



The Risks of NGO Staff Misconduct: When might an NGO or its directors be held legally responsible?

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DLA Piper Hong Kong



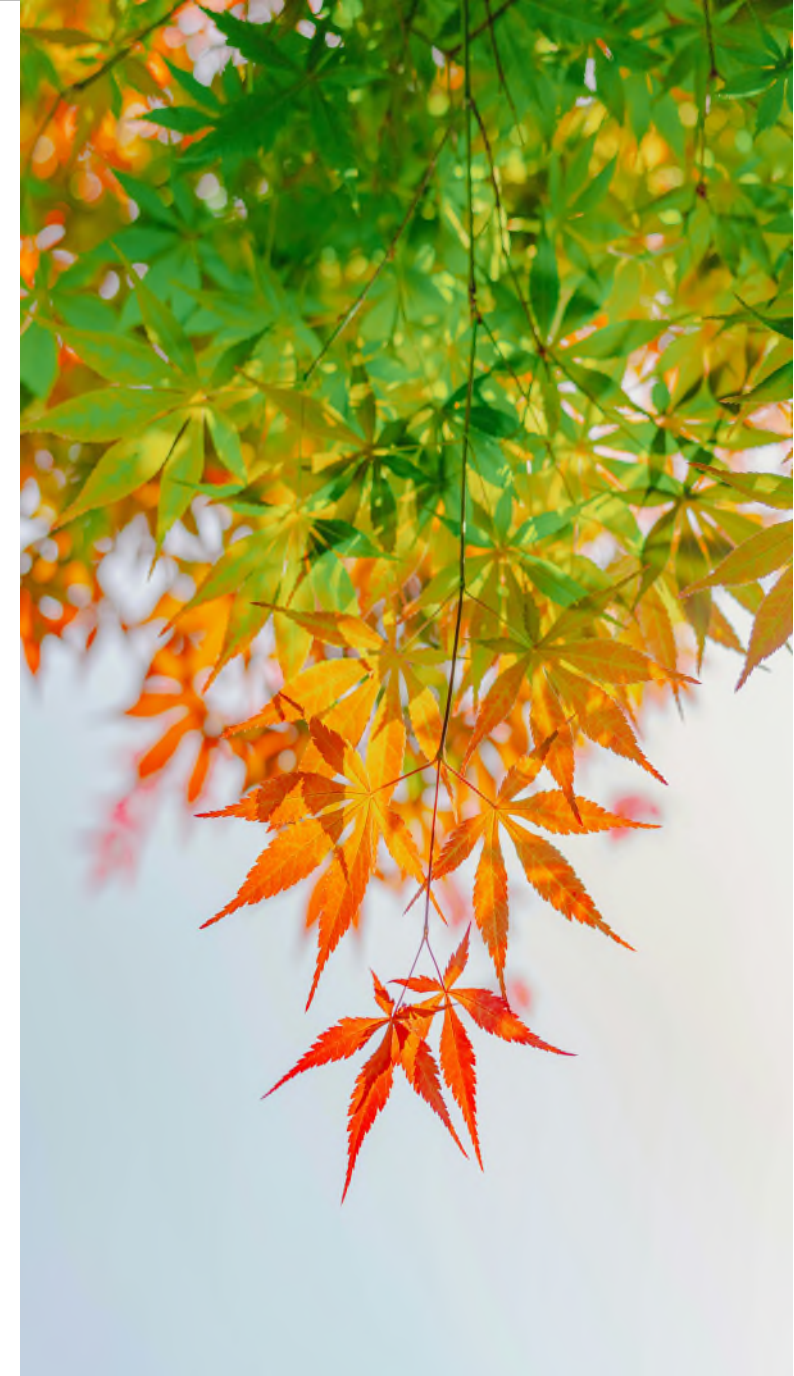
Negligence and Vicarious Liability

Negligence

Broadly defined, negligence is behaviour that falls below the standard of reasonably careful people which causes personal injury or property damage.

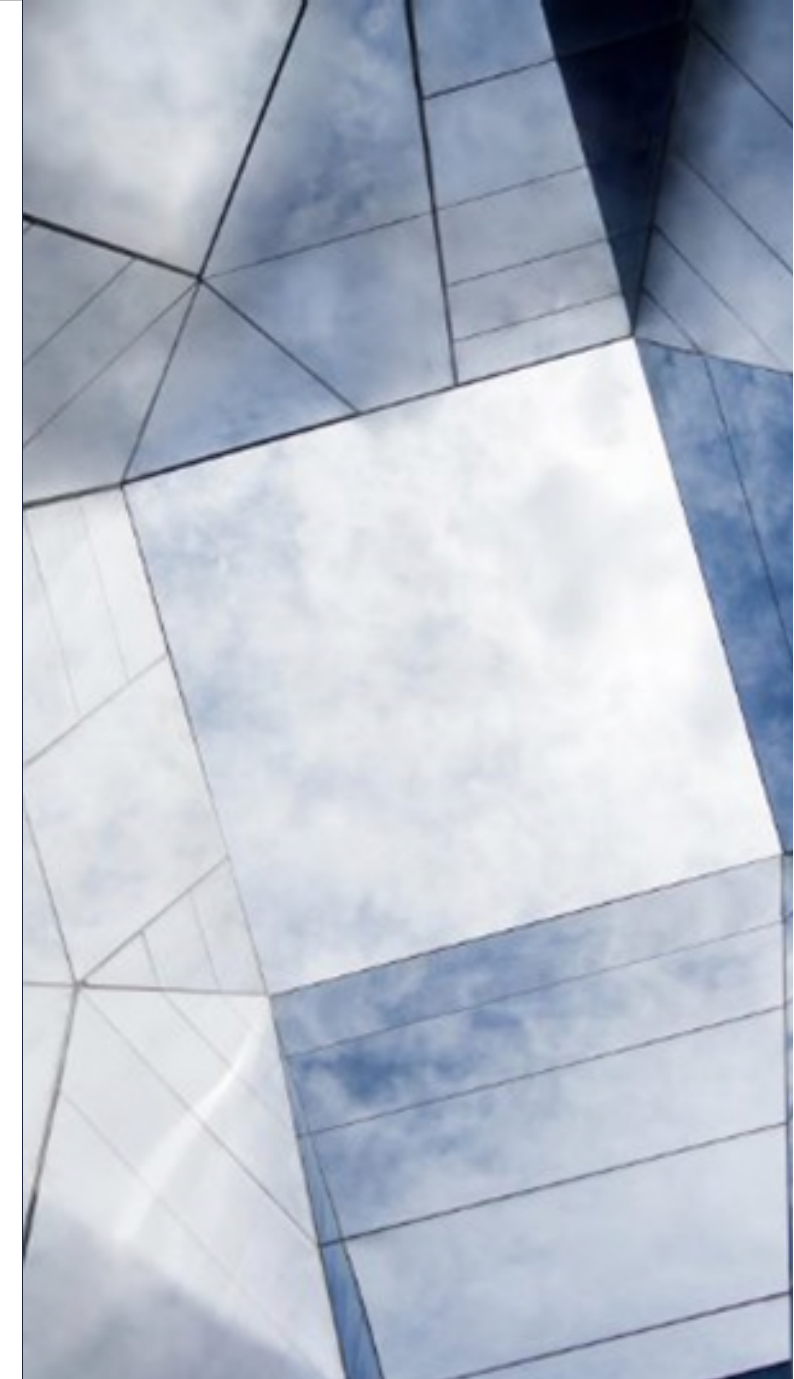
Example:

- A staff of a daycare center was scrolling her phone when she was supposed to be supervising a group of children during playtime.
- As a result, a child fell and sustained a serious head injury that could have been prevented with proper supervision.



How does the court look at Negligence?

- Plaintiff (i.e. the person who needs to prove his/her claim) that:
 - There was a **breach of duty** to exercise care (e.g. careless / unreasonable conduct); and
 - There was **consequential damage** to the Plaintiff.
- The Plaintiff will have to prove **causation** – the Defendant's breach of duty actually caused the damage.



