accused of using the CNM as an agent to further its own business interests, and therefore, the plaintiff felt that the hospital should pay all of the nurse-midwife’s damages. (Hospitals have more money than individual CNMs). In *Whitmeyer*, that claim failed because the plaintiff could not prove the direct agency or employment relationship. The court indicated that actual agency needed to be shown by the existence of a “master/servant” relationship as well as the direct control or right to control on the part of the hospital. (Note: “master/servant” is a common law phrasing which denotes a relationship based on control and responsibility on one party and action on the other party.) This ability to control the details of the agent’s conduct must be shown in order for a claim of vicarious liability to prevail. This simple right to supervise, even as to the work and manner of performance, is not enough control to create liability.⁷

However, the plaintiff also accused the hospital of failing to meet its own separate and unique duties. In this case, the court found that a hospital has four duties directly to its own patients: 1) a duty to provide safe and adequate facilities and equipment; 2) a duty to select and retain competent providers; 3) a duty to oversee providers; and 4) a responsibility to create adequate rules and policies and to assure adequate care for the patients.⁸ In this case, the vicarious liability claim was denied, but the issue of direct responsibility was still in controversy.

Ali v. Community Health Care Plan, Inc. is a Connecticut case that provides an example where vicarious liability between a CNM and employer existed. Community Health Care Plan, Inc was a health maintenance organization that employed the nurse-midwife. Community Health Care Plan, Inc was sued directly, by virtue of

the theory of vicarious liability, for alleged malpractice: the plaintiff complained of fluid discharge during her pregnancy. The midwife claimed that the plaintiff described this discharge as watery and the midwife advised the plaintiff accordingly during a telephone call. The plaintiff later claimed that she had described the discharge as milky. The suit alleged that the plaintiff suffered a devastating loss of amniotic fluid resulting in the eventual death the child. This appeal dealt with applying the appropriate standard of care in order to determine liability. The standard of care under dispute was not that of Community Health Care Plan, Inc, but the distinct standard of care that would be applied had the nurse-midwife been sued directly.⁹ In vicarious liability, the employer/principal is “in the shoes of” the employee/agent. In this case, the Community Health Care Plan, Inc measure of liability was the standard of care that a prudent CNM would exercise in the same or similar circumstances.

In a Louisiana case (*Murry v. Optioncare*), the appeals court sent the parties back to trial to determine whether or not a nurse was an independent contractor or employee.¹⁰ This highly fact-intensive issue had to be resolved by a court or a jury to determine whether or not vicarious liability would apply later, and is an example of how critical it is to determine the defendant’s relationships with one another. The final outcome will depend on the unique facts and circumstances of their relationship. In the end, someone has to determine that the relationship is either so interconnected that liability should apply, or that the relationship is disconnected enough that the two entities do not have responsibility for one another.

Scope of Employment

If the employee’s errant behavior is outside of the scope of agency or employment, the principal or employer would not be liable. For example, in *Piedmont Hosp., Inc v. Palladino* the court found that a hospital was not vicariously liable for a nurse’s alleged sexual assault of a patient(s).^{11,12}

Not only is an employment relationship an important factor in making the determination of vicarious liability, but the specific purposes for the interrelationship have to match up with the inciting event. A fairly recent Massachusetts case provides a good example. In this case, a corporation was found to not be vicariously liable for the injuries to the patient as a result of the nurse’s alleged negligence. This was because the corporation only dealt with the hospital’s management; the city had specific control over the clinical matters. So while the specific corporation may have been responsible for important management decisions that affected the nurse, they had no responsibility over her medical duties and were therefore were not liable for the patient’s injuries.¹³

Collaborative Practice Agreements Do Not Create Vicarious Liability

Midwifery collaborative practice agreements have a common outline: the CNM/CM independently practices her/his art so long as the pregnancy, labor, or birth is proceeding normally. If complications arise, the CNM/CM will notify the physician and consult. The physician and the CNM/CM may work in concert dealing with the apparent complications. If need be, the physician may take over the care of the patient. These relationships are well described in the ACNM position statement “Collaborative Management of Midwifery Practice for Medical, Gynecological and Obstetrical Conditions.”¹⁴

Instead of the direct supervisory role, the collaborative practice agreement provides for a transition of responsibilities between different health care providers with differing scopes of practice. Nothing in this sort of agreement creates an agency relationship or an employer/employee relationship. Therefore, a collaborative practice agreement would serve to articulate the *nonexistence* of the type of relationship necessary to establish vicarious liability. A review of the case law found no reported cases that would support a theory of vicarious liability by virtue of a collaborative practice agreement being in effect.

