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Can a defendant employer claim a contribution or indemnity from a negligent employee?

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Introduction

When a claimant has suffered loss as a result of a person's negligence in the course of that person's ordinary employment, the person's employer will usually be vicariously liable for the actions of its employee.

A recent Queensland Court of Appeal decision[1] has indicated that in Queensland, it may still be possible for an employer to seek a contribution or indemnity from an employee whose negligent acts have exposed the employer to legal liability to a third party, if the employee's acts amount to a breach of an implied term in their employment contract to exercise due care and skill in discharging their role.

The decision also suggests that where there has been such a breach of that implied term, an employee's entitlement to damages arising from personal injuries suffered in the course of their employment may be offset to the extent that the employee's negligence caused his or her loss.

This newsletter discusses the current position in relation to potential contributions and indemnities available from employees in the circumstances described above, and the consequences for insurers and their insureds operating in Queensland.

Discussion

One of the most prominent cases involving an employer being indemnified for the negligence of its employee is the English case of *Lister v Romford Ice and Cold Storage Co Ltd.*[2] That case involved an employed truck driver who injured his father (who was also an employee in the same company) in the course of his employment. The employee's father brought a claim against the employer and recovered damages in respect of the employee's negligence. The employer's insurer, exercising its right of subrogation, brought a claim in the name of the employer against the employee for indemnity (by way of damages) for the employee's breach of an implied term in his employment contract to use reasonable care and skill in his driving duties.

In *Lister*, the court found that the employee was under a contractual obligation of care to his employer in the performance of his duty as a driver, and that the company was entitled to recover the damages that it was obliged to pay the employee's injured father.

Immediately following the decision, members of the British Insurance Association in the employers' liability market entered into a *'gentlemen's agreement'* whereby the members would not institute claims against their insured's employees in respect to damages paid to a fellow employee (because of the first mentioned employee's negligence), without the prior consent of the employer. This agreement did not apply where there was wilful misconduct by an employee.[3]

Lister was a controversial decision; however while it has not received any critical examination from the High Court, it has been endorsed by the High Court *in obiter*,[4] and assumed to be correct by lower courts.[5] Most jurisdictions in Australia have abrogated the decision of *Lister* by way of legislative intervention,[6] however Queensland has not.

While Queensland has not introduced legislation preventing employers from claiming indemnity or contribution from negligent employees, s 66 of the *Insurance Contracts Act 1984* (Cth) (**Act**) removes an insurer's right of subrogation to an employer's rights against an employee in the above circumstances except where the conduct is serious or wilful. Accordingly, if the employer's insurance policy is considered a contract of *'general insurance'* (and therefore governed by the Act), then the employer's insurer may not step into the shoes of the employer to pursue the negligent employee.

Insurers of policies not governed by the Act are not restricted by the operation of s 66. For example, the 1996 Queensland Court of Appeal decision of *AR Griffiths & Sons Pty Ltd v Richards*[7] involved a claim for contribution and indemnity by a workers' compensation scheme insurer against a negligent employee. In that case, the court applied *Lister* (although not without a strong dissenting judgment from Fitzgerald P), with the majority finding that there were no circumstances of that case which justified formulating a rule of general application to contracts of employment which would have the effect of abrogating the authority of *Lister*.[8]

In that case, the negligent employee held a policy of insurance that would respond to the claim for contribution and indemnity against him. That consideration appears central to the majority's decision, in which they note '[the employee] *will not be required to foot the bill...*' and found that if there was an anomaly of the kind referred to by the critics of *Lister* (such as an employee being required to pay substantial damages from personal funds) then a different finding could be justified.[9]

The majority ultimately recognised a duty of care owed to an employer by an employee and held that the employer will be entitled to contribution or indemnity from an employee who breaches that duty in circumstances where ***'the employer is blameless and has ensured that the employee will be indemnified by an insurer'***. (our emphasis). In regard to the latter qualification, the employer in that case had purchased a policy of insurance for the vehicle used by the employee, which responded to the claim by the employer against the employee.