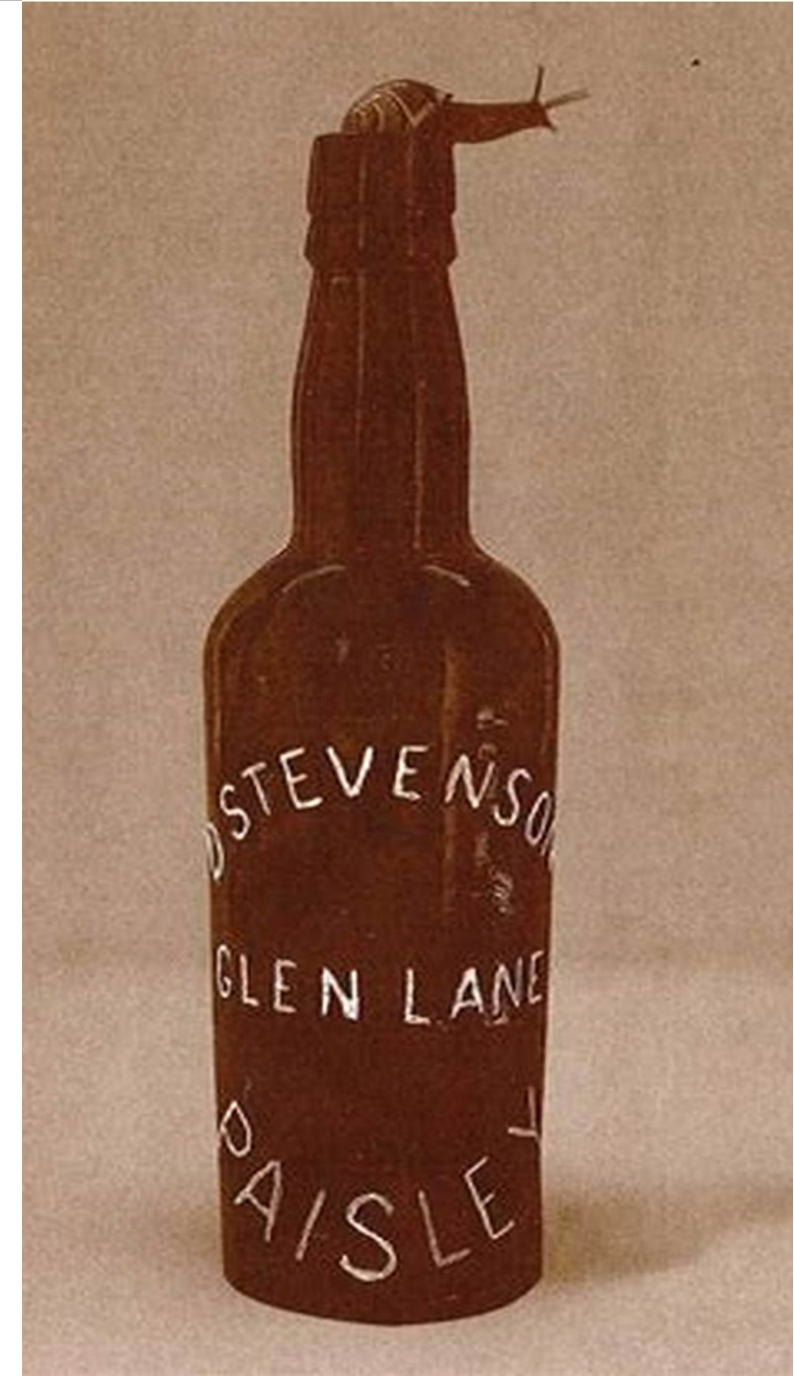
5 Elements of Negligence

1. Duty of Care

- **The Neighbour Principle** – *Donoghue v Stevenson* [1932] AC 562

“Persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being affected when I am directing my mind to the acts or omissions which are called in question”

- How does the Court assess whether there is a duty of care?



