Common Law Liability

Michael Bannister
Common Law Claims Manager
18 April 2013
Introduction

Most common law damages claims are pursued on the basis that an employer is liable for the claimant's injuries because the injuries were caused by the employer's:

(a) breach of contract; and/or
(b) negligence; and/or
(c) breach of statutory duty prescribed by the Workplace Health & Safety Act 1995 (Qld) (WPHSA).
One issue is that often significant, but not a question of law, is whether the incident actually occurred as alleged. The possibilities include:

(a) the incident was witnessed and there is direct evidence to corroborate the claimant;

(b) the incident was witnessed and there are different accounts;

(c) the incident was not witnessed, but there is no evidence to contradict the claimant's account; or

(d) the incident was not witnessed and there is evidence that contradicts the claimant's account e.g. a contemporaneous medical record.
Reversal of Bourke

This is possibly the most significant case in the last few years.

If an employer can show that they took all reasonable and necessary care, it is then for the Claimant to show what steps could have been taken that would have resulted in the accident not occurring.

Whilst there is no longer a cause of action for breach of statutory duty, the standard of care imposed on an employer has always been high and WHSA and Codes of Practice are not irrelevant. A Court will still look at the “reasonableness” of an employer’s conduct.
Duty of Care

Employers’ duty to take case and to protect an employee against foreseeable risk of injury – this scope includes;

a duty to provide a safe system of work;

a duty to provide a safe place of work; and

a duty to provide safe plant and equipment

In discharging its duty, the employer must have regard for an employee’s misjudgement, inadvertence or inattention. The high standard of care can be looked at on a similar basis as a teacher/student or a doctor/patient relationship. It is that high.
A duty to provide a safe system of work

The employer's duty of care requires the employer to not only provide a safe system of work, but to establish, maintain and enforce a safe system of work.

When injury at work can be seen to have been caused by the mode of carrying out some particular activity, then it can be alleged that the employer has failed to provide a safe system of work.

Case example - *Bankstown Foundry Pty Ltd v Braistina* (1986) 160 CLR 301- a hoist which would have avoided the risk of injury was available to be used by the injured employee. It was held that a safe system of work would not only include access to a hoist for heavy work but also a direction that the hoist had to be used and enforcement of that direction.
A duty to provide a safe place of work

An employer's duty of care extends to ensuring the safety of the employer's premises, any premises used in connection with the employment and pathways which are used as a regular means of access to the employer's premises.

Further, when an employee carries out work at the premises of a third party, the employer must take reasonable steps to ensure the third party's premises are safe.

ACI Metal Stamping and Spinning Pty Ltd v Boczulik (1964) 110 CLR 372

Sinclair v William Arnott Pty Ltd (No 2) [1964] NSWR 748

An employer's duty of care with respect to plant and equipment extends to the exercise of reasonable care in its maintenance and repair, although it does not extend to defects in plant that the employer buys from a reputable vendor or manufacturer, where the defects were the product of the manufacturer's negligence.

The duty requires an employer to exercise reasonable skill and care to ensure that plant and equipment is not unsafe due to inappropriateness for a particular use.

Further, an employer must provide its employees with proper safety equipment, protective clothing and other aids or devices as far as reasonably necessary to prevent foreseeable risks of injury.

Lepore v New South Wales (2001) 52 NSWLR42
Foufoulas v FG Strang Pty Ltd (1970) 123 CLR 168 at 172
Lincoln Electric Co Pty Ltd v Taylor (NSWCA, 8 September 1981, unreported)
Instruction, training and supervision

In discharging its duty of care, initial training by an employer may be insufficient and an ongoing system of training may be required.

It is necessary for an employer to take into account the personal characteristics of the employee, is required to instruct new employees in the safe and correct operation of plant and equipment. An employer also must ensure the proper coordination and supervision of employees.

*Bux v Slough Metals Ltd* [1974] 1 All ER 262
*Fox v Hack* [1984] 1 Qd R 391
*Laybutt v Glover Gibbs Pty Ltd t/as Ba/fours NSW Pty Ltd* (2005) 79 ALJR 1808
*Mambare Pty Ltd v Bell* [2006] NSWCA 332
Non-delegable duty of care

The employer cannot delegate the discharge of its duty of care to another party.

This means that a duty of care attaches to the employer regardless of personal fault on its part, as long as the employee proves that damage was caused by lack of reasonable care on the part of someone within the scope of the relevant duty of care.

*Kandis v State Transport Authority* (1984) 154 CLR 672
*TNT Australia Pty Ltd & Ors v Christie* (2003) 65 NSWLR 1
Case Example: In the case of *TNT Australia Pty Ltd & Ors v Christie*, the plaintiff was employed by an employment agency (Manpower Services). Manpower assigned the plaintiff to work at a brewery operated by TNT. The plaintiff was injured when a walk-behind forklift he was using to pick up beer orders malfunctioned and moved backwards over his foot. The pallet jack was owned and serviced by Crown Equipment and leased to TNT. The plaintiff sued both Manpower and TNT. The court held that both TNT and Manpower owed the claimant non-delegable duties of care, which they breached by virtue of Crown Equipment's failure to detect and/or repair the pallet jack. Accordingly, even though the plaintiff was working at TNT's premises, pursuant to TNT's established system of work and under its direction and supervision, Manpower was held liable as the plaintiff's employer pursuant to its non-delegable duty of care.
In considering whether an employer has breached its duty of care to an employee, the following issues are pertinent:

was the risk of injury sustained by the employee reasonably foreseeable? (foreseeability)

if the risk was reasonably foreseeable, were there reasonably practicable means of removing the risk? (preventability)

if there were reasonably practicable means of removing the risk, did the employer act reasonably in not adopting those means? (reasonableness)

If the risk of injury was reasonably foreseeable and the employer did not act reasonably to remove the risk, it will be found to have breached its duty of care.
A 'foreseeable danger' is one which a reasonable person in the employer's position would have foreseen as involving a risk of injury to the employee arising from the employer's conduct. It is not far-fetched or fanciful although it may still be foreseeable even if it is quite unlikely to occur.

