Duty of care/safe place of work

Last reviewed: March 2020

Authored by Stephen Price, Partner and Annika Martz, Senior Associate, Corrs Chambers Westgarth; Updated by the LexisNexis Legal Writer team.

All contracts of employment contain an implied term requiring the employer to exercise reasonable care for the health and safety of its employees. The tort of negligence imposes a very similar duty, and statute law in all jurisdictions requires employers to ensure, so far as is reasonably practicable, the health and safety of workers. The common law duties can be enforced through actions for damages and (in principle) injunctions. The statutory health and safety duty can be enforced using one or more of a number of techniques, including criminal prosecutions, and the issue of administrative notices by regulators and (to a lesser extent) by worker-elected health and safety representatives. In most jurisdictions, the statutory duty of employers has been subsumed into the duties of "persons who control a business or undertaking" (PCBU).

At common law, an employer may be vicariously liable for the wrongful acts of an employee, and thereby face a claim for damages in relation to any harm caused by the employee's wrongdoing.

Common law duty of care

The High Court expressed the implied duty of care in *Hamilton v Nuroof (WA) Pty Ltd* as a "duty to take reasonable care to avoid exposing the employees to unreasonable risks of injury." The court added that "the degree of care and foresight required from an employer must naturally vary with the circumstances of each case".
References: *Hamilton v Nuroof (WA) Pty Ltd* (1956) 96 CLR 18, 25; *BC5600520*

In *Wilsons and Clyde Coal Co v English*, the House of Lords indicated that the duty of care comprises three sub-duties, namely "to provide a competent staff of men, adequate material and a proper system, and effective supervision".
References: *Wilsons and Clyde Coal Co v English* [1938] AC 57, 78

An employee who suffers injury as a consequence of breach of this implied term could, in principle, recover damages for breach of contract. However, the capacity to maintain such an action has been severely curtailed — if not entirely eliminated — by statute in all jurisdictions in recent years.

Theoretically, it should also be possible to obtain injunctive relief to restrain an actual or impending breach of the implied term, although this never happens in practice.

The duty owed under the implied term is for all practical purposes identical to the duty of care imposed by the law of negligence — access to damages in negligence has also been curtailed or eliminated in all jurisdictions.

Although the duty of care derived from the implied term is effectively identical to that imposed by the law of negligence, circumstances can arise where it will be in the interest of an injured worker to sue in contract rather than tort (or vice versa).
References: *Matthews v Kuwait Bechtel Corporation* [1959] 2 QB 57
Toth v Yellow Express Carriers Ltd [1969] 2 NSWR 425

Employees are under a reciprocal duty of care by force of an implied term in their contracts of employment and the law of torts. See *Duty of care and skill*.

Practice Tip: Irrespective of any potential damages action for breach of contract and/or in tort, it is highly likely that a person who suffers injury arising out of or in the course of employment will be able to make a claim under the

applicable workers' compensation legislation. Entitlements under such legislation can include income maintenance, reimbursement of medical expenses, and (to a limited extent) lump sum payments. For more information on the workers' compensation legislation in different jurisdictions, see our personal injury modules:

- *Personal Injury NSW*
- *Personal Injury QLD*
- *Personal Injury Vic*

The statutory duty of care

General duty provisions

All jurisdictions, apart from Victoria and Western Australia, have enacted harmonised work health and safety legislation based upon the *Model Work Health and Safety Act* (Model Act) which was endorsed by Safe Work Australia in late 2009 and finalised in June 2011. The Victorian government has indicated that Victoria will not adopt the model laws in their current form, while Western Australia looks likely to pass a new Work Health and Safety Bill which adopts the core elements of the model laws with some modifications.

The relevant legislation is now to be found in:

- *Work Health and Safety Act 2011 (Cth)*;
- *Work Health and Safety Act 2011 (NSW)*;
- *Occupational Health and Safety Act 2004 (Vic)*;
- *Work Health and Safety Act 2011 (Qld)*;
- *Occupational Safety and Health Act 1984 (WA)*;
- *Work Health and Safety Act 2012 (SA)*;
- *Work Health and Safety Act 2012 (Tas)*;
- *Work Health and Safety (National Uniform Legislation) Act 2011 (NT)*; and
- *Work Health and Safety Act 2011 (ACT)*.

This Guidance Note is based upon the Model Act. Users in Victoria and Western Australia should continue to refer to the *Occupational Health and Safety Act 2004* (Vic) and the *Occupational Safety and Health Act 1984* (WA) respectively.

The broad thrust of the legislation is the same in all jurisdictions (including Victoria and Western Australia). This is reflected in the fact that they all impose a series of general duties upon persons who can properly be seen to have responsibility for the prevention of work-related risks to health and safety.

Under the Model Act, the primary duty of care is set out in s 19. This requires persons who control a business or undertaking (PCBU) to "ensure, so far as is reasonably practicable", the health and safety of workers engaged or caused to be engaged by that person, and workers whose activities in carrying out work are influenced or directed by that person, "while the workers are at work in the business or undertaking". PCBUs must also ensure, so far as is reasonably practicable, that the health and safety of other persons (such as visitors to a workplace, or passers-by) is not put at risk from work carried out as part of the business or undertaking.

General duties are also imposed upon PCBUs whose business or undertaking involves:

- management or control of workplaces (s 20);
- management or control of fixtures, fittings or plant at workplaces (s 21);
- design of plant, substances or structures (s 22);
- manufacture of plant, substances or structures (s 23);
- importation of plant, substances or structures (s 24);
- supply of plant, substances or structures (s 25); and
- installation, construction or commissioning of plant, or structures (s 26).

All of the general duties are qualified by reference to the fact that the duty-holder is required only to do that which is "reasonably practicable" in order to discharge their duty. In other words, the duties are not "absolute".

The general duties are also qualified by ss 16 and 17 of the Model Act. The first of these makes clear that more than one person can concurrently have the same duty, and that where this happens the duty-holder must discharge their duty to the extent that they have the capacity to influence and control the matter. Section 17, meanwhile, makes clear that a duty to ensure health and safety requires the duty-holder to eliminate risks to health and safety so far as is reasonably practicable, and where that is not possible, to "minimise" it so far as is reasonably practicable.

Reasonably practicable

"Reasonably practicable" is defined in s 18 of the Model Act as "that which is, or was at a particular time, reasonably able to be done in relation to ensuring health and safety, taking into account and weighing up all relevant matters including:

- the likelihood of the hazard or the risk concerned occurring;
- the degree of harm that might result form the hazard or the risk;
- what the person concerned knows, or ought reasonably to know, about:
  - the hazard or the risk; and
  - ways of eliminating or minimising the risk; and
- the availability and suitability of ways to eliminate or minimise the risk;
- after assessing the extent of the risk and the available ways of eliminating or minimising the risk, the cost associated with available ways of eliminating or minimising the risk, including whether the cost is grossly disproportionate to the risk."

In principle, the general duties are owed to anyone whose health or safety may be impacted by the duty-holder's conduct of their business. This can include employees; independent contractors; users of plant, substances or structures; persons who are present at workplaces; and members of the general public. However, the extent to which duties extend beyond the immediate work environment will clearly be conditioned by the reasonable practicability qualifier.

Breach of a general duty provision is a criminal offence, which can give rise to a conviction, the imposition of very substantial fines and, for individuals, imprisonment. In extreme cases, fines of up to $3 million and 5 years' imprisonment may be imposed in respect of each offence (see s 31(1) of the Model Act). Breach, or apprehended

breach, can also provide the basis for the issue of administrative notices (notably improvement notices) by the relevant regulator (see Pt 10 of the Model Act), and of provisional improvement notices or directions that work cease by worker-elected health and safety representatives (see Pt 5, Divs 6 and 7, of the Model Act).

The obligations imposed by the general duty provisions are clearly very similar to the common law duty of care described earlier. However, it is clear from s 267 of the Model Act that breach of these provisions does not:

- confer a right of action in civil proceedings in relation to a contravention of a provision of the Act;
- provide a defence to an action in civil proceedings, or otherwise affect a right of action in civil proceedings; and
- affect the extent (if any) to which a right or action arises, or civil proceedings may be brought in relation to breaches of duties or obligations imposed by regulations.

Industrial manslaughter laws are in place in Queensland, Australian Capital Territory, Victoria and Northern Territory, and are being considered in Western Australia. Penalties for the other offences under the Model Work Health and Safety Act are based on exposure to risk, whereas industrial manslaughter is concerned with the consequences of the exposure to a risk ie death. The penalties for industrial manslaughter are consequentially much higher. See *Industrial manslaughter — A national overview*.

