Insurance and Personal Injury

A Closer Look at Non-delegable Duty – Employer’s Liability for the Fault of Its Independent Contractor

Introduction
In the August issue, we have an overview on the law of employer’s non-delegable duty to its employee. This article aims to discuss the employer’s liability when it has engaged an independent contractor to perform the work, that is, would the employer be held liable for the fault of its contractor for the injuries sustained by that contractor’s employee or a third party.

The general rule
The general rule is that an employer is not liable for the torts committed by its independent contractor.

Exceptions to the general rule
An employer cannot avoid liability simply by engaging an independent contractor. It may not run round to say that it is the contractor’s responsibility if:-
1. the law imposes a non-delegable duty upon the employer, or
2. the work is extra-hazardous, or
3. the fault is attributable to the negligence or other faults of the employer; or
4. the employer is an occupier of the premises, the Plaintiff is a lawful visitor thereto and the employer is unable to disprove liability under the 4-point test under common law.

The first exception
The Construction Sites (Safety) Regulations, Cap.59I is an example of the law which imposes a non-delegable duty upon the employer. Reg. 2(2)(a) of the Regulations provides that where there is more than one contractor undertaking construction work at the site, then the principal contractor (i.e. the employer) is the contractor responsible for the various specific safety equipment, operations, and to ensure safety of work place prescribed under the Regulations. Thus, the employer is equally liable with the independent contractor for breach of the Regulations.

The second exception
It has been held in cases that extra-hazardous work are those that are inherently dangerous, in their very nature in the eyes of the law special danger to others, or involve the use of things recognized in law to be dangerous in themselves, for example, work that would cause fire and explosion.
The third exception

A typical example is when the employer is a joint-tortfeasor. In *Luen Hing Fat Coating & Finishing Factory Limited v Waan Chuen Ming* FACV No. 19 of 2009, the Plaintiff, an employee of the independent contractor, sustained injuries while using a pallet jack to transfer a calendering unit in the employer’s premises. The Court found that the employer realized that such system of transportation is unsafe, but it still allowed its pallet jacks to be used by the independent contractor for the transportation. The employer breached the common duty of care owed by the employer to the Plaintiff.

Other examples are the employer has employed an insufficient number of men, or has itself so interfered with the manner of carrying out the work that damage result, the employer is liable even though the immediate cause of the damage is the contractor’s wrongful act or omission.

The fourth exception

The 4-point test adopted by the court is whether the employer (i.e. the occupier) (a) has acted reasonably in entrusting work to the independent contractor, (b) has used reasonable care in selecting the contractor; (c) has taken reasonable steps (if they are possible) to supervise the carrying out of the work; and (d) has used reasonable care to check (if possible) that the work has been properly done. The employer must satisfy the 4-point test to disprove liability.

This 4-point test is in line with the statutory provisions in the Occupiers Liabilities Ordinance, Cap.314 (“OLO”). Section 3(4)(b) of the OLO stipulates that “In determining whether the occupier of premises has discharged the common duty of care to a visitor, regard is to be had to all the circumstances, so that (for example)...(b) where damage is caused to a visitor by a danger due to the faulty execution of any work of construction, maintenance or repair by an independent contractor employed by the occupier, the occupier is not to be treated without more as answerable for the danger if in all the circumstances he had acted reasonably in entrusting the work to an independent contractor and had taken such steps (if any) as he reasonably ought in order to satisfy himself that the contractor was competent and that the work had been properly done.”.

In *Wan Tsz Nok and another v Hung Fai Electrical Engineering Limited and another* HCPI 1117/2004, the Court held that the words “without more” in section 3(4)(b) connote the meaning that even if the employer has acted reasonably in entrusting the work to an independent contractor and had taken such step as it reasonably ought in order to satisfy itself that the contractor was competent and that the work was properly executed (i.e. the 4-point test), it will still be answerable for the tort committed by its contractor or its contractor’s employees under some special or more aggravating circumstances. Those circumstances
include the employer’s conduct (i.e. the 3rd exception), or the circumstances in relation to the nature of the work to be executed by the independent contractor in which the law imposes a higher standard of care on the employer (i.e. the 1st exception), or where an independent contractor is employed to perform an extra-hazardous act, which as a matter of common sense and policy must be at the employer’s peril (i.e. the 2nd exception).

The Court also held that the employer bears the burden of proving that it had so acted reasonably. Once the employer has discharged that burden, it is up to the injured person to show that the case falls outside the “without more” circumstances such that the employer is liable for the tort committed by the contractor despite it had taken reasonable care in the employment of the contractor.

**The English case**

It should be noted that in *Woodland v Essex County Council* [2013] UKSC 66, the Plaintiff, a young girl, suffered severe brain injuries whilst taking part in swimming lesson organized by her school, the Defendant. The school was held liable for the negligence of its independent contractor which employed the teacher to supervise and provide tuition. The Court stated that this type of non-delegable duty of care arises when:

- The Plaintiff is a patient or child or is vulnerable or dependable on the protection of the school against the risk of injury.
- The relationship between Defendant and Plaintiff places the Plaintiff in actual custody, charge or care of the Defendant. The relationship implies a duty of care on the Defendant to protect the Plaintiff from harm. The Defendant delegates such duty to a third party.
- The third party is negligent in the performance of the duty delegated by the Defendant i.e. it has breached the duty of care.

It would appear that *Woodland* falls under “special relationship” type of non-delegable duty. Thus, schools, possibly hospitals and care homes can be found liable for the negligence of an independent third party even if it has confirmed the contractor’s competency and carried out all the necessary checks and measures. In any event, it remains to be seen how this case will be interpreted and applied in Hong Kong.

**Conclusion**

An employer is generally not liable for the torts committed by his independent contractor but there are exceptions as illustrated above. Whilst the decision in *Woodland* and its application in Hong Kong Courts is yet to be seen, it is recommended that institutions / public authorities should have adequate insurance in place or have written contracts where the contractor agrees to provide full indemnity.
For enquiries, please contact our Insurance & Personal Injury Department:

E: insurance_pi@onc.hk  T: (852) 2810 1212  
W: www.onc.hk  F: (852) 2804 6311

19th Floor, Three Exchange Square, 8 Connaught Place, Central, Hong Kong

**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.

Published by **ONC Lawyers © 2016**