

Employers liability in negligence



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Employers Liability in Negligence •May be personally liable to employees who injure themselves. •May be personally liable to employees who are injured by another employee or sometimes by an independent contractor employed by the employer.

•May be vicariously liable if one employee is injured by another employee.

NOTE: •Employees may also be able to recover from statutory workers compensation schemes. •Employees' rights at common law may be restricted by the same schemes. •e.

g. WorkCover Queensland Act 1996 Other Possible Causes of Action Against an Employer The tort of breach of statutory duty (separate tort). •Breach of an express or implied term of the contract of employment (contracts). •Non-employees may be able to sue an employer on general negligence principles or in some other select duty category.

•Employers may be vicariously liable to non-employees injured by employees. Summary •An employer may be: •Personally liable in negligence to injured employees and third parties; •Vicariously liable to employees and third parties injured by employees; •Liable otherwise e. g. breach of statutory duty. Why may employers be liable to employees both personally and vicariously? One answer: personal liability relates to negligence only; vicarious liability also relates to other torts e.

g. conversion. •More importantly: the historical context of the unholy trinity of defences once available at common law to protect employers from liability to employees in negligence actions. The historical context •The earliest English legislation was designed to prevent the workers who had survived

the ' Black Death' of 1348 from demanding wage rises and/or leaving their current employer. •In the 17th century, it was legally permissible to discipline with a cudgel but not a sword.

•The 19th century: Industrial revolution (started c1750). •Relationship of master and servant is based upon the law of contract. •Jeremy Bentham and the philosophy of laissez faire i. e.

there should be no restriction on freedom of contract. •Legislation preventing workers collectives (i. e. trade unions). The unholy trinity

•Common Employment: •Based upon a fictitious term in the employment contract that servants accepted the natural risks of employment including the natural risks of employment including negligence by fellow employees.

•Volenti non fit injuria: •Will only be available today in the most extreme cases e.

. ICI v. Shatwell •Contributory Negligence: •Abolished by statute as a complete defence. Common Employment •Doctrine did not apply where the master had breached a personal duty of care •Therefore, as the courts became more sympathetic to servants the notion of a personal duty was expanded. •Contributed to the development of workers compensation legislation. •Common employment as a defence was legislatively abolished in the mid 20th century.

The Employment Category •The duty is owed through precedent, an established duty category. •It is the content and scope of that duty which may be contentious. Traditionally the duty owed has been divided into 3 aspects: •Proper plant, appliances and works; •Competent selection of staff

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(established in *Wilson v Tyneside Window Cleaning*); • Safe system of work.

NOTE: • There are no fixed technical rules and decisions in similar cases are only a guide.

• Need to balance the relevant factors because the risk is usually foreseeable. • Expert evidence is not conclusive. • Re the nature of the relationship compare: *Raimondo v. State of SA (1959)* *Bankstown Foundry v.*

Braistina (1986) *Bus v. SCC (1989)* *Raimondo's Case (1959)* • The nature of the relationship is not one of 'nurse and imbecile child'. Experienced painter and the risk of injury was very slight. • Employee could appreciate risk of injury as much as the employer. • Unlikely that warning would have made any difference. • Therefore, employer not found liable.

• Esp. at page 517/8. *Braistina's Case (1986)* • Appeal by the employer against: 1. The finding of liability. 2.

The finding of only 10% contributory negligence. • Dismissed the appeal: 1. P conduct must be judged in the context of the finding of D's failure to provide a safe system of work. 2. P's conduct was mere inadvertence, inattention or misjudgement.

• Leading Authority presently. At page 310, "Once it is accepted that such use [of such hoist] would eliminate the risk of injury, it necessarily follows that a prudent employer exercising reasonable care would require that it be used." • The employer must insist on a safe system, if it is not used, must sack the employee. *Bus v.*

S. C. C. (1989) • “The law has progressed by placing an increased emphasis upon the relevance of the possibility of negligence or inadvertence on the part of the person to whom the duty is owed” at page 90. • Defendants must anticipate carelessness on the behalf of others. Premises and Tools • Davie v.

New Merton Board Mills • The plaintiff got hit in the eye by a piece of a chisel, the employer was not liable because: • The defect in the tools was not discoverable on reasonable inspection AND • Bought from a reputable manufacturer. Wilson v Tyneside • Employer not liable because: • P experienced window cleaner. • D did issue warnings in writing and orally. • Duty not so high when premises not Ds.

• P had cleaned those windows before and knew them to be unsafe. • Checking was not the trade practice. Smith v. Austin Lifts • Employer 20% and owner 80% liable.

• Had reported the defective door four times. Employer had reported defect to owner by the owner had done nothing. Halley’s Case • Employer liable when employee lost both legs below the knees. • Trainee shunter (17 years old). • Given no specific warnings. • Caused by his enthusiasm and zeal to do the job.

