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## LEGAL TOPIC: EMPLOYER'S LIABILITY FOR DAMAGE OR INJURY TO ITS EMPLOYEES

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### A) INTRODUCTION

Employer's Liability for Damage or Injury to its Employees, covers a range of statutory and common law duties placed upon an employer in order to protect its employees against hazards or injury at work.

Generally, under "common law," employers owe their employees a duty to take reasonable care for their safety and this duty is personal to the Employer and non-delegable, which means that the Employer *cannot* escape liability by claiming to have passed on the responsibility for the employee's safety to another party. (CV2014-01610 Seeta Persad v The National Maintenance Training & Security Company Limited and Ryan Sinanan)

Subject to the requirement of reasonableness, this duty also extends to employees working away from the employer's premises, which may include employees working off-site, say at a client's premises or compound or working abroad at say for instance, the Company's overseas facilities. An example of this may be like Caribbean Airlines Ltd which would have Offices and stations where it's Employees work, at various airports and cities throughout the Caribbean and elsewhere.

In Trinidad and Tobago, this common law duty is supplemented by statute, namely, the Occupational Safety and Health Act Chapter 88:08 as amended ("the OSH Act") which casts further obligations on an employer for the protection of its workmen.

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The primary goal of the OSH Act is to ensure the safety and welfare of persons at work through the implementation of specific health and safety measures. An employer who fails to comply with the duties as required by statute, can be held liable for breach of statutory duty and for specific breaches of the OSH Act. This is particularly topical now in the era of Covid-19 as Employers have an even greater responsibility and duty to protect and safeguard their staff, especially their frontline workers who interact with the public. So Doctors, Nurses, Hospital Administrative Staff, Staff at Health Centres, Hospital Orderlies, Matrons, Cleaners, Wardsmaids all have a right to demand that they be provided with adequate and effective stocks of PPE (Personal protective Equipment) especially in this present Pandemic. This is exacerbated by the stories we see from around the world where frontline Healthcare workers have themselves ended up being the ones most at risk and some of them end up as patients themselves at the very Hospitals they work at; and in extreme cases, some of them have already become casualties.

In a T&T context, we have had official Reports of at least one Healthcare Worker in Tobago who has been the victim of the Covid-19 virus and questions will necessarily arise, as to whether adequate protections were put in place by the Employer, for the protection of that Worker from contamination by the virus. It also heightens and increases the responsibility and duty on the Employers of our healthcare workers here in T&T to ensure that adequate supplied of effective PPE are provided to our Doctors, Nurses, hospital Administrators and Cleaners, Wardsmaids and all Hospital Staff. It is hoped that the Representative Associations for Doctors, Nurses and other healthcare personnel, will agitate and ensure that they are adequately and effectively equipped to do their jobs in safety and without being exposed to undue risk of they themselves becoming victims of this Pandemic they're fighting on the frontlines.

Translate this also to other Emergency and Essential Workers such as Supermarket workers, gas station workers, Hardware workers, Police Officers, Security Guards, Fire Officers, soldiers and sailors. Look at the situation with Captain Crozier of the USS Theodore Roosevelt who raised the alarm about rampant covid-19 amongst his crew and sailors and instead of being treated like a Hero, the US authorities subsequently fired him. As it turns out, he himself has also become a direct victim of the Covid-19 as he has tested positive for the virus. He therefore should be able to institute a massive Lawsuit against the US Navy for this and also for his dismissal.

All in all, there is a fair degree of overlap between the common law protection which has developed over the years and the statutory protection introduced by our OSH legislation. It must be noted however that Employer's Liability reflects the ordinary principles of negligence, in that, only injuries that have been sustained by a failure to take reasonable care will give rise to liability and this is different from a situation of Workmens Compensation under the Workmens Compensation provisions where it is not necessary to find Negligence in an employer, for Compensation to be awarded under Workmens Compensation.

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## **B) DEFINITION**

The obligations of an Employer only arise where an employer/employee relationship exists and it extends to those acts which are reasonably incidental to the employment.

According to section 4 of the OSH Act, an “employer” is defined as;

*“... a person who employs persons for the purpose of carrying out any trade, business, profession, office, vocation or apprenticeship”*

Section 4 of the said Act, also defines an “employee” as;

*“... any person who has entered into or works under a contract with an employer to do any skilled, unskilled, manual, clerical or other work for hire or reward, whether the contract is expressed or implied, oral or in writing or partly oral and partly in writing, and includes public officers, the protective services and teachers”*

## **C) DUTIES OF THE EMPLOYER**

Section 6 (1) of the OSH Act provides that;

*“it shall be the duty of every employer to ensure, so far as is reasonably practicable, the safety, health and welfare at work of all its employees.”*

At common law, this duty has been elaborated to involve the following four categories of specific responsibilities:

1. The duty to provide a competent staff of men;
2. The duty to provide adequate plant, materials and equipment;
3. The duty to provide a safe system of work and safe working practices; and
4. The duty to provide safe premises and a safe place of work

### **Competent Staff of Men**

An employer must ensure that he recruits competent staff and that an appropriate level of training and supervision is provided to ensure that employees do not pose a threat to the safety of their colleagues.