5 Elements of Negligence

2. Breach of Duty

- **The standard of reasonable person** – *“What could we expect a reasonable person, in the defendant’s position, to do?”*
 - Average person \neq Reasonable person
 - Reasonable person cannot be expected to guard against unforeseeable harm, and therefore the Defendant will not be liable.
 - Burden is **on the Plaintiff** to prove a breach of duty.



5 Elements of Negligence

3. Causation

- The “But-For” test

“But for D’s breach of duty, would P have suffered the damage in question?”

- To be assessed on a balance of probabilities

Example:

Presence of a teacher would not have prevented an accident in which a pupil was injured – *Chan Kin Bun v Wong Sze Ming & Ors* [2006] 3 HKLRD 208



5 Elements of Negligence

4. Remoteness

- P's damage must be caused by D's breach of duty and must not be too remote – *The Wagon Mound (No. 1)* [1961] AC 388
 - “*But for D's breach of duty, would P have suffered the damage in question?*”
- Placing limits on D's liability for the damage that he has caused
- **The “thin skull rule”** – take your victim as you find him



5 Elements of Negligence

5. Damages

- The Plaintiff has actually suffered harm from the Defendant's negligence for which compensation is available
 - **Financial loss**
 - **Loss of earning capacity**
 - **Pain, suffering, loss of amenities (PSLA)**
 - **Loss of society**
 - **Emotional distress**



Vicarious Liability

What is Vicarious Liability?

- An employer will be vicariously liable for the torts of an employee committed in the course of employment
 - Vicarious liability co-exists with the liability of the tortfeasor
 - Jointly and severally liable

Rationale

- Employer will be more financially capable to pay damages
- An injured plaintiff stands a better chance of recovering compensation

Does the above apply to NGOs / charities?



Legal test of vicarious liability in tort

Stage 1:

Whether the relationship between the defendant and the wrongdoer was one of employment or akin to employment

Stage 2:

Whether the wrongful conduct was so closely connected with acts that the wrongdoer was authorized to do such that it can fairly and properly be regarded as done by the wrongdoer while acting in the course of his/her employment or quasi-employment (i.e. the “close connection test”)



Is an employer liable for the acts of its employees?

- Employers may be **vicariously liable** for acts of their employees **in the course of their employment**, regardless of whether the acts were done with the employers' knowledge or approval.
- It is a defence for the employer to show that it has taken reasonably practicable steps to prevent employees from committing such acts.



An employer held vicariously liable for staff misconduct

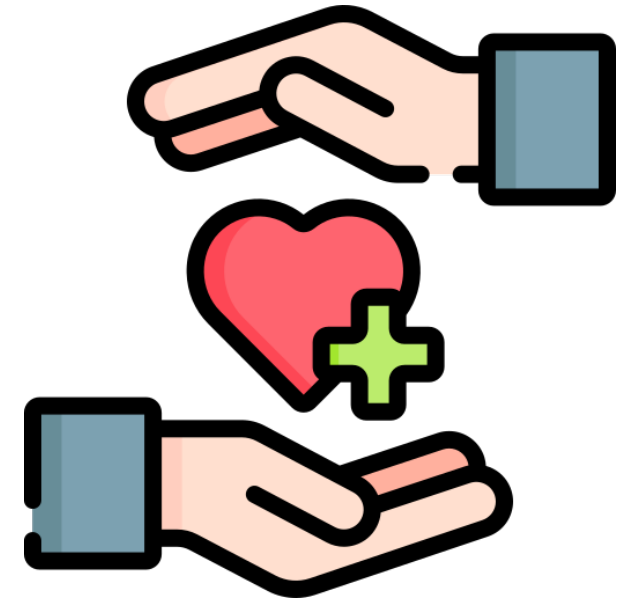
Lee Sze Man v Cheung Kin Wah & Ors [2024] HKC 458

- **Facts**

P was a mentally incapacitated person and a resident at Bridge Rehabilitation Company (康橋之家). She was sexually assaulted by D1, a male warden of a residential care home. D2 (i.e. the residential care home) was the employer of D1.