• Since introduced a training programme. The Current Standard • Braistina’s Case (1989) • High Court’s explanation that the changing and higher standards placed on employers reflect community standards as to the responsibilities of employers and as to who should bear the cost of compensating injured employees at pages 309 & 314. Workers

Compensation Legislation An example of the tension between judicial and legislative law making. •Based on strict liability i.

e. there is no need to prove negligence on the part of the employer, fault is irrelevant. •Liability must arise out of or in the course of employment.

•Causal or temporal link with employment.

•Covers physical injury and disease. •Aggravation or acceleration of disease.

•In some jurisdictions mental suffering. Provides For: •Periodic payments for loss of earnings for a specified period. •Then further reduced until cuts off.

•Hospital and medical expenses.

•Death benefit for dependants. •Lump sum for the loss of a bodily function or part. For example: •loss of nose \$25 775 •loss of smell \$12 600

•paraplegia \$92 790 •quadriplegia \$103 100 •genitals \$50 300 •loss of kidney \$10 310 •loss of fertility \$15 465 •loss of sexual function \$30930

Generally: •An injured employee has 2 avenues of compensation: •Workers compensation. •Common law claim for damages less workers compensation. •Recent changes have included: •Caps on the amounts of damages.

•Complete bans on employee's access to Common Law. •Restrictions on common law actions: •Re types of compensation recoverable. •Re making choice between workers comp and the common law. Substantive and procedural modification of common law. WorkCover Queensland Act •A more restricted definition of a worker.

- Someone who works under a contract of service AND is a PAYE employee.
- Compensation for work related impairment of less than 20% •Must irrevocably choose to either accept the WorkCover lumpsum entitlement or sue the employer at common law. •non-certifiable injury (less than 20%) •All common law actions against employers are now subject to Ch 5 – ‘ Access to Damages’ – which modifies the common law in regard to: •Nature of liability; •Nature and quantum of damages; •Orders as to cost; Procedural matters.
- For example Liability: •If common law actions is based on the failure to provide a safe system of work, must prove that the employer “ made no genuine and reasonable attempt” to put such a system in place.
- That the event giving rise to the injury was not solely as a result of “ inattention, momentary or otherwise, on the worker’s part” The Employer’s Duty An Employee: •At common law the contract of employment is a contract of service. •Generally this means that the employer has lawful authority or control over the employee. •Also that the employer is vicariously liable. Vicarious liability is based upon the notion that the employer is the best loss spreader. •A Contractor: •An independent contractor has with the employer a contract for services. •Generally this means that the employer has no authority or control over how the contractor provides the services required.
- At common law the employer cannot be vicariously liable for the acts of a contractor. •The employer of a contractor will only be liable if the person duty is, in law, non-delegable. •An Employers: •For employers the duty owed to an employee is non-delegable. •The employer’s personal duty is to take care e.

g. o set up a safe system of work. •The non-delegable aspect of that duty is to ensure that the contractor takes care e. g. to set up a safe system of work. Kondis v.

State Transport Authority (1984) Kondis v. STA •Kondis was Ds employee and injured by the negligence of an employee of an independent contractor. •D cannot be held vicariously liable for the negligence of the employee because he was not Ds employee. •D was nevertheless liable because it was in breach of its duty on the basis that it was a non-delegable duty and so D was required to ensure that care was taken by the independent contractor and its employees.

Therefore: •If an employee is injured through his or her own negligence then the employer may be liable because: •It breached its personal duty of care e. g. failure to provide a safe system of work => Braistina's Case •Note: simply hiring the employee will not constitute a breach of the duty. •If an employee is injured by the negligence of another employee then the employer may be liable because: •It breached its own duty of care (e. g. failure to provide a safe system of work). •The employer is vicariously liable for the actions of the other employee e. g. Bus v. SCC •If an employee is injured by the negligence of an independent contractor then the employer may be liable because: •It breached its own personal duty of care e. g. failure to provide a safe system of work. •It breached its non-delegable duty of care e. g. to set up a safe system of work e. g Kondis v.

STA The Delegation Exception •The employer's personal duty may, in very clear circumstances, be delegated to the employee who is subsequently injured by his or her own negligence. •In those circumstances the employer will not be liable. *Witham v. Shire of Bright* •The delegation must be by mutual agreement. The employee must be properly skilled and an appropriate delegate.

•The whole of the aspect of the duty must be delegated. •The employee must be injured by reason of his or her own failure to properly fulfill the delegated task. Consider...

•What happens when the employer and the employee are arguably the same person? •*Nichol v. Allyacht Spars Pty Ltd* •P was director of D who was injured whilst employed by D •Held that D not liable to the extent that P was responsible for the design of the system of work. •This found to be 40%
•Compare *WorkCover*, where directors are excluded from recovery.