

Question 3

Can an employer sue an employee for professional errors or omissions which result in loss to the employer?

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Two Kinds of Obligations:

- Tort Liability: Two requirements
 - Duty of the tortfeasor (the employee) to the employer
 - Breach of that duty with subsequent damage
 - Physical damage versus purely economic damage
- Contractual Liability:
 - Breach of stated or implied contractual obligation to the employer

Tort Liability

- *Douglas v. Kinger*

- Plaintiff hires 13 year old 'boat boy' to perform duties at cottage. 'Boat Boy' lights match to see into gasoline can to see if enough 'gas' - boathouse burns down
- Trial Judge finds boy negligent but no liability on policy considerations - boy is unskilled, no expectation of liability for negligence
- Appealed to Court of Appeal

- Detailed analysis of skilled v. unskilled

- Essentially rejects this analysis - instead was the 'negligence' mere carelessness, or gross or intentional negligence
- examination of relationship and policy considerations

Tort liability (continued)

- Court of Appeal finds, in this case, no tort liability – largely on policy grounds
- Important Factors
 - degree of negligence important
 - mistake v. intentional failure to perform fundamental functions of employment obligations
 - possible employee mistake in contemplation of the parties
 - employer can protect with insurance coverage
 - no utility to requiring both employer and employee to obtain insurance coverage

Contract Liability

- *Petrone v. Marmot Concrete Services*
 - Employee hired to supervise concrete construction
 - Ignored error when came to his attention and continued to deny his error
 - Hired because of his 'expertise' - more than mere negligence - breach of implied contractual obligation
 - Hired to provide competent supervision
 - Responsible for cost of replacement but not lost profit

Contract Liability (Continued)

- *Pinto v. BMO Nesbitt Burns*
- Pinto experienced investment advisor
- Breached Company rules and client instructions
 - unauthorized stock purchases on behalf of clients
 - unauthorized and impermissible discretionary trading
 - pattern of dishonesty and attempted cover up
 - fabricated evidence to employer
- Result:
 - Terminated for cause
 - Liable for damages to BMO - but only for proved damages - settlement amounts not sufficiently proved

Conclusions

- Professional employees can be liable BUT conditions:
 - (1) More than mere negligence may be required - needs to be gross or intentional
 - (2) Skill level is important but not determinative
 - (3) Policy considerations are crucial: In general employees should not be liable for simple carelessness or negligence - expected part of employee/employer relationship
 - (4) Insurance issues; inequality of bargaining power; fiduciary responsