

# Common Law Liability

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## Introduction

The common law is the unenacted law built up and developed through the courts over the years into rules and principles.

Common law is not a book of rules and regulations like statute law. In a general sense, it comprises those maxims and doctrines, which have their origin in court decisions and are not founded upon statute.

Common law actions generally depend on fault on someone's part, unlike Workers Compensation, where damages are the usual remedy. Damages can be extensive whereas Workers Compensation payments are quite limited. You can however pursue both your right to Workers Compensation and your common law claim subject only to deducting from the damages award, the value of compensation benefits already received.

Tort liability exists primarily to compensate the person injured by compelling the wrongdoer to pay for the damage he has done. Actions at common law differ from Workers Compensation claims in that they require proof of negligence. Amounts of damage are assessed by examining the degree of fault, the extent of pain and suffering, any resulting disabilities and other factors.

## The Tort of Negligence

Liability for the tort of negligence rests on the plaintiff proving fault on the part of the defendant. The test of negligence is to ask whether the defendant behaved unreasonably towards the plaintiff in circumstances where a duty of care was owed.

The plaintiff must prove:

- that the defendant owed him a legal duty of care
- that the defendant has a particular standard of care expected of him
- that the defendant was in breach of that standard of care
- that the plaintiff's injury and loss arose from that breach

The standard of care adopted is that of the reasonable man of ordinary prudence.

There are three main areas where the employer can be held liable for injuries or damage suffered by an employee:

- Vicarious liability of the employer
- Personal liability of the employer
- Breach of Statutory Duty

## Vicarious Liability of the Employer

Basically, the employer is held responsible for the negligent actions of his employees in the course of their employment. A negligent employee could theoretically be sued himself, but in reality it is the employer who is sued. The employer could however have his redress by disciplining the employee (demotion, sacking, etc) or even demanding contribution. By way of example, a number of common law cases have come to court where a person being given a ride (hitchhiking) has been injured. In these cases, the employer of the person who was driving the vehicle has often been held liable.

An often quoted passage which puts vicarious liability into perspective can be found in *Poland v. John Parr and Sons Ltd* (1927) where it was said that a master is not responsible for the wrongful act done by his servant unless it is done in the course of his employment. It is deemed to be so done if it is either:

- a wrongful act authorised by the master: or
- a wrongful and unauthorised mode of doing the same act.

Cases have occurred where an employee has been engaged in a criminal or has been carrying out activities specifically prohibited by his employer and his actions in the course of his employment have resulted in an injured third party successfully obtaining damages from the employer.

## Personal Liability

In the previous case, the employer is held liable for the negligence of another. However, the employer himself owes certain duties to his employees and he will be liable for any breach of those duties which results in injury to another employee.

There are four basic duties:

- to provide and maintain competent staff;
- to provide and maintain a safe place of work;
- to provide and maintain safe plant and appliances;
- to provide and maintain a safe system of work. (A system means generally the way things are done).

### 1. The Duty to Provide and Maintain Competent Staff

There is at law an obligation on the employer to provide competent staff and competent fellow employees for the benefit of their workers. By way of example, if a man is half blind and driving a locomotive and because of his condition fails to see somebody, then that man's condition, regardless of any other factor, would enable the employee to succeed in a negligence claim because the employer is obliged to employ persons whose physical condition will not have the potential to damage other employees. Other examples of the rule are untrained foreigners who because of their inability to understand the language cannot properly go about their work; or employees who habitually engage in horseplay and whose conduct goes unchecked by the management; or similarly in the case of a person who is known to be one who habitually assaults fellow employees. So, if a person demonstrates that he is unfit to do his job without endangering himself or his fellow employees, the employer should consider all appropriate options.

There is in addition an obligation upon the employer to ensure members of his workforce are adequately trained in their jobs. If they are not adequately trained, and as a result somebody is injured as a consequence of an action that the employee would not have engaged in if he had been properly trained, then the employer will be liable for damages.

### 2. The Duty to Provide and Maintain A Safe Place of Work

Factories or any place of employment have to be reasonably safe, bearing in mind all the circumstances. For example, a wet factory floor slippery with oil is obviously dangerous. If that set of conditions could reasonably have been eliminated then there is an obligation upon the employer to eliminate it. Ladders, for example, must be securely constructed. If they are not and somebody is injured as a result, then the employer will be liable. The duty upon the employer is not to eliminate every risk with respect to the place of work, but to take all reasonable steps under the circumstances. It is impossible to give a definition at law which one can turn to and say that is all that is reasonably necessary. The employer should sensibly look at the situation and say (if it does exist) that situation is dangerous or potentially dangerous. The employer then has to determine what steps he can take to eliminate or reduce the risk of anybody being hurt as a consequence of the danger.

The real test is what is reasonable under the circumstances. The big problem of course is not always one of expense, but rather of the employer actually foreseeing the risk! In that respect, it is incumbent upon the employer to be imaginative and carefully and continuously look at the work place and ensure that it is safe as it can reasonably be.

This duty also covers change houses, washrooms which employees are entitled to use, including means of access to them.

