The Non-delegable Duty Owed by the Employers to Their Employees

Introduction

Generally, employers are regarded as those who have the control of the system of work and the safety of workplace. This is probably the reason why the common law imposes a non-delegable duty on employers to take reasonable care of the safety of the employees at work.

The meaning of non-delegable duty

The employer's duty is said to be non-delegable and personal to him because an employer should not expect its employee to discharge its duty of care on its behalf. An employer cannot be relieved by simply saying that the injured employee could equally have foreseen the risk associated with the unsafe system of work and could have designed for himself a safe system of work.

Non-delegable duty is not a form of strict liability. It is a duty to see that reasonable care is taken. An employer who has exercised reasonable care in all the circumstances is not to be found liable to its injured employee. The law does not require an employer to treat its workers in the carrying out of their everyday normal jobs which do not entail any special risk or danger by the workers, as though they were kindergarten pupils. But where the work system or mode of operation is complicated or dangerous, the employer shall take responsibility to adopt a reasonably safe system of work. Therefore, the crux is what reasonable steps a reasonably prudent employer would take to protect the safety of its employees.

The scope of duty

The scope of common law non-delegable duty is four-fold, namely, the provisions of:-

1. competent staff;
2. safe plant and equipment;
3. a safe place of work; and
4. a safe system of work.

It should be noted that under section 6 of the Occupational Safety and Health Ordinance, Cap.509, the employer is to:

a. provide or maintain plant and systems of work that are so far as reasonably practicable safe and without risk to an employee’s health;
b. make arrangements for ensuring, so far as reasonably practicable, safety and absence of risks to the health of an employee in connection with the use, handling, storage or transport of plant;

c. provide such information, instructions, training and supervision as may be necessary to ensure, so far as reasonably practicable, the safety and health at work of the employee; and

d. provide or maintain a working environment for an employee that is, so far as reasonably practicable, safe and without risks to health.

These provisions are co-extensive with the employer’s non-delegable duty of care under the second to fourth folds.

Competent staff

The duty to provide competent staff is similar to vicarious liability, that is, the employer is liable when the injury is caused by the injured employee’s co-worker resulting from the latter’s fault. This duty pinpoints that the employer shall provide competent worker to guard the safety of his employee.

Safe plant and equipment

This duty may overlap with the employer’s statutory duties under regulations made under the Factories and Industrial Undertakings Ordinance, Cap.59, such as to provide safe woodworking machinery, lifting appliances and lifting gears. However, the common law gives further protection to employee that the employer is to provide safe and proper working tools, such as ladder, not regulated under any ordinance.

Safe place of work

It is the employer’s responsibility to take reasonable care to provide a safe premises including safe ingress and egress to the workplace. This duty may overlap with the employer’s duty under the Occupiers Liability Ordinance, Cap.314 (“OLO”) which also relates to the state of the premises itself. Under OLO, the employer is generally regarded as having the occupation or control of premises and the employee is a visitor. Therefore, when the workplace is within the control of the employer, it is incumbent on him to take reasonable steps to ensure that the workplace is safe and free from danger.

However, it should be noted the employer’s duty to provide safe place of work remains non-delegable even when the employee was sent to work outside the employer’s premises. In *Lee Wai Man, Wendy v Wah Leung Finance Limited* HCPI 106/2002, the employee fell through holes in the flooring of a building at a construction site in Shanghai and died. The Court held that the Hong Kong employer was in breach of its non-delegable duty to take reasonable care for the deceased employee’s safety because it had not taken any steps to
inspect the site in Shanghai and satisfy itself that the Shanghai contractor in charge of the site had indeed adopted a safe system of work.

**Safe system of work**

A safe system of work is the term used to describe the organization of the work, the way in which it is intended the work shall be carried out, the giving of adequate instructions (especially to inexperienced workers), the sequence of events, the taking of precautions for the safety of the workers and at what stage, the number of such persons required to do the job, the part to be taken by each of the various persons employed, and the moment at which they shall perform their respective tasks. It also involves the employer’s duty to perform risk assessment.

This duty of care does not end with the employer having established a safe system of work. The employer must also ensure that safety procedures are followed and the system is effective. The employer must warn the employees of the potential danger when the normal routine was interrupted. Even if the workman is experienced and has knowledge of the danger involved in the work, it does not exonerate the employer from his duty of care, though it would be taken into account when the court considers the extent of an employer’s liability and the issue of contributory negligence on the part of the experienced employee.

**Conclusion**

The common law non-delegable duty of employer is crucial for protection of employee’s work safety. It supplements the employer’s statutory obligations and affords better work protection to the employees. Though an employer is only obliged to act reasonably in the circumstances, the standard of care is a high one. As illustrated in the above case, the employer has the duty to provide a safe place of work for employee even if the work place is not the employer's own premises and outside Hong Kong. The employer's duty is not limited to establishing a safe system of work but also to ensure that such system is enforced at the time of the accident.

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**Important:** The law and procedure on this subject are very specialised and complicated. This article is just a very general outline for reference and cannot be relied upon as legal advice in any individual case. If any advice or assistance is needed, please contact our solicitors.

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