

Employee Liability

Some may be unaware that employees may have a personal liability for any negligence in the course of employment. Although new legislation now in place in NSW provides increased protection to employees, the legal ramifications do vary from state to state.

In the absence of any relevant legislation, an employee committing a tort while carrying out employment duties will remain primarily and directly responsible to compensate in damages any third party suffering loss as a result of that loss. This liability is independent of any vicarious liability imposed on the employer by reason of the fact that the tort was committed in the course of employment.

Generally speaking, vicarious liability is a form of liability imposed upon a person responsible for the misconduct of another, such as an employer, even though the employer is free from personal blameworthiness or fault. An employer can only be vicariously liable for the negligent actions of an employee if the negligent acts occur in the course of the employee's employment. Understandably, there are often difficulties in determining whether a particular action actually falls within the course of employment.

Where an employer is held vicariously liable for the actions of an employee it may recover from that employee any damages awarded against it (the employer). This principle was established in 1957 in the case *Lister v Romford Ice and Cold Storage Company Limited* (1957) AC 555, in which an employee was injured as a result of the negligence of another employee, Lister. The employer was held vicariously liable and compensated the injured employee. The employer then brought proceedings against Lister.

An employee may be relieved from personal liability where the employer is vicariously liable if it can be demonstrated that the employer is liable to protect the employee against any loss arising out of a claim made against the employee. This indemnity will apply in three situations:

1. As a result of an express stipulation in the contract of employment. Such a provision is encountered rarely although it could conveniently be included in Industrial Awards.
2. Where the employee can establish that there is an implied obligation in the contract of employment on the part of the employer to extend such indemnity. The courts would be prepared to imply such a term where the employee committed the tortious act as a result of carrying out an express and explicit order given by the employer.
3. Under the terms of legislation enacted in New South Wales, South Australia and the Northern Territory in an attempt to overcome the

effects of the decision in *Lister v Romford Ice and Cold Storage Company Limited*:

- (a) New South Wales *Employee's Liability Act 1991* passed on 22 April, 1991.
- (b) South Australia *Wrongs Act 1936-1975* by virtue of the *Statutes Amendment (Miscellaneous Provisions) Act 1972*.
- (c) Northern Territory *Law Reform (Miscellaneous Provisions) Act 1956* by virtue of an amendment Act in 1984.

All of these Acts only apply to contracts of employment in the states or territory in which they were enacted.

Further protection for the employee is provided under the *Insurance Contracts Act 1984*. Section 66 of the Act prevents an insurer, under a contract of general insurance, from being subrogated to the rights of the insured against an employee of the insured unless the conduct of the employee which gave rise to these rights was serious or wilful misconduct.

The *Insurance Contracts Act 1984* does not, however, apply to contracts of insurance that relate to workers' compensation or compensation for death of or injury to a person arising out of the use of a motor vehicle. For example, if an employee injured a fellow employee and compensation was paid by a workers' compensation insurer to the injured employee, the insurer is not prevented from taking action against the negligent employee (except, of course, where prevented by the state legislation detailed above).

In addition, this Act has no effect on the employer's rights to take direct action against an employee.

South Australia and Northern Territory

The relevant provisions of the South Australian and Northern Territory Acts provide that an employee shall not be liable to indemnify an employer in respect of its vicarious liability. The Acts also require the employer to indemnify the employee for any tortious liability where the employer is vicariously liable, unless the employee is otherwise entitled to indemnity (e.g. under an insurance policy). These provisions do not apply if the tortious act occurs as a result of the employee's serious and wilful misconduct.

Under the South Australian and Northern Territory Acts the employer is subrogated to the rights of its employee under any insurance policy held by the employee which covers such liability.

New South Wales

The *Employees' Liability Act 1991*, assented to by the State Government on 22 April, 1991 provides that an employer is not entitled to seek from an employee an indemnity in contract or contribution as a tortfeasor (person guilty of tort). It provides that, where a tort victim

recovers damages directly from an employee, the employee is entitled to an indemnity from the employer unless the employee is otherwise entitled to an indemnity in respect of liability (e.g. under an insurance policy).

The Act also abolishes the action in tort that an employer may have to recover damages from an employee based on the loss of the services of any injured fellow employee.

This is all tempered somewhat by the fact that the employer is subrogated to the rights of its employee under any insurance policy held by the employee where the employer is proceeded against for the tort of his or her employee. In addition, the Act does not apply to any tort committed as a result of the serious misconduct of the employee or of conduct not related to employment.

All Other Australian Jurisdictions

In all other states and territories, each employee should protect him or herself by ensuring that there has been an understanding reached with his or her employer that, if loss or damage to others or to the employer is sustained in circumstances where insurance has been effected by the employer to cover any resultant loss, no proceedings by way of indemnity or recovery will be initiated by the employer directly against the negligent employee.

This does not, however, overcome the problem in respect of policies to which the *Insurance Contracts Act 1984* has no application (i.e. workers' compensation and motor third party injury policies) where there is nothing to prevent the insurer from instituting proceedings against an employee. One exception to this is in Tasmania where the workers' compensation insurance policy arranged by an employer also indemnifies the employee in respect of liability for injury suffered by a fellow worker. Also, of course, all compulsory motor third party insurance policies indemnify both the owner and the driver of a vehicle causing injury.

In actual fact, few cases involving recovery action against negligent employees have been brought before the courts in recent times, and it would probably be only in cases of serious or wilful misconduct on the part of the employee that this would happen.

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