STATE-BY-STATE EXCEPTIONS

Just as in every other aspect of the medical field, regulations of specific activities often vary from state to state.¹⁵ Even the classification of the role of the CNM/CM can be markedly different from one state to the next. For example, some states have made the decision that because they require all health care providers to carry malpractice insurance, vicarious liability is no longer allowed. The state of Kansas requires a select subgroup of health care practitioners to carry a certain amount of mandatory professional liability insurance. A portion of the insurance is obtained through the open market, and a portion is paid for through a fund created by the state (the Health Care Stabilization Fund). In the statutes that created the Health Care Stabilization Fund, vicarious liability was eliminated between the individuals and entities covered by the fund under the theory that because coverage is mandatory, the fund supplants the need for vicarious liability.¹⁶ In other words, the purpose of vicarious liability is to find a financially responsible person to cover the alleged mistakes, and a tradeoff was made when transferring the liability to mandatory insurance provisions.¹⁷ However, a health care provider is defined in this statutory scheme as only that specific subgroup of individuals who are required to obtain coverage under the fund.¹⁸ By this definition, a registered nurse anesthetist is considered a health care provider under Kansas law, but neither CMs nor CNMs are considered defined health care providers.¹⁹ For those not

covered under this unique statutory scheme, such as the CNM/CM, their health care provider employers could be vicariously liable for the CNM's/CM's actions.

Not all states have the same definition of health care provider. In Pennsylvania, the courts have made a determination that a CNM is a health care provider.²⁰ Analyzing whether a defendant is in the same class—for example health care provider—can help determine lines of responsibility and respective scopes of authority. Often, the rules of liability and the distribution of responsibility work differently for individuals of the same class. For example, only a health care provider may perform certain acts, so if a non-health care provider helps, they are considered an extension of the health care provider's efforts and vicarious liability may apply. However, if the two individuals belong to the same class, it is much easier to support the argument that they are working in concert and not for one another—neither being vicariously liable for the other. The possible permutations are numerous and answered only by looking to the law of that particular jurisdiction.

Obviously, when the specific term health care provider is used in the statute to alter the common law assumptions about liabilities, as in the Kansas example cited above, then determining whether the CNM/CM is included is a matter of definition.

HOW DOES ONE MANAGE THE RISKS IMPOSED BY VICARIOUS LIABILITY?

First, as discussed above, a clearly documented articulation of the working relationships is helpful. Employment contracts, collaborative practice agreements, hospital by-laws, and clinic protocols are all good examples of how the individual activities of one profession interrelate with the activities of another. Given that the fundamental issue surrounding vicarious liability is the search for direct and appropriate financial responsibility to protect the unintended victim, most health care institutions require that practitioners carry their own liability coverage. However, some address the vicarious liability theory by insuring the institution that employs the practitioner, so that all practitioners within the institution are covered under the institution's policy. There are many clinics employing several health care practitioners, advanced practice nurses, and other professions whose liability is covered by one policy. In this case, the group intentionally relies on the vicarious liability theory and assumes the responsibility it imposes.

Such an approach is highly dependent upon state law and accreditation policies. Some state laws and/or accreditation policies may have independent requirements for malpractice coverage, requiring individual coverage for the CNM/CM. One problem with relying on employer's liability is that the employee has no direct coverage for himself or herself. Unless the employer contractually

accepts the responsibility for the employee, such as having an indemnification agreement in an employee's contract, the employee may suffer economic risk. Take for example a CNM/CM who is a defendant in a malpractice claim. Even though the employer willingly planned to cover those risks, the plaintiff may still obtain a judgment against the CNM/CM, putting his or her individual assets at risk. Vicarious liability theory adds employers or principals to the scope of liability, but does not subtract the employee/agent. This is why most professionals require their employer to provide individual malpractice coverage.

The rules are no different when a CNM/CM employs others. As employers, CNMs/CMs are responsible financially for the mistakes made by their employees. Properly documented and well-managed working relationships are the key to understanding where the risks may or may not lie. The need for professional liability coverage can then be adequately reviewed and purchased if necessary. Coverage for the individual CNM/CM is highly recommended, if not imperative, because it protects that professional. Coverage for the CNM/CM employer necessarily includes consideration for the action of their employees.

CONCLUSION

Vicarious liability is a common law doctrine in regular use today that simply makes employers or entities financially responsible for the mistakes made by their employees and agents. A review of more than a decade of case law and legal scholarship dealing with vicarious liability yields no distinguishing factors for the midwifery professional. While the role of the CNM/CM may have many unique aspects, the midwife's role itself provides no special or unique considerations regarding vicarious liability. When a midwife is working for someone else, the employer is liable for the mistakes that were incurred by a nurse-midwife in the course of that employment. However, when a CNM/CM is an independent contractor and not in the employ of someone else, then the institution or collaborating physician has no vicarious liability for the midwife's actions, because the collaborative practice agreement between a physician and a CNM/CM creates no principal/agent or employer/employee relationship.

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