- **Main issues for determination**

- Whether P could prove the allegations on a balance of probabilities
- Whether D2 had breached its duty of care owed to P
- Whether D2 was vicariously liable for D1's actions





Whether D2 had breached its duty of care owed to P

- D2 was under a duty to provide a safe environment for P
- No evidence on how less costly but effective measures had been employed:-
 - Replacing sandblast door of the office with clear glass
 - Requiring the door of the office to remain open when a female resident is inside alone with any male staff
 - Installing surveillance cameras inside the office
 - Office not to be on the floor housing female residents





Whether D2 (i.e. the residential care home) was vicariously liable for D1's actions

- The Court applied the two-stage test in determining vicarious liability
- The main question was whether D1 was employed by D2:-
 - Flexible working hours
 - No written employment contract between D1 and D2
 - D1 received salary and directors' fees from D2
- A person can have dual roles – simultaneously a director and also an employee





Fiduciary Duties of Directors

What is Fiduciary Duty?

- Directors' fiduciary duty is **owed to the company alone**, and not to any individual shareholder
- Generally apply to all types of companies, even directors of NGOs
- The duty to act *bona fide* **in the best interests of the company**



- Duty **not to delegate powers** except with proper authorization
- Exercise **independent judgment**
- Duty **not to compete** with the company
- Avoid conflict of duties and interests
- Exercise reasonable level of **skill, care and diligence**
- Duty to refrain from fettering his own discretion



Breach of Fiduciary Duty

- Directors are liable to the company for any loss or damage suffered by the company occasioned by:-
 1. **improperly expending the property of the company** in a transaction which is beyond the company's powers;
 2. **negligence**; or
 3. **breach of fiduciary duty**.
- A range of potential consequences





Case Studies



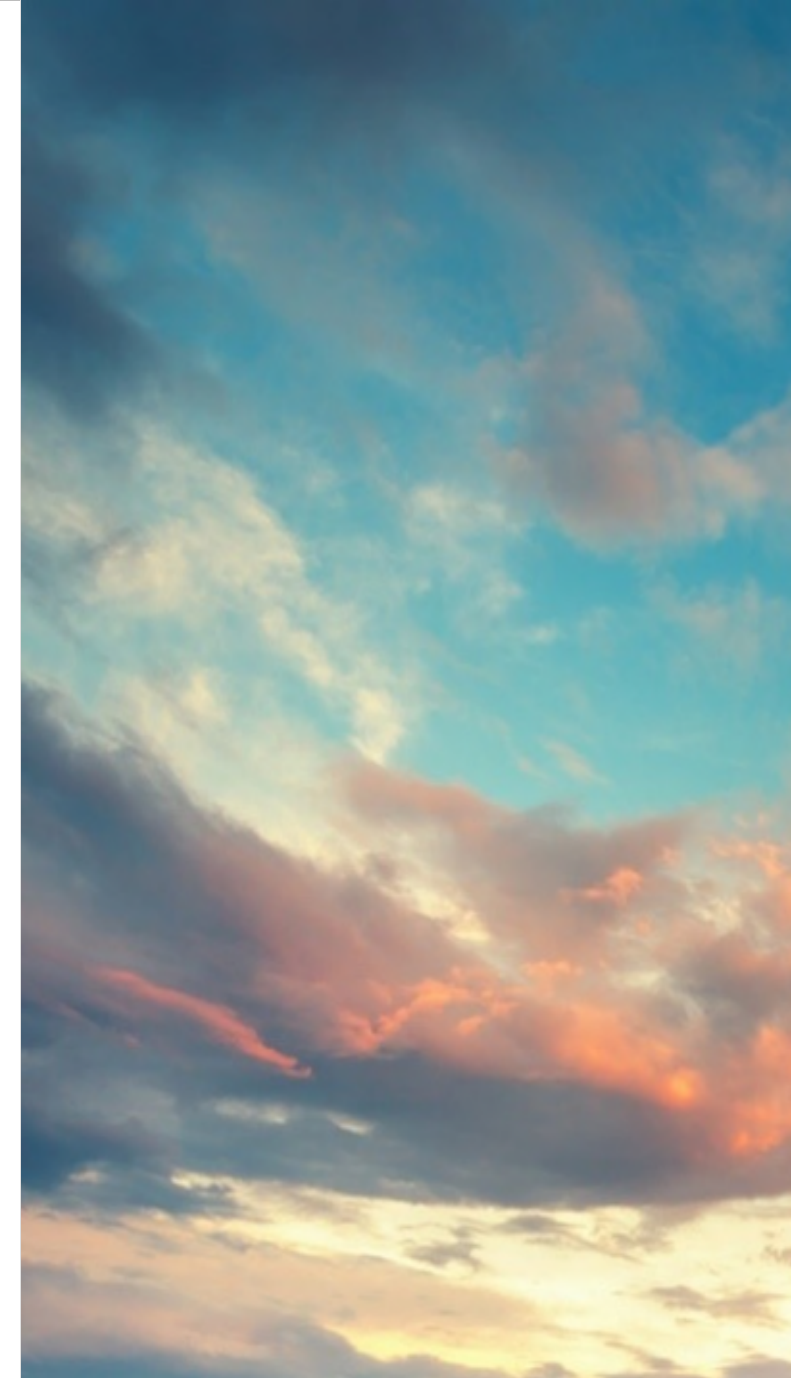
Case Study Scenario 1: **Staff harming service users**

