

Legal Review

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Vicarious Liability – An Employers Burden



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The majority of people have a general understanding of the concept of vicarious liability, which, as a general rule, means the employer will be liable for the wrongful conduct of its employee which causes loss to a third party and occurs during the course of his or her employment. However there are a number of statutes that impact on the concepts of vicarious liability and limit the rights of an employer to seek re-dress from the employee for his or her wrongful acts.

The reason vicarious liability has some attraction to those that suffer loss is that if loss can be shown to have arisen in the course of employment then the victim is more likely to seek compensation from the employer who will usually be likely to meet the damages claimed and it is also more likely will hold the relevant insurance cover.

Vicarious liability may occur when:

- the conduct is intended to further the employer's business, and is not contrary the employer's business.
- the employee was acting as its servant or agent, either because it has held the employee out as having done so, or otherwise knew of, and failed to prevent, the relevant conduct.
- the employer's business creates a special risk (or "enterprise risk") — giving rise to the likelihood of the criminal conduct (e.g. where an employer operates a childcare business and children are assaulted by employees of the business).

In certain circumstances the employer may seek to have the employee indemnify them if the employer is found vicariously liable. However, in NSW, an employee is not liable to indemnify an employer against his/her negligent acts, for which the employer is vicariously liable (section 3 & 5 of the *Employee Liability Act 1991* NSW). However by reason of section 5 of that Act will not protect an employee if the action:

- was serious and wilful misconduct, or
- did not occur in the course of, and did not arise out of, the employment of the employee.

As set out above the employer's vicarious liability can extend to negligent, reckless and even criminal acts if carried out by the employee in the course of employment. An act occurs in the course of employment when:

- the act was a wrongful act authorised by the employer (such as where the employer has given incorrect or negligent instructions), or
- an employee has engaged in a wrongful and/or unauthorised mode of completing some act authorised by the employer.

This common law principle has been adopted in NSW (in section 7 of the *Law Reform (Vicarious Liability) Act 1983*)

The *Insurance Contracts Act 1984* (Cth) also has something to say about an employer recovering from an employee if an insurance policy is in place, overriding the common law principal of subrogation, which allowed the insurer to sue the employee to recover damages from the relevant employee. Section 66 of the *Insurance Contracts Act 1984* (Cth) bars insurers from bringing recovery proceedings against an employee in relation to loss unless it arises as a result of serious and wilful misconduct.

In summary for an employer or insurer to claim an indemnity or contribution from an employee relevant conduct causing loss must be serious or amount to wilful misconduct.

Vicarious liability is not only limited to negligence claims

As noted from the above many of the vicarious liability issues arise in the context of negligence claims and as such are a common issue in claims for personal injury claims or motor vehicle damages claims. However the boundaries do not stop there and employers and employees alike need to be aware that vicarious liability can extend to, for example:

- bullying occurring in the work place in which the victim suffers damages;
- discriminatory acts in the workplace (though the test under discrimination legislation is not strict and differs from the common law).
- sexual harassment (employers have been held vicariously liable for the sexual harassment conducted by employees at after-hours Christmas party).

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