Can an Employee be Sued for their Workplace Negligence?

In an industry where small mistakes can cost millions of dollars, it is not an uncommon question to ask whether an employee can be sued for their workplace negligence, either by another employee, their own employer, or a third-party (such as a bystander). Despite the importance of this question, it has never, in my experience, been addressed by an article readily available to mariners in British Columbia, hence it is the topic of this month's Legal Desk.

Suits for Personal Injury:

While in most cases, the *Workers Compensation Act* of B.C. prevents both an employee and an employer from being sued *by another employee* for causing *personal injury* on the job, this bar to suing applies only to events of "*personal injury, disablement or death arising out of and in the course of employment*" (s.10 *Workers Compensation Act*). I say "in most cases" because whether the *Workers Compensation Act* applies to a particular marine employee is occasionally debatable, depending on where the contract of employment was formed, where the work the work is carried out, and other more subtle factors. Generally, however, an employee cannot be sued by their employer or another employee (even an employee of a different employer) for personal injury or death caused by their at-work negligence.

Importantly, however, the *Act* does not prevent a *third-party* from suing the employee for personal injury or death, unless that third party was a "worker" and their injuries "arose out of and in the course of employment". Take for example a longshoreman, operating a forklift on a dock, whose machinery malfunctions and collides with a tourist – the longshoreman could be sued by the tourist. However, if the injured party was another longshoreman or other type of worker involved in their work at the time, the driver of the forklift could not be sued.

Suits for Property Damage:

The bar to suing an employee provided for by the *Workers Compensation Act*, however, is limited to law suits for "*personal injury, disablement or death*". In other words, the *Act* does not stop an employer, another employee, or a third-party from suing an employee for causing property damage in the course of their employment. However, simply because the *Workers Compensation Act* does not prevent such a law suit does not mean that, once the law suit has been started, the court will hold the employee personally responsible for the damages. As discussed below, broad public policy considerations have developed to protect employees by

requiring that their employers be liable for the employee's at-work negligence – this is referred to as "vicarious liability" of the employer.

The Employer's Vicarious Liability (for Employee's negligence)

The vicarious liability of an employer (for an employee's negligence) developed in law for several reasons. Most obviously, employers generally have more money than employees – this allows employers to more easily absorb the cost of paying damages for injury or property damage as a cost of doing business. From an injured party's perspective, this is important because a judgment for injury or property damage against an employee who has no money does little good – whereas, if the employer is vicariously liable, they can recover the money from the employer (who typically has insurance) for the employee's negligence. The second of several reasons is that, in an employment relationship, it is the employer that generally has control over the working environment and how the work is carried out. Because of this, the law views the employer as being in a better position than the employee to minimize the risk of injury or property damage. The law has translated this higher degree of control by the employer into a higher degree of responsibility for any resulting accident – hence the employer can be sued for the employee's negligence. In cases where a negligent employee causes personal injury or property damage to a third-party (someone other than another worker) in the course of work, the injured party and the court will often look directly to the employer to pay damages, and the negligent employee will not be named as a defendant.

Can the Employer Sue the Employee for Money it has to Pay for the Employee's Negligence?

Mariners who work in a unionized environment are sometimes protected from their employer suing them for property damage caused by the employee's negligence by express provisions in the collective bargaining agreement. However, for the many mariners who are not unionized, there is a concern that they can be sued by their employer for damage to the employer's property, or monies paid to third-parties as a result of personal injury or property damage the employee causes to third parties. For example, the mate of a tug runs into a pier damaging both the tug and the pier. Can the mate be sued by the employer (or the employer vessel's insurance company) for damage to the vessel, or for money they have to pay to the third-party to repair the pier? A momentary lapse of attention can cost millions of dollars.

A June 2008 case from the Ontario Court of Appeal (*Douglas v. Kinger*) addressed this issue (though on different facts), when the owner of a boathouse sued his employee for burning down the boathouse and its contents - a loss of $285,000. The court recounted how the loss occurred

(which I can't resist reprinting) when it said: "*because [the defendant] was unsure whether the gas can, which was stored in the boathouse, contained enough fuel... he held a lighted match to the mouth of the can to peer in and check the gasoline level...the flame ignited the vapours*".

This case had yet to come up for a Darwin Award. In finding that the employee could not be sued by the employer for the property damage, the court held that generally an employee could only be liable to an employer for their damages in cases where the employee is *grossly negligent* and commits an *intentional wrongdoing*. Simple negligence is where one's conduct does not meet the standard of a reasonably prudent person in the circumstances, while gross negligence is an unrestrained disregard for consequences or where ordinary care is not taken in circumstances where, as a result, injury or grave damage is knowingly likely (in the Douglas case the court found that because the defendant was an adolescent his lack of knowledge could not make him grossly negligent). Dangerous operation of a vessel (like that discussed in July 2008 *Mariner Life*) is an example of gross negligence where the employer can likely sue the employee.

In closing, it is important to point out the above discussion relates to "employees". An employee is distinct from a "contractor", who typically has more control over their work and assumes more risk than an employee. While a contractor is legally distinct from an employee, an employer can still be liable for the negligence of a contractor - this is because the law may recognize the contractor as an "agent" of the employer, and parties can be vicariously liable for the acts of their agents. Most importantly, however, is that the same broad policy considerations that act to protect employees from being sued by their employers, do not apply to contractors. In part this is because the law expects, correctly or not, that contractors are in a better position than employees to negotiate higher remuneration to compensate for the risk they may be sued by the employer. In other words, contractors can be sued by their employer for even simple negligence.

In a future Legal Desk we will discuss other important differences between "employees" and "contractors", as well as some of the legal and financial benefits, and drawbacks, to being one versus the other.

Darren Williams is a marine lawyer with Williams & Company in Victoria and can be reached for question or comment at dw@MarineLaw.ca, or toll-free at 1-866-765-7777, or by emergency cell phone at 250-888-0002.