Practice Tip: It is important to appreciate that the same person (natural or otherwise) can owe duties to different people "wearing different hats" — for example a PCBU may owe a duty to end-users of its products as one or more of a designer, manufacturer, supplier or installer — while still owing a "primary" duty to its employees as their employer.

Practice Tip: It is not possible for a duty-holder to transfer duties to another person such as an employee or independent contractor — for example by including provision to that effect in a contract of employment or a contract for the provision of services. On the other hand, both employees and independent contractors can, of course, be duty-holders in their own right (see Div 4 of Pt 2 of the Model Act for the health and safety duties held by officers, workers and other persons at a workplace).

Bullying

In principle, failure to prevent workplace bullying can constitute breach of the employer's common law duty of care, and of legislated general duty provisions. In addition, *Part 6-4B of the Fair Work Act 2009 (Cth)* makes specific provision for dealing with workplace bullying. However, it does so as part of the workplace relations, rather than the occupational health and safety, regime. Note also *s 21A* of the Crimes Act 1958 (Vic), which extends the notion of "stalking" to include conduct which constitutes workplace bullying — this is the so-called "Brodie's law". See *Legal risks associated with workplace bullying and harassment*.

Specific statutory duties

Legislation in all jurisdictions provides for the imposition of specific duties upon persons who have control, or ought to have control, over risks to health and safety. Sometimes this is done by means of legislative enactment — for example in relation to specific industries such as mining or seafaring. More often it is done by means of regulations made under the authority of a principal act.

In many instances, such specific duties are "absolute" in character, in the sense that they are not qualified by the "reasonable practicability" criterion.

Breach of these specific obligations is unlawful, and can generally be enforced by means of criminal prosecution. Unlike the general duty provisions, breach of regulation can also provide the basis for a civil action for breach of

statutory duty, by which the claimant may recover damages etc. As noted earlier, the Model Work Health and Safety Act expressly provides that nothing in that Act is to be taken as affecting the right to bring such claims.

For more information on work health and safety laws in different jurisdictions, see our *Work, Health & Safety* module.

Further Reading - you will need a LexisNexis© subscription

College of Law Practice Papers NSW > Employment and Industrial Relations > Practice Paper EI101 Overview of Employment Law > [Commentary] > Implied Duties of Employer > [EI101.160] Duty of care

Vicarious liability

Employers can be held vicariously liable for the acts and omissions of employees, such as where an employee's negligence causes harm to another person.

The imposition of vicarious liability in the employment context has as its foundation the proposition that "employers choose to take on employees, knowing there will be consequences, including the assumption of the risk that in carrying out duties and functions relevantly connected to that employment, the employee will cause injury or damage to others": *Cincovic v Blenner's Transport Pty Ltd*.
References: *Cincovic v Blenner's Transport Pty Ltd [2017] QSC 320*

Vicarious liability requires a sufficiently close connection between the wrongful act and the wrongdoer's employment. An employer may only be liable for wrongful acts undertaken in the scope or course of employment, however the relevant act need not be authorised. Vicarious liability may arise in relation to an employee's unauthorised acts that are "so connected" with authorised acts that they may be regarded as modes, although improper modes, of doing the authorised acts.

The fact that a wrongful act is a criminal offence does not preclude the possibility of vicarious liability. Where the employment can be said to provide both the opportunity and occasion for the criminal offence to occur, this will usually be sufficient to hold the employer accountable for the employee's actions. Consideration will be given to any special role that the employer has assigned to the employee and the position that this puts them in vis-a-vis the victim. Features of the role that may be relevant include authority, power, trust, control and the ability to achieve intimacy with the victim: *Prince Alfred College Incorporated v ADC*.
References: *Prince Alfred College Incorporated v ADC [2016] HCA 37* at *[81]*

In a minority decision in *Prince Alfred College Incorporated v ADC*, Gageler and Gordon JJ cautioned that the so-called "relevant approach" described above and accepted by the majority does not prescribe an absolute rule for determining an employer's vicarious liability and that it will need to be developed on a case-by-case basis.
References: *Prince Alfred College Incorporated v ADC [2016] HCA 37* at *[131]*