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An employer *will* be in breach of this duty if it continues to employ a man who is known to it to be a danger or workplace hazard to his fellow workmen, and another employee is subsequently harmed by the hazardous actions of that said man: **Ifill v Rayside Concrete Works Limited (1981) 16 Barb LR 193.** According to the learned author, Gilbert Kodilyne in **Commonwealth Caribbean Tort Law**, an employer will similarly be in breach of this duty if he engages a workman who has had insufficient training or experience for a particular job and, as a result of that workman's incompetence, another employee is injured.

### **Adequate Plant, Materials and Equipment**

Section 6 (2) (a) of the OSH Act stipulates that the generality of an employer's duty extends to the *provision and maintenance of plant and systems of work that are, so far as reasonably practicable, safe and without risks to health.*

An employer's duty to provide safe and appropriate equipment for its employees includes the provision of protective devices and clothing and in appropriate cases, a warning or exhortation from the employer to make use of such equipment. The employer will be liable to any workman who is injured through the absence of any equipment which is obviously necessary or which a reasonable employer would recognise as being necessary for the safety of the workman. This is an especially potent and poignant point at this time as it is imperative that employers provide their Emergency Workers of Essential Employees with adequate and effective supplies of masks, gloves, Hand sanitizers, washing facilities, sneeze-guards, and social distancing guidelines and provisions so as to do everything possible to ensure that they are not inadvertently exposing their Staff to risk of infection or contamination by the Covid-19 virus. We have all seen the horror stories out of the USA where doctors and Nurses have been forced to cut up garbage bags to use as make-shift surgical gowns, where they have been advised to use rags and bandanas as substitutes for official and proper PPE such as the N-95 masks and in other cases where they've been told to re-use and to try to sanitize and wash and use again their face masks because there aren't enough to go around. That type of situation is wholly untenable and utterly unacceptable and thankfully, it does not appear that Trinidad & Tobago is any near such a dire, desperate and dastardly situation and we hope never to reach there, otherwise, Employees will definitely have cases and causes of action against their Employers for failures to provide adequate Personal Protective Equipment for their Employees to be able to carry out and do their jobs in safety.

Look however at the case in London, where several Bus Drivers have died in the last few weeks through contracting the Covid-19 virus through their jobs as Bus Drivers and from coming into contact with Hundreds of passengers on a daily basis. Questions are now being asked of the authorities and London Mayor Sadiq

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Khan has weighed in on the issue of whether enough safeguards have been put in place to ensure the safety and security of their Bus Drivers from the transmission to them, of the Covid-19 virus.

In the local case of **Morris v Point Lisas Steel Products Ltd (1989) HC 142**, the Claimant was employed as a machine operator at the Defendant's factory. While the Claimant was using a wire cutting machine, a piece of steel flew into his right eye, causing a complete loss of sight in that eye. In the instant case, the employer was held liable for a breach of its common law duty of care in failing to provide the Worker with protective goggles which could have possibly protected his eye from being damaged. Hosein J asserted that:

*“ ... since the risk was obvious to the defendant and not insidious, the defendant ought to have made goggles available and also given firm instructions that they must be worn, and the defendant ought to have educated the men and made it a rule of the factory that goggles must be worn, since, if an accident did happen, the probability was likely to be the loss of sight of one or both eyes.”*

Interestingly enough, the Employer's Duty does not stop at merely providing the Personal Protective Equipment for its Employees, but it must also go further and ensure that systems are put in place to monitor and insist upon the actual use and wearing of the PPE by employees. If for instance there is a lax corporate culture in the organization where PPE is provided but Employees regularly don't use same and Management is aware of this and does nothing to insist and enforce the use of the PPE, then the Employer can still be held liable for any resulting injury to an Employee from not wearing the PPE even though the Employer had provided same to the employee. This scenario was exemplified in the case of **Bux v Slough Metals Limited [1973] 1 WLR 1358** where the Claimant lost sight in one of his eyes when his eye was splashed with super-heated molten metal while executing his duties at work. Although the employer had provided the employee with protective goggles in compliance with statutory regulations binding upon the Employer, the Employer was nonetheless still found liable for Negligence and Breach of his Common Law Duty of care towards the Employee, by not persuading and even insisting upon the use of protective equipment by the Employee. So to simply provide the PPE is not enough, the Employer must put in place systems and procedures to ensure as much as possible, that Employees actually use the PPE when executing their duties.