This topic was recently discussed in the Queensland Court of Appeal case of *Hevilift Limited v Towers*[10] which involved a claim from an employed helicopter pilot against his employer for personal injury damages he suffered when his helicopter crashed in Papua New Guinea (**PNG**) after it was suddenly enveloped in thick cloud and struck a tree. The evidence established that the rate at which thick cloud could suddenly form (in a matter of tens of seconds) was a phenomenon unique to the southern Highlands of PNG where the helicopter was flying.

The pilot succeeded in his claim against his employer at trial and on appeal, however of relevance to this newsletter is the *obiter* of Fraser JA in which he discussed the employer's counter-claim for an indemnity from the pilot for breach of contract (so as to set off the amount the employer was ordered to pay the pilot). Fraser JA cited *obiter* from the Queensland Court of Appeal (which observed *Lister*),[11] which suggested that in circumstances such as in *Hevilift*, an employer may be able to claim an indemnity from the employee to the extent that the employee's negligence caused his loss (based on the same principles as those in *Lister*).[12]

The court was not required to consider the counter-claim in light of the finding that the pilot was not negligent, however the discussion does suggest that Lister's case is still good law in Queensland and in appropriate circumstances, an employee may be found liable to their employer in respect of damages payable to a third party because of the employee's negligence, or may have damages payable to the employee himself (in the context of personal injury claims brought by the employee against the employer) to the extent that the employee caused their own injuries.

Significance

It is common in many professions for employees or their unions to hold professional indemnity policies that may cover the employees for liability to third persons injured from their negligent acts and omissions during the course of their employment (independent of the insurance policies held by their employers). While the above authorities largely concern policies of motor vehicle insurance, insurers of individual professionals should be cognisant of the possibility of that insured's employer (or its insurer) making a claim against the insured professional in appropriate circumstances and if Queensland law applies.

Additionally, employers (and their insurers) who are found liable to third parties for the acts of their negligent employees, or liable to the negligent employee for injuries the employee sustained partly (or wholly) due to the employee's negligence, should consider the option to seek a contribution or indemnity against the employee in appropriate circumstances.[13]

It appears however, that such a claim will only be maintainable if the employer is blameless and has ensured the employee will be indemnified by an insurer (by for example, mandating that the employee obtain individual cover or by purchasing the cover on behalf of the employee). The point is ultimately a double edged sword for insurers.

[1] *Hevilift Limited v Towers* [2018] QCA 89.
[2] [1957] AC 555.
[3] *Lister v The Romford Ice and Cold Storage Company, Ltd* (Report of the Inter-Departmental Committee), 1959.
[4] See *Voli v Inglewood Shore Council* (1963) 110 CLR 74, 101.
[5] See for example: *Boral Resources (Qld) Pty Ltd v Pyke* [1992] 2 Qd R 25; *Kelly v Alford* [1998] 1 Qd R 404; *Northern Assurance Co Ltd v Coal Mines Insurance Pty Ltd* [1970] 2 NSWR 223; *Kashemije Stud Pty Ltd v Hawkes* (1978) 1 NSWLR 143.
[6] See *Employees Liability Act 1991* (NSW) s 3(1); *Law Reform (Miscellaneous Provisions) Act 1955* (ACT) s 21; *Wrongs Act 1936* (SA) s 27C; *Law Reform (Miscellaneous Provisions) Act 1956* (NT) s 22A; *Civil Liability Act 2002* (Tas) s 49B.
[7] [2000] 1 Qd R 116.
[8] *Lister v Romford Ice and Cold Storage Co Ltd* [1957] AC 555 at 142.
[9] Ibid.
[10] [2018] QCA 89.
[11] *Wylie v The ANI Corporation Limited* [2001] 1 Qd R 320 at [80] – [81].
[12] Ibid [97].
[13] To the extent that such a course does not infringe s 66 of the Act.

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