



# Protecting Your Business

## WHAT YOU NEED TO KNOW ABOUT VICARIOUS LIABILITY

By Jennifer Tyrwhitt Gory

**V**icarious liability is a “form of strict, secondary liability for the tort of another event though the person being held responsible may not have done anything wrong.” This is often the case with employers or superiors who are held vicariously liable for the damages caused by their employees, or subordinates, provided that the tort occurs during the course of the employment. For an act to be considered within the course of employment it must be either authorized or be so connected with an authorized act.

Before we explore different liability insurance products one can purchase, there are many ways you can reduce your liability as an employer or franchisor. Firstly, document, document, document. Documentation is one of the most important things an employer and employee can do. When establishing negligence, the first items that will be asked for during discovery and prior to litigation is your procedure manual, workflows and/or documentation. You may avoid the courts completely if it can be demonstrated to a third party that you have documented, and there is absolutely no negligence. Secondly, know your limitations. No one business can do it all. If it's better to hire a third party to do work at your premises; not only will you reduce your liability as a third party is taking on the job, but if you get sued, there will be subrogation rights for the insurer. An example of this is to hire a snow removal company for your parking lot and sidewalks. Ensuring that they have proper insurance is, however, your responsibility. Avoid contracts with hold harmless agreements. You may be unknowingly assuming liability of other parties. Have your attorney,

or in the case of insurance, your insurance broker review any agreements such as lease agreements, or agreements with your vendors and/or suppliers.

Protecting your assets and business by purchasing liability insurance is one of the most important business decisions that you can make and there are different types of liability policies. A **Commercial General Liability (CGL)** policy indemnifies you for **compensatory damages** arising from negligence for property damage and bodily injury occurrences. This could result from your **premises, operations, products or completed operations**.

**Example 1.** An employee didn't clean up properly at the end of the day, and left some cords lying on the ground. You have a client visit, and they trip over the cord and injure themselves. You receive a Statement of Claim 6 months later. The employer and/or business could potentially be sued for bodily injury of the injured party. Once negligence is established, a **CGL policy would insure you for defence costs and damages**.

**Example 2.** An employee shares information which is slanderous to one of your suppliers, and your supplier claims that his character has been defamed. You receive a Statement of Claim for Defamation of Character. A Personal Injury Liability Endorsement on the CGL policy would insure you for defence costs and damages.

**Example 3.** An employee drives to the bank in their own vehicle to take in the daily company deposit, and on the way to the bank, is involved in an accident where the accident is at the fault of the employee. A pedestrian is killed in the accident. As the employer, and as the employee was in the course of their employment, you are sued. This can be covered by purchasing **Non-Owned Automobile Liability** as an endorsement on the **Commercial General Liability (CGL) policy**.

A CGL policy, however, doesn't insure against **financial loss**, nor for your employees' or Board of Director's **wrongful acts or errors and omissions**. This includes, but is not limited to, negligence, error or omission, wrongful dismissal, wrongful termination, sexual and verbal harassment, employment practices liability, lack of duty of care or prudence, etc. This can be covered by purchasing an **Errors & Omissions Liability policy** and a **Directors & Officers Liability policy**.

**Example 1.** A home inspector is an employee of a home inspection company and goes to inspect a house. The inspector misses the evidence of mould, and doesn't include the mould problem on the home inspection. The sale of the house goes through, and goes for over asking to the seller. The buyer of the

home, 6 months later, discovers that the house's second floor is covered in mould. The buyer of the home claims that they not only have to pay for the remediation of the mould, but the value of the home is lower than what they paid for it, and claims a financial loss and sues the home inspection company. Defence Costs and damages can be covered by an **Errors & Omissions Liability** policy.

**Example 2.** One female employee claims that her male supervisor in the same company made comments that are sexual in nature. The female employee sues the partners for sexual harassment. Defence Costs and damages can be covered by purchasing a **Director's and Officers and Employment Practices Liability** policy.

### Employee Theft

Are you vulnerable to employee theft? Are you responsible for the theft committed by an employee? Again, taking deposits into the bank on a daily basis, and being on top of your receivables and bank statements is paramount in avoiding employee theft. However, you can also purchase different types of Bonding or Crime insurance that would indemnify either yourself, or your customer.

### The Franchisor and Franchisee Relationship

The relationship between the franchisor and franchisee is a unique one. However, the liability and responsibility of the franchisor for the franchise group or over the franchisee is not significantly different. The mere distance and geography of the franchisor and franchisee with some franchise programs can be a real exposure for the franchisor. How often are the various locations being visited or inspected? What type of reporting is going on between the franchisor and franchisee?

Firstly, expectations of the franchisees and clear and concise expectations and responsibilities should be encouraged, if not insisted upon. The courts, again, would see if the franchisee took a mere detour with workflows, suppliers, or working completely independent from the franchisor, and one way of determining this is through documentation. The franchisor would be encouraged to not only purchase a Commercial General Liability policy with the Non Owned

Automobile, Employers Liability, Personal Injury, Advertising Injury, Tenants Legal Liability extensions, but also a Directors & Officers Liability policy, which would cover for "wrongful acts" of the franchisor's Board of Directors.

As a franchisor, consider the following liability coverages, and exposures of your business. It will protect what you have worked so hard for.

### Commercial General Liability

Premises & Operations/Products and Completed Operations. Coverage provided for compensatory damages resulting from negligence of the insured for bodily injury or property damage.

### 30-Day Notice of Cancellation

The standard normal notice written into standard policies is 15 days notice. However, this additional timeframe and wording protects the franchisor's interest and provides additional notification that the company wants to be relieved of its obligation to insure the risk.

### Contingent Employers Liability

In the event that an employee who is insured under an existing workers' compensation plan, or is required to be so insured, is injured and is denied. The benefits of that plan is that it will respond to insure the contingent liability of the insured for those injuries.

### Abuse Liability

Definition of Abuse includes sexual, physical, psychological or emotional abuse, molestation or harassment, including corporal punishment. Continuous or repeated actual or threatened "abuse" of the same person by the same Insured(s) will be deemed to be a single occurrence or offence and to have taken place on the date that the "abuse" first occurred.

### Employee Benefits E&O Liability

This coverage would be called upon if there was an error or omission with the addition of an employee, for example if the benefits administrator omitted to add an employee after a 90 day probation period, and the employee had a claim against the employer/franchisor/franchisee owner.

### Tenants Legal Liability

Covers cost of rebuilding rented premises. This coverage would be required if the franchisee, as a tenant, is found negligent as a result of a loss on his or her premises. The CGL would cover all neighboring tenants for negligence of alleged damage of the franchisee.

### Advertising Liability Limit

This includes privacy, unfair competition or infringement of copyright.

### Non-Owned Automobiles

Covers the liability of bodily injury or property damage losses of automobiles neither owned nor leased by the company.

### Contractual Liability

Provides coverage for bodily injury and property damage arising out of liability assumed under oral or written contracts.

### Errors & Omissions Liability

This includes Defence Costs, including first dollar defence, and covers for a financial loss of a third party due to an error or omission of a professional.

### Medical Malpractice

Coverage is provided for rendering or failure to render, medical, surgical, dental or nursing care.

### Directors & Officers Liability

This includes Employment Practices Liability, and includes wrongful dismissal, harassment, and other wrongful acts of the Executive, Directors & Officers, together with volunteers of the Corporation.

One of the many advantages of working with one insurance broker on your insurance program is that your broker could ensure that your franchisees have sufficient insurance, and that you are not going to undertake any additional insurance exposure. 🌸

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