Negligence in Employment Law

Alfred G. Feliu
Weyman T. Johnson
Editors

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Alfred G. Feliu
Vandenberg & Feliu, LLP

Weyman T. Johnson
Paul, Hastings, Janofsky & Walker, LLP

Editors

The Bureau of National Affairs, Inc., Washington, D.C.

Published by BNA Books
1231 25th St., N.W., Washington, D.C. 20037
http://www.bnabooks.com

International Standard Book Number: 1-57018-263-9
Printed in the United States of America

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PREFACE

Employment law emerged as a potent force in the American workplace in the 1960s with the enactment of federal anti-discrimination legislation. Discrimination law remains today, almost 40 years later, a vibrant and impactive body of law directly affecting the way we interact with each other on a daily basis in the workplace.

The enactment of legislation, however, is episodic. Legislation is often born after a short gestation period, and the glare of public scrutiny generally accompanies its birth. Developments in the common law, in contrast, are incremental, slow, and persistent. They generally command little attention as the common law tends to develop in a whisper. Few are present when they occur, and except in rare occasions even fewer seem to notice. It is only with the perspective of time that we can truly assess how far down the road on any one issue the common law has traveled.

Negligence law is a creation and inhabitant of the common law. It is an elastic concept designed to set standards of behavior in a wide variety of often unrelated settings. Its application to the employment setting, until recently, was generally very limited, often involving issues of workplace safety. Even then, workers' compensation legislation was and is generally the rule when it comes to legal issues surrounding the safety of employees, negligence law the exception. When third parties were injured by the misdeeds of employees, *respondeat superior* principles governed issues of liability. Such liability was often limited, however, where the misdeeds were not authorized or encouraged by the employer. A sexual assault by an employee on a customer could rarely be found to be within the scope of the offending employee's employment. In short, negligence principles played a small part in the legal landscape of the workplace.

That began to change, however, in the 1980s. A cadre of employment law specialists recruited to litigate discrimination cases began to challenge some established notions of employer liability. If an employer could be held liable for discrimination or harassment committed by its executives on vicarious liability grounds, even where the offending actions were contrary to the employer's policies or practices, in what other ways could employers be held responsible? Once the topic was raised courts began to analyze anew the principles underlying the common law of negligence and in time found them wanting. In addition, dramatic scenes of violent encounters in the workplace grabbed public attention, further increasing pressure to find a remedy for these and other wrongs in the workplace. But who is to bear the risk of the violent employee—the victimized

co-worker or customer or the employer who hired the offending employee? The question in time answered itself for most courts. Employer liability increased, negligence principles expanded, and the topic of negligence in the employment setting established itself as an increasingly important and continually changing component of employment law.

But where was an employer practitioner to turn for guidance and applicable legal authority? The dearth of secondary sources made the need for this text self-evident. Our goal in preparing this text was to provide the practitioner with a treatment of these issues written for practitioners by practitioners. Each chapter is written by experts, each given the editorial mandate of raising and answering the questions likely to arise in counseling clients on these issues and, when necessary, litigating on their behalves. The final text demonstrates that each author has carried out his or her mandate well.

We do not deceive ourselves into believing that all questions relating to the topic have been fully answered or even that all relevant issues have been identified. Such are the hazards of offering a text on a dynamic topic rooted in the common law of over 50 distinct jurisdictions. We can, however, say confidently that this text will help fill a void in the literature that needed filling and will serve to aid the practitioner in his or her efforts to counsel and represent clients on negligence issues in the employment setting.

Alfred G. Feliu
Weyman T. Johnson

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CHAPTER 1

THE ROAD FROM NEGLIGENCE TO NEGLIGENCE IN EMPLOYMENT*

I. INTRODUCTION

This chapter will sketch in broad strokes the evolution, or, some might say, mutation, of tort law into a home for a wide spectrum of negligence claims in the employment context. Although rooted in state law, the negligence principles that are the focus of this chapter and book have migrated to other areas of employment law, most notably federal civil rights legislation.

This chapter will begin by setting forth the core elements of the tort of negligence, stemming from negligence law's historical contexts. Next, the scope of the liability of the principal, or here the employer, for acts committed by the employer's agent, its employee, or its surrogate, will be addressed. Representative cases are incorporated to illustrate major, evolving principles in specific, representative contexts.

This introduction to the application of negligence principles to the employment setting is intended to serve as a foundation and underpinning for the more detailed chapters that follow.

II. THE TORT OF NEGLIGENCE

A. Historical Overview

Negligence originated as a separate common-law tort during the early nineteenth century.[1] Prior to that time, the word "negligence" had been used in a very general sense to describe the breach of a legal obligation, or to designate a mental element, usually one of inadvertence or indifference, entering into the commission of other torts.[2]

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*This chapter was authored by David L. Gregory, Professor of Law, St. John's University School of Law, Jamaica, New York. Jennifer Pearson and Walter Glibowski provided research assistance.

[1] W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS, §28, at 160 (5th ed. 1984) [hereinafter PROSSER].

