



Vicarious Liability

Addressing Barriers to Midwifery Practice

2019 & Beyond

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July, 2019

WELCOME

We've put together for you a packet on vicarious liability. This 2019 review updates the 2007 article published in JMWH written by Joseph Booth. Findings provide insight into a thorough review of case law over the last 12 years and underscores unfounded barriers related to vicarious liability. Conversations on this topic are often grounded in myth, misinterpretation and malpractice carriers that misguide physicians. Our aim is to provide legal review and recommendations in order to increase collaborative arrangements between Midwives and Physicians.



ABSTRACT

When are physicians vicariously liable for damages arising from acts or omissions made by a midwife? The growth in midwifery-led models of team-based care necessitates all stakeholders have a clear understanding of vicarious liability. This often-misunderstood legal principle is commonly asserted as a barrier to establishing physician/midwife collaborative relationships. Vicarious liability is a legal principle that makes one liable for the wrongdoings of another who is acting on their behalf. Most often this form of liability arises where employers are held liable for damages done to others by an employee. Analysis from an updated and comprehensive caselaw review shows few cases involving midwives and vicarious liability. This finding is consistent with prior research by these authors in 2007 and serves as validation that physician/midwife practice relationships have not created an increase in liabilities. Additionally, research continues to confirm that a collaborative practice agreement does not create any unique vicarious liability risk and that the collaborative practice relationship is different from an employer/employee relationship. State regulated collaborative practice agreements for midwives, whether licensed in a state that acknowledges full practice authority for midwives or not, do not create the required employment/agency relationship needed to establish vicarious liability. This article offers important recommendations for midwives and those with whom they collaborate, including how both parties can best describe their relationship in contractual arrangements. Without an employment or agency relationship vicarious liability simply does not apply.

Toolkit Contents

Abstract & Introduction (free)

Key facts to lead any Midwife/Physician conversation

20-page Article including: (\$50)

Full citations using LEXIS/NEXIS Research Systems

All cases involving CNM/CM's since 2007

Vicarious Liability Algorithm

Flow chart to determine risk for vicarious liability

Recommended Steps to address Vicarious Liability

Ten strategies for successful agreements and drafting best practice collaborative arrangements

Consultative Services

Discounted fees with toolkit purchase

KEY POINTS

Carefully written collaborative practice agreements can help limit vicarious liability risks and clarify non-employment or non-agent relationships, even in full practice authority states.

Vicarious liability is not to be confused with situations in which there is more than one care provider of a single patient, each being sued for his or her own contribution to the damages.

Not only is an employment relationship or agency relationship an essential factor in making the determination of vicarious liability, but the specific allegation of an act or omission must relate in some way to the employment or agency relationship.



VICARIOUS
LIABILITY

INTRODUCTION

This review is an update of an article these authors published in the Journal of Midwifery and Women's Health (JMWH) 2007. Physicians and midwives [Certified Nurse-Midwives (CNM) and Certified Midwives (CM)] frequently confuse vicarious liability with other types of liability creating a false impediment to collaborative practice. As scope of practice laws and regulations relating to the autonomous role of CNM and CMs change, the probability of increasing or reducing physician risk for vicarious liability is rarely discussed. Regulatory language often includes phrases such as, 'consult, co-manage, and refer' within the overall context of collaboration and supervisory authority. Left without clarification, it is unclear if the working relationship is collaborative or that the midwife is acting under the directive of the physician.

Concern can also arise when the midwife provides financial remuneration to a physician to 'act' as their collaborating physician. Collaborative practice agreements do not create vicarious liability in and of themselves for the physician or the midwife. But there could be a circumstance where the midwife's payment for the physician's services creates a vicarious liability in a form rarely thought of in these discussions; that being the midwife being vicariously liable for an act or omission alleged against the physician employed by the midwife.

The phrase vicarious liability is often wrongly applied. In legal terms, vicarious liability is a principle's liability for an agent's damages caused by a breach of some established duty or failure to follow through with contractual obligations. A principle is a person that undertakes a course of action using help of others to complete their work. Those other individuals who are helping others complete their work are described as agents. The principle/agent relationship is dependent upon the agent acting for the principle. An employment relationship is a principle/agent relationship for compensation. In order for liability to be imposed, there must be damages arising from a breach of a duty. The duty may arise from a professional role or from a breach of contract between the employer and the patient.

Vicarious liability arises from the functional and economic relationship between individuals not the educational or licensure status among individuals. Physicians are not liable for a midwife's acts or omissions simply because they have a broader scope of practice in the medical field. Physicians would be liable for the midwife's acts or omissions if the physician, in the course of their own role, had the midwife perform medical services for the physician.