

LEGAL DESK

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Liability of Employees for Workplace Negligence

Whether you are a longshoreman, deckhand, marine engineer, ship's officer or shipping executive, you have likely asked yourself, "can my employer sue me for my workplace mistakes?". In an industry where small mistakes can cost millions of dollars, 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), is a question that is often asked, but seldom answered... until it is too late.

Suits for Personal Injury: While in most cases provincial workers compensation legislation prevents both an employee and an employer from being sued by another employee for causing personal injury on the job, this bar to suing typically applies only to events of personal injury, disablement or death arising out of and in the course of employment. This law does not prevent a third-party from suing the employee (or their employer) for personal injury or death, unless that third-party was a worker and their injuries arose in the course of their employment. Take for example a longshoreman, operating a forklift on a dock, whose machinery malfunctions and collides with a bystander – the longshoreman could be sued by the bystander. 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 (and their employer) could not be sued.

Suits for Property Damage: The bar to suing an employee provided for by workers compensation legislation is typically limited however to law suits for personal injury, disablement or death. In other words, the law does not generally stop an employer, another employee, or a third-party from suing an employee for causing property damage in the course of their employment. For example, the engineer of a tug mistakenly pumps the oily bilge overboard as the vessel is passing a large oyster farm, ruining the beds. The oyster farmer can sue the engineer for the property damage, even though they are both workers.

However, simply because workers compensation legislation 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 expense of paying damages for

injury or property damage as a cost of doing business. From an injured party's perspective, this is important because an award 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). 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.

Can the Employer Sue the Employee for Money it has to Pay for the Employee's Negligence? While many employees are protected by terms of their union agreements, for those who are not there is a concern that they can be sued by their employer for money paid out as a result of that employee's negligence. In the oyster farm example, the farmer sues the vessel owner and their insurer pays \$850,000 in damages. Can the engineer be sued by the employer (or the insurance company) for the money it paid to the oyster farmer?

Canadian courts have generally held that an employee can only be liable to their employer for damages caused by the employee where the employee is grossly negligent or acts in bad faith. An employee whose simple negligence (such as lapses in attention or judgment) causes damage, no matter how large, cannot be sued by their employer. It is only where the employee acts with flagrant disregard for foreseeable harm, or acts intending to cause harm, that the employer can sue the employee to recover damages. When asked to determine if an employee was grossly negligent, the courts will often give significant deference to the employee's evidence. In other words, it is a rare case where the court finds an employee grossly negligent.

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, and unlike an employee, an employer may sue a contractor for damage even the contractor's simple negligence may cause.

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