[2] *Id.*

The rise of negligence as a separate tort coincided with the Industrial Revolution. Actions for negligence were undoubtedly stimulated by the rapid increase in industrial accidents and by advances in methods of transportation (e.g., railroads, carriages, ships).[3] Intentional injuries, whether direct or indirect, began to be grouped as a distinct field of liability, with negligence serving as a basis for the separate category of unintended torts.[4] Gradually, negligence developed into the dominant cause of action for accidental injury.[5] By the end of the nineteenth century, the U.S. Supreme Court could identify with surety the standard for negligence as being "the omission to do something that a reasonable, prudent man, guided by those considerations that ordinarily regulate the conduct of human affairs, would do, or doing something that a prudent or reasonable man would not do under all the circumstances of the particular transaction under judicial investigation."[6]

The negligence tort has many applications in modern jurisprudence. Indeed, negligence principles come closest to articulating a general principle of tort liability in American law today. By imposing liability in the absence of intent, negligence law serves to both heighten the standard of care externally imposed on the citizenry in the carrying out of everyday activities and simultaneously provide a means to allocate the risk in a more efficient and socially beneficial manner, i.e., by penalizing the entity with a deeper pocket than an employee has—an entity that can, in turn, ameliorate its injury through insurance coverage, price increases, and like efforts. Moreover, negligence as a tort is very flexible and is highly dependent on the circumstances underlying the events at issue. As was so well stated by a member of the House of Lords in a landmark decision in 1932 in the English law of product liability, "The grounds of action may be as various and manifold as human errancy; and the conception of legal responsibility may develop in adaptation to altering social conditions and standards. The categories of negligence are never closed."[7]

More than mere careless conduct is required to establish a claim for negligence. As a general rule the law of negligence imposes on individuals a duty to conduct themselves in their activities so as not to create an unreasonable risk of harm to others. Negligence also describes a form of wrongful conduct that is itself an element of various tort causes of action. Generally, "negligence" is defined as conduct that falls below the standard established by civil law for the protection of others against unreasonable risk of harm.

B. The Elements of the Cause of Action for Negligence

There are, traditionally, four main elements necessary to establish a negligence claim.[8]

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[3] G. EDWARD WHITE, TORT LAW IN AMERICA, 15–17 (1980).

[4] PROSSER, *supra* note 1, at 161.

[5] *Id.*

[6] Union Pac. Ry. Co. v. McDonald, 152 U.S. 262, 273 (1893).

[7] M'Alister or Donoghue v. Stevenson (1932), per Lord MacMillan, *as quoted in* SPEISER, KRAUSE, GANS, THE AMERICAN LAW OF TORTS 992 (1985) [hereinafter SPEISER].

[8] The basic elements of a negligence claim are further discussed in Chapter 6 from the perspective of defenses to such claims.

1. Duty

The first necessary element is a duty to use reasonable care in performing an act, which requires a person to conform to a certain standard of conduct recognized by the law to protect others against unreasonable risks.[9] Generally, a duty of care exists anytime there is a foreseeable risk of injury to others arising out of the failure to take the necessary steps to prevent such injury. The duty will be imposed where an employer knew or should have known that its workplace or employee was dangerous or had propensities that might cause injury to others, or that its actions negligently performed or statements negligently made are likely to cause injury to a discernible party who had cause to and did rely on the employer's proper oversight of those actions or statements. The question whether a legal duty exists is one for the court to decide.[10]

The traditional measure of this standard is a legal fiction known as the "reasonable man" standard.[11] A failure to conform actions to what would be expected of a "reasonable man of ordinary prudence" in the same situation constitutes negligence.[12]

A duty imposed by law, such as the duty to drive a car safely, is required for a negligence claim to exist. (The duty may be imposed in retrospect—e.g., by a court and in a jury trial.) An obligation rooted in contract—an agreement between private parties—is not generally sufficient to serve as a basis for a negligence claim unless a separate and distinct duty is also imposed by law. Failure to satisfy the terms of a contract is simply a breach of contract and will not give rise to a negligence claim. For example, a truck driver who is required by his or her employer to arrive at work on time and to drive the truck safely and who fails to do either has breached the employment contract on both scores. The truck driver may also be found negligent in the unsafe manner in which the truck was driven. There is, however, no legal duty to arrive at work on time, only a contractual one.

The employer may not avoid liability by merely delegating its duty of care to others. For example, an employer who is under a duty to provide protection for, or to have care used to protect, others or their property, and who places the performance of such duty upon an employee or agent is subject to liability to others for harm caused to them by the failure or negligence of the employee or agent in performing the duty.

A court will decide whether a legal duty exists by weighing the relationship of the parties, the nature of the risk, the public interest in the recognition of such a duty, and all the surrounding circumstances.[13] "The greater the risk of harm, the higher the degree of care necessary to constitute ordinary care."[14]

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[9] *See* Morris v. Orleans Parish Sch. Bd., 553 So. 2d 427, 429 (La. 1989) (defining duty as "an obligation, to which the law will give recognition and effect, to conform to a particular standard of conduct toward another.").

[10] SPEISER, *supra* note 7, at 1008–10.

[11] *See* Nugent v. Quam, 152 N.W.2d 371, 377 (S.D. 1967) (describing the reasonable man as one who exercises the knowledge and judgment that society requires of its members for the protection of their own interests and the interests of others).

[12] *See* Ambrose v. Cyphers, 148 A.2d 465, 469 (N.J. 1959) (explaining that the reasonable man standard necessarily implies varying degrees of care in relation to the variable elements of risk).

[13] Johnson v. Usdin Louis Co., 248 N.J. Super. 525, *cert. denied*, 126 N.J. 386 (1991).

[14] Welsh Mfg. v. Pinkerton's, Inc., 474 A.2d 436, 440 (R.I. 1984).