For vicarious liability to exist there must be an employer/employee relationship. Courts recognize a difference between employees and independent contractors. Generally, the law does not hold someone vicariously liable for the actions of independent contractors [1]. Events occurring outside the course and scope of employment fall within the employee’s personal liability; moreover, any such action taken against the employer will likely fail. In addition, the employer’s assurance (professional liability insurance or certified general liability insurance) would also likely be exempt from liability for non-work-related actions.

Vicarious liability applies only to damages sustained by third parties. It does not address the question of whether the employer who has been found vicariously liable has the right to recover those damages from the negligent employee. In the employment relationship, the employee owes the employer a duty of competence; but in practice, employers very rarely sue their employees for negligence [1].

1. In the light of vicarious liability, what steps should your small group’s fictional business take to minimize potential liability?

Vicarious liability is a type of risk that any business should consider. The first step is to recognize the risk; is case of vicarious liability is a pure risk; the second step is to measure the potential impact that it could represent for the company. Once that the risk is recognized and scoped, the third step is to decide what to do with this risk; four possible alternatives could be followed:

- **Risk avoidance**: the firm opts for risk avoidance by declining to enter or by ceasing to participate in a risky activity. In the case of Le Petit restaurant, an example of risk avoidance could be to decide not to offer delivery service (e.g. some kind of accidents).

- **Risk Control**: when avoidance is not practical or desirable, companies can practise risk control. Training of employees is a common practice for risk control (e.g. training oriented to defensive-driving techniques for the delivery service example). In addition, documented training increase the risk control. The same idea could be applied to every employees and area of service in Le Petit (waiters, security people, etc). In *Francis v. Clarke; MacAskill v. Clarke, 2007* (Francis v. Clarke; MacAskill v. Clarke, 2007 NSSC 47) we could measure the risk for not well trained people in restaurants and where the plaintiff was awarded with 35,000. All business may minimize vicarious liability risks and maximize the
likelihood of a favorable ruling in a malpractice suit through a variety of ways. A supervisor can clearly define expectations, set or follow standardized policies and guidelines, be aware of high-risk practice areas, provide pertinent training and structured supervision. To further control risks, the supervisor can fully assess the supervisee's performance strengths and weaknesses, document all supervisory sessions, develop a written supervisory plan, develop and use a feedback system and provide sufficient support for challenging cases. A by-side consideration is about the first decisions starting a company is the form of business. This decision has a huge impact in liabilities for the point of view or the people, but not for the vicarious liability of the company.

- **Risk retention:** when losses cannot (or don’t want) be avoided or controlled, firms must cope with the consequences. When such loses are manageable and predictable, they may decide to cover them out of company funds. Following with the delivery service, the company could decide do nothing related with the risk, and in case of some event, simply to pay the consequences.

- **Risk Transfer:** when the potential for large risks cannot be avoided or controlled, an option is the risk transfer. The risk is transferred to another firm, an insurance company. In the case of service delivery, Le Petit could buy an insurance covering many incidents in the service delivery. Other kind of risk transfer is to contract for the delivery service an independent company; because the company operates as contractor not as employees, the risk for the delivery service are transferred to this company.

The **fourth step** is to implement the decided program (basically for risk control, retention and transfer), and the **final step** is to monitor results (e.g.: supervision of employees, identify changes in the law, insurances, options, cost in case of retention). Monitor and supervision is a vital element in the practice of social work. Supervisors provide advancement of the social work profession, develop individual social workers to perform with professionalism and protect clients.

2. **Consider the risks or liability potentially faced by your particular line of business. Will your employees be interacting with customers or suppliers? List the potential tort actions that a business such as your small group’s fictional business might face.**

In a business such a restaurant the employees have a huge interaction with customers and suppliers. Such as any business, Le Petit is exposed to several tort actions, some of them directly through management and business operations, and some of them due to employees conduct through the vicarious liability concept. Some of these tort actions are:

a. Assault and battery, for example when an employee discuss with a customer or supplier and the discussion finish (maybe not) in an unwanted physical contact. Then customer/supplier could sue for damages to Le Petit.

b. Trespass to land, for example when an employee installs a poster for the business promotion in the neighbor land.

c. Trespass to chattels, for example when Le Petit employees cause damage to the goods of another (e.g.: car).
d. False imprisonment, for example when security people at Le Petit intentionally restrin people in an unlawful way (e.g.: Bahner v. Marwest Hotel Co [2]).

e. Private nuisance, for example due to strong noise (e.g.: Balmain Hotel Group L.P. v. 1547648 Ontario Ltd. (Ménage), 2009 CanLII 28199 (ON S.C.))

f. Defamation, when an employee or the communication department publishes a false statement to a person or company’s detriment.

g. Interference with economic relations, when Le Petit interfere with economic relations.

h. Inducing breach of contract, it could occur when Le Petit hires a new chef that it was working for the competence.

i. Intimidation, for example when the negotiation with providers goes further.

j. Deceit, for example when Le Petit causes damages to other person misleading her.

k. Conspiracy, for example when acting in wrong association with other person/company injures the business interest of another.

l. Malicious prosecution, for example when Le Petit improperly uses the justice system to attack an enemy or competitor.

m. Conversion Actionable, for example when at Le Petit employee intentionally appropriate of goods of another person for Le Petit purposes.

n. Detinue, for example when Le Petit employees are involved in a wrongful possession of someone else’s goods.

o. Passing-off, for example when Le Petit appropriate business or products that they are presented to the public in the way that the public believe that the product is being provided by another.

p. Confidential information, for example when some Le Petit employee has access to some provider confidential information and she uses it for getting better conditions from other provider, sharing the information.

q. Injurious falsehood, for example when someone at Le Petit attacks the reputation of another’s product or business.

r. Privacy, for example when some Le Petit employee invades some person’s privacy (e.g. L.A.M. v. J.E.L.I., 2008 BCSC 1147 (CanLII)).

s. Fraudulent misrepresentation, for example when some employee at Le Petit does a false statement in relationship basically with providers but also with customers.

t. Fiduciary duty, overcome the own interest for another party, with damage for this party.

3. What should your business do to minimize the potential of being sued? How should staff be trained? If staff are trained properly, is it still necessary to purchase insurance? Why or why not?

In Q1 was described the steps trying to minimize the potential of being sued; basically it consists in the recognition, evaluation and assessment of the risks and then to choice how to deal with these risks.

The staff training is, at the first point, an effective and cheap way for decreasing risk for being sued. Expert counsel could be a good point for starting to assess the risk and
potential mitigation actions. This could be any association, specialized training companies, specialized lawyer, etc.

Whether or not to purchase liability insurance is an answer that the management at Le Petit should analyze. The risk evaluation and how to deal with, it will answer the question about to purchase insurance. Also there are uninsurable risks and insurable risks. If case of necessity of dealing with some uninsurable risk, Le Petit should analyze the step to minimize the impact or avoid the risk. For insurable risks, there are four criteria that they should be taken into consideration in the analysis: predictability, casualty, unconnectedness and verifiability. Usually, the answer about to purchase an insurance also after to train the staff it will be yes for the most common risks (and cheap insurance), but for those that they have a very low probability of occurring and/or a very low cost in a civil case, Le Petit could assume the risk and not to purchase insurance.

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