Foreseeability is usually only an issue in cases of pure psychiatric injury and seemingly innocuous activities. Section 305B of the WCRA deals with the issue of foreseeability.

*Wyong Shire Council v Shirt* (1980) 146 CLR40
Preventability

At common law, an injured employee bears the onus of establishing a reasonably practical alternative system of work to that prescribed by the employer.
Importantly, this onus may be discharged if there has been a change in the system of work since the injury.
Following the Bourke reversal, Section 305C provides, for incidents occurring after 1 July 2010, that a subsequent change "does not, of itself, give rise to or affect liability."

Green v Hanson Construction Materials [2007] QCA 60
Neill v New South Wales Fresh Food and Ice Pty Ltd (1963) 108 CLR 362
At common law, an employer's duty is to act 'reasonably'. That is, to take reasonable care for its employee's safety, rather than to safeguard against all perils.

Accordingly, once it is established that an alternative system of work would have avoided the risk of injury, the employer can still escape liability if its response in not adopting the alternative system was reasonable.

Where it is possible to guard against a foreseeable risk of injury by adopting a system which involves little difficulty or expense, the failure to adopt such a system will in general be negligent.

Finn v The Roman Catholic Trust Corporation for the Diocese of Townsville [1997] 1 Qd R 29

Wyong Shire Council v Shirt (1980) 146 CLR40 at47-8

Turner v South Australia (1982) 42 ALR 669
In assessing a particular claim, the essence of what you must consider is:

a) what did the employer (or someone for whom the employer is liable) fail to do that they should have done; and/or

b) what did the employer (or someone for whom the employer is liable) do that they should not have done.

Section 305B of the WCRA restates the principle of reasonableness.
Lusk v Sapwell

The Court of Appeal set aside a judgement at first instance which awarded approximately $390,000.00 in damages for breach of duty. The plaintiff was assaulted by an elderly male customer while working as an optical technician. She brought a claim in negligence against her employer after developing post-traumatic stress disorder caused by the assault. The primary judge found that the plaintiff had been left in a vulnerable position by the employer's failure to install an exclusionary mechanism in the workroom. On appeal, it was held that the primary judge may have focused unduly on the circumstances of the incident rather than on the response of a reasonable person in the position of the employer having regard to the prospect of the risk of injury. The Court of Appeal found that having regard to the very slight magnitude of the risk of a female employee being assaulted and the practical difficulties with the exclusionary mechanisms advanced, it had not been shown that the employer breached their duty to the plaintiff.
Vicarious liability

An employer is liable for the negligence of an employee where that employee's act or omission is within the course of his/her employment. It has been suggested in some cases that the liability of agents and servants is the same.

Accordingly, if an employee is injured by the act of a co-employee during the course of their employment, the employer will be liable for the conduct of the co-employee. Whilst vicarious liability will not extend the liability of an employer for actions of an employee that are outside the scope of his/her employment, it will extend to acts that are sufficiently connected to the employment even if they are in some way improper.

*Heatons Transport (St Helens) Ltd v Transport & General Workers' Union* [1973] AC 15

*New South Wales v Lepore* (2003) 195 ALR412
At common law, an injured employee must establish that the employer's breach of duty was a material cause of the employee's injury. Without this causal link, an employee's claim against his/her employer will fail. In general, causation will be established if it appears that the employee would not have injured him/herself had the employer not been in breach of its duty.

As a practical example, an employee may establish that an employer breached its duty of care by failing to provide certain training that a reasonable employer would have provided. To establish causation, the employee must go on to prove that, had the relevant training been provided, they would not have been injured.

*March v E & MH Stramare Pty Ltd (1991) 171 CLR506 at 514*

Section 305D of the WCRA
Contributory Negligence

A claimant's behaviour must exceed mere inattention or inadvertence before it is considered to be contributory negligence.

Section 305H of the WCRA also provides a non-exhaustive list of circumstances in which the court may make a finding of contributory negligence.

Section 305F provides that the principles that are applicable. A court may decide on a reduction of 100% if the court considers it just and equitable. (s305G WCRA)

There is now a presumption of contributory negligence if the person who suffers injury is intoxicated. (s305J WCRA)

_Czatyrtio v Edith Cowan University_ (2005) HCA 2005
_Reck v Queensland Rail_ [2005] QCA 228
Case discussion

Steps removed from right, Claimant stepped through door and fell to the ground, sustaining significant upper limb injuries.

Employer negligent?
Case discussion cont.

Investigations revealed;

Claimant was in charge of the crew that removed the stairs.
Claimant instructed the crew to remove the stairs.
Claimant assisted the crew to remove the stairs

Employer still negligent?
Further information required?
Case discussion cont.

Further evidence revealed that;

Stairs were dismantled at 8.30 pm and accident occurred at 9.45 pm. There were no systems in place prior to the accident for doors to be locked, tagged or warning signs displayed. Post accident, doors are secured, tagged and warning signs displayed.

Employer liable?

Relevant that system changed post accident?
Case discussion cont.

Contributory negligence?

How much in percentage?