### 3. The Duty to Provide and Maintain Safe Plant and Appliances

The broad obligation upon an employer is to purchase suitable tools from a reliable source. Any equipment that is used by employees in the course of their occupation must be entirely appropriate for the job. The Courts tend to frown upon systems that are an adaptation and inappropriate. An example is an employer who was found liable for allowing an employee to use a pickaxe in a job where a sledgehammer was the appropriate tool. When a metal chip flew off and went into the eye of an employee, even though he was wearing safety glasses, the negligence in providing the wrong tool ensured that the employee recovered damages.

Again, the general obligation on the employer is to keep himself up-to-date with modern methods. If there is better safety equipment available then the employer must at least ask the question 'Should we have that piece of equipment?'

#### 4. The Duty to Provide and Maintain A Safe System of Work

This duty is a catchall proposition that prevents the law from closing the areas of negligence open to it by rigidly defining the duties of the employer.

To affix liability on the employer for injury resulting from an unsafe system of work, the plaintiff must be able to prove four things:

1. He must be able to show that the risk of injury was reasonably foreseeable (i.e. could have been foreseen by a reasonable man - the employer)
1. The plaintiff must also prove that there was a reasonable practicable alternative which occasioned injury to him
1. The plaintiff must prove that the flaw in the system caused the particular injury
1. The plaintiff must prove that the defendant's conduct was, in all the circumstances, unreasonable

A number of miscellaneous issues arise from these four aspects:

- A The employer is judged not on the theoretical work system but on the system which actually operates at the place of employment. To be unaware of the difference between the two is no valid excuse.
- B The fact that an employer uses a system (and particularly a system used by other employers) which has a good accident record is a point in his favour.
- C The fact that the system used by the employer is one that has been superseded by a more up-to-date system used by other employers is not proof of negligence – it is simply a factor that may weigh in the plaintiff's favour. The contrary argument can be put where the employer uses a system widely used by other employers in the industry.
- D The fact that the injured employee or other employees have complained about the dangers of the system may be relevant. The contrary argument can be advanced where there is an absence of complaints.
- E The fact that the employer has introduced safety measure after an accident to prevent the recurrence of that type of accident is not proof of negligence – it merely goes to show that there was a reasonably practicable alternative open to the employer.
- F The provisions of warning notices and the giving of instructions must be adequate and reasonable in the circumstances. The employer must consider that a number of his employees may not read or speak English.
- G The failure of the employer to provide proper safety equipment e.g. protective goggles, respirators, rubber boots etc, may be evidence of negligence, as may also failure to comply with a statute or a regulation prescribing such equipment. A more difficult question is how far the employer must exhort his workmen to use safety equipment. First of all, the equipment in question must be readily available and not locked away in a shed some distance from the place of employment. Secondly, it is clear that the employer must train new and inexperienced employees and require them to wear the safety equipment provided, at least until they have become experienced in their work.

#### Level of Duty

The courts impose a high duty upon employers where the risk to the employee is a high one. The standard of care is particularly high where there is an insidious danger that can affect the employee. Examples of insidious danger are silicosis and dermatitis. By virtue of their insidious nature, the employee may not be conscious of the fact that he is either exposed to risk

of suffering harm. He may not even be aware of the existence of particles in the air that he is breathing in. He is even less likely to be aware of the fact that the floating substances will, of necessity, cause damage to the lungs. An employer, however, is supposed to be aware of these dangers if the state of knowledge of his industry is such that a reasonably competent employer would know of the dangers.

A further example in insidious danger is the danger produced by noise. Workmen get used to it and indeed deafness will develop gradually making the elevated noise level ultimately more comfortable to the employee.

In cases of insidious danger, the duty on the employer is very high. By admonition and pressure, the employer must ensure that the employee takes all steps to look after his own safety. It is not enough simply to provide masks to prevent silicosis, but rather an employer must be constantly vigilant to ensure that the masks are worn. It is not enough to give employees the option of wearing ear protection in noisy situations, but rather management must put considerable pressure upon employees to ensure that they wear the protection offered. What the employer must do is to set up a climate whereby the employee virtually has no option but to wear the equipment. The courts have held that an employer may take disciplinary action against an employee who persistently fails to use protective equipment. Disciplinary action can include dismissal of the employee.

Similar considerations apply with respect to eye glasses. If there is a risk of flying objects, the employer must ensure that eye glasses are issued to each man and that steps are taken to ensure that they are worn. The supervision must not be spasmodic or dependent upon a blitz system. It must be constant. Every reasonable reminder that can be given to men must be given.

In all these areas, the employer must lead by example.

The duty on the employer is not so high where the danger is an obvious and patent one. However, the employer cannot allow his own standards to slip. For example, if the very people who should have been supervising the use of safety belts did not always wear them, then despite the obvious hazard, an employee will substantially recover because the employer has failed in his duty.

Part of the duty of providing a safe system of work involves examining every aspect of one's business and to constantly ask the question 'Is this job being done in the safest manner reasonably possible?' Where methods to ensure the safety of men are used or where safety equipment is necessary then the question again must be asked 'Are my supervisors doing all that they reasonably can under the circumstances to ensure that men are complying with the safety standards imposed by the company?'

## Breach of Statutory Duty

Breaches of statute law eg. Workplace Health and Safety Act may:

- i) give rise to penalties (as an offence against the Act);
- ii) give rise to civil action for damages for any injuries caused.

If a breach of statute is proved, the case for damages for injury arising out of the breach is automatic.