### **Safe System of Work and Safe Working Practices**

An employer must organise a safe system of work for his employees and must ensure as far as possible that the system is adhered to. **Clerk and Lindsell on Torts 21<sup>st</sup> Edition** explained that a safe system of work involves:

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*“the organisation of the work; the procedure to be followed in carrying it out, the sequence of the work; the taking of safety precautions; the stage at which they are to be taken; the number of workers to be employed; the parts to be taken by them; and the provision of any necessary supervision.”*

Where an employer hires an employee who is young and/or inexperienced, there will also be a breach of the duty to provide a safe system of work if insufficient training and instructions are given for the particular job. In the Barbadian case of **Hurdle v Allied Metals Ltd (1974) 9 Barb LR 1**, a 16-year-old Claimant was employed as a machine operator. Without any prior training or instruction, she was put in charge of a power press set up to stamp out heart shapes for lockets. Whilst the Claimant was operating the press, her hand became trapped in the machine and she was seriously injured. Douglas CJ, in the Barbados Court of Appeal, held the Defendant Employer to be in breach of their duty of care, as no adequate instructions and/or training had been given to the Claimant, having regard to her age and inexperience and the potential risk and danger involved.

### **Safe premises and a Safe place of work**

An employer has a duty to take care to ensure that the premises where his employees are required to work are reasonably safe.

Under the OSH Act, the term “premises” includes any place, and, in particular;

*“(a) any vehicle, vessel, aircraft or hovercraft;*

*(b) any subterranean installation or installation on land, including the foreshore and other land intermittently covered by water;*

*(c) any offshore installation and any other installation, whether floating or resting on the seabed or the subsoil thereof or resting on other land covered with water or the subsoil thereof; and*

*(d) any tent or movable structure;”*

The employer must take reasonable steps to ensure that the building itself and its structural aspects, such as the floors and windows are safe; and that the employee is not injured by defective premises. The local case of **CV2017-01897 Irving Williams v MIC Institute of Technology** confirmed that the duty to provide workmen with a safe place of work does not mean merely warning them against unusual dangers known to them, but also to make the place of employment as safe as the exercise of reasonable skill and care would

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permit. If the employee's work takes him onto premises owned by others, the employer must also take reasonable steps to ensure that these are safe and that they will not injure his employee: **Halsbury's Laws of England, Volume 52 (2014) paragraph 376.**

In the case of **Cook v Square D Limited [1992] ICR 262,** the Court of Appeal identified the factors that an employer must consider when determining whether a workplace is safe for an employee:

- a) The location where the work is required to be done;
- b) The nature of the building;
- c) The nature of the work required from the employee;
- d) The employee's expertise and experience;
- e) The degree of control that it is reasonable to expect the employer to exercise; and
- f) Whether the employer is aware that the premises are dangerous.

#### **D) ESTABLISHMENT OF THE OSH AGENCY**

Under section 69 of the OSH Act, an Occupational Safety and Health Agency has been established and the said Agency is responsible inter alia for conducting inspections of industrial establishments within Trinidad and Tobago; investigating any accidents and/or incidents which occur at the workplace; and they are also responsible for investigating any other workplace complaints reported to the Agency. After conducting their investigations, the Agency has the Authority to determine thereafter whether enforcement action is required as against the employer or otherwise.

#### **E) RIGHTS OF EMPLOYEES TO REFUSE WORK**

Under section 15 of the OSH Act an employee is entitled to refuse work in certain conditions where:

- “a) there is serious and imminent danger to himself or unusual circumstances have arisen which are hazardous or injurious to his health or life;*
- b) any machine, plant, device or thing he is to use or operate is likely to endanger himself or another employee;*

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- (c) *the physical condition of the workplace or the part thereof in which he works or is to work is likely to endanger himself;*
- (d) *any machine, plant, device or thing he is to use or operate or the physical condition of the workplace or part thereof in which he works or is to work is in contravention of this Act or the Regulations made under it and such contravention is likely to endanger himself or another employee.”*

However, it must be noted that upon refusing to work or do the particular work, the employee must *promptly* report the circumstances of his refusal or intended refusal to the employer or his representative; and also to a representative of the safety and health committee in accordance with the OSH Act.

In light of the risks and dangers presented by this present Covid-19 virus Pandemic and the inherent dangers to our front-line workers, it is important to note however, that Section 15 does not apply to the following occupations:

- a) Members of the Defence Force, Police Services, Fire Services and Prison Services;
- b) Employees associated with health care;
- c) Employees of a laboratory;
- d) Employees of a power plant in conjunction with the above occupation.

So even if the workplace conditions in Trinidad & Tobago are unsafe for healthcare workers, Members of the Defence Force, members of the Police Service, Fire Services and Prisons Services or employees of a testing Lab or a power plant; they can bring these conditions to the attention of their Employers and request that they be rectified, however they do not have the right, under the OSH Act, to refuse to work as a result of these unsafe work conditions. That’s a rather sobering and important fact to note, particularly at these times, and it makes it even more incumbent upon our employers and Governmental agencies to provide proper and sufficient and adequate PPE and safe working environments and conditions for these categories of front-line workers at the forefront of this Covid-19 Pandemic, because the fact is that under the OSH legislation, they cannot refuse to work, even though the conditions are unsafe. We do not want another situation where any of these front-line workers end up giving up their lives, simply by trying to do their jobs.

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