What if...

- there was injury or death of the client or other colleagues caused by a staff not working in accordance with the guidelines

Examples:

- Negligence on the part of the staff of a rehabilitation minibus
- Failure to take into account the client's ability to challenge himself/herself in the course of a sports activity, resulting in injury or death of the client due to the staff's persistent encouragement of the client to challenge himself/herself



Child Abuse

- 1,394 child abuse cases in 2023, a 12.3% increase from the year before

Cases in NGOs:

- Abusing a child repetitively, including stomping on the child's face and repeatedly hitting the child's mouth with a water bottle in 2023
- Staff abusing children at Children's Residential Home in 2021
- Pre-school center for children with special needs



Elder Abuse

- Currently no legislation in Hong Kong specifically tailored for elder abuse.
- *“Procedural Guidelines for Handling Elder Abuse Cases (Revised 2021)”* prepared by the Social Welfare Department
- For general application only and are not limited to instances of elder abuse

Source: [Procedural Guidelines for Handling Elder Abuse Cases \(Revised 2021\)](https://www.swd.gov.hk/en/procedural-guidelines-for-handling-elder-abuse-cases-revised-2021) (swd.gov.hk)





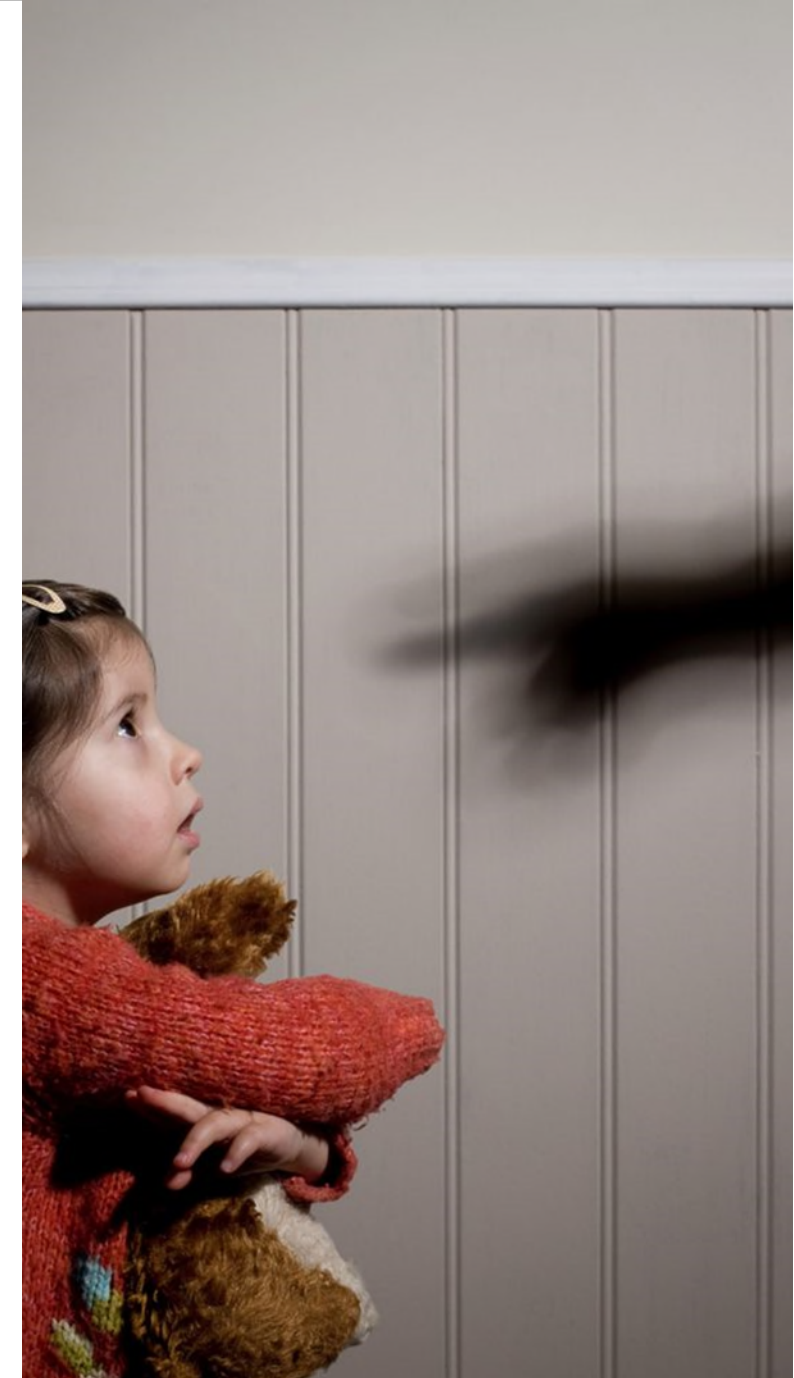
Case Study Scenario 2: **Failure to report misconduct**

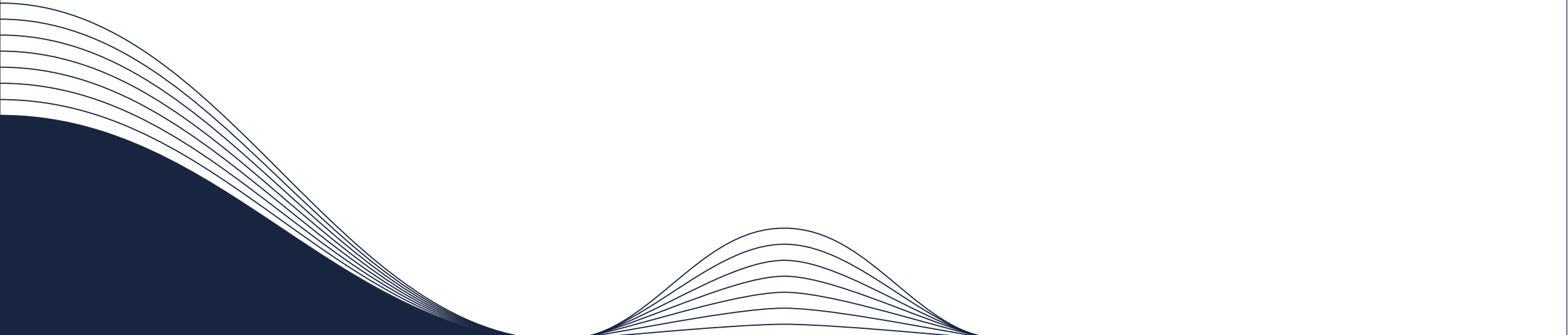
What if staff fails to report misconduct?

The Mandatory Reporting of Child Abuse Bill

- Professionals in social welfare, education and healthcare sectors who fail to report incidents involving physical, psychological and sexual abuse of children, as well as neglect, face up to a HK\$50,000 fine and three months in prison
- Must file reports as soon as they are aware of suspected cases
- Also applies to those who obstruct the making of report or disclose identity of specified professionals who made them

Source: [Cap. 650 Mandatory Reporting of Child Abuse Ordinance \(elegislation.gov.hk\)](http://elegislation.gov.hk)





Tips to Avoid/Limit Liability for NGOs/Directors of NGOs

Preventive measures against staff misconduct

1. Sufficient Internal Training, Internal Controls and Supervision

- Regularly train staff and directors on legal obligations, ethical standards, and risk management.
- Ensure staff are aware of complaint handling procedures.
- Establish robust internal controls.
- Review and update procedures to adapt to changing risks.
- Effective supervision of staff by managers and directors.
- Address issues, once arisen, promptly and transparently.



2. Staff Declarations

- Require staff to disclose potential conflicts of interest.
- Obtain declarations related to financial interests, family relationships, and other relevant matters.
- Use declarations to assess risks and take preventive measures.

3. Whistleblower Protection

- Establish a confidential whistleblower policy.
- Encourage staff to report misconduct without fear of retaliation.
- Investigate whistleblower complaints thoroughly.



4. Board Oversight

- Engage the board of directors in risk management.
- Regularly update the board on compliance efforts and risks.
- Ensure board members understand their legal responsibilities.
- Conduct regular checks to assess compliance with policies and procedures.

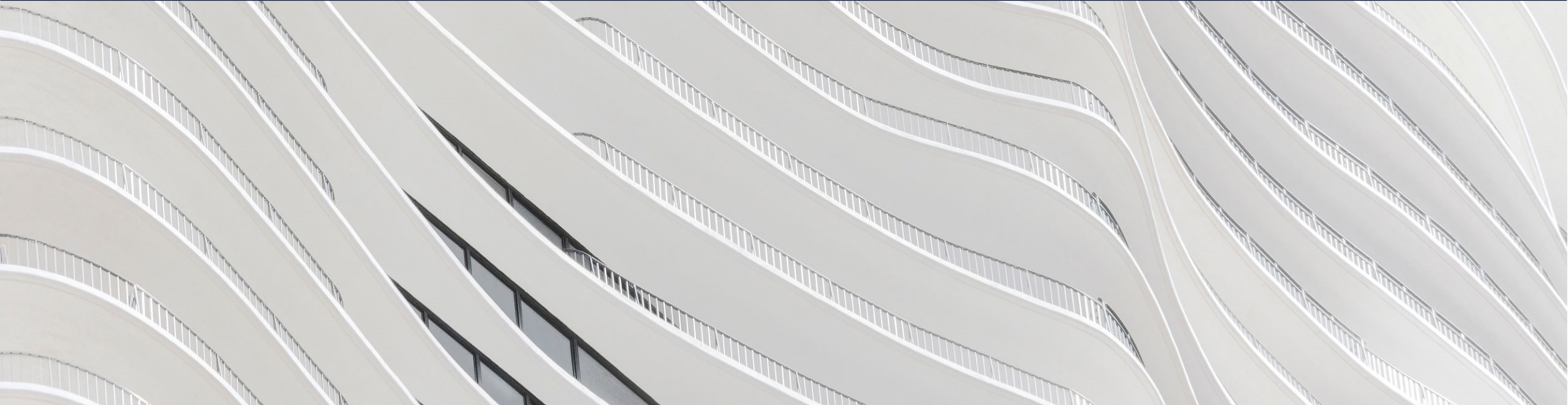


5. Insurance Coverage

- Explore liability insurance options for directors and officers (D&O insurance).
- Understand the coverage limits, exclusions, and reporting requirements.



Q&A



Thank you

Disclaimer: Each case turns on its own facts, and the information provided here is not to be construed as legal advice. It is always recommended to consult with a lawyer for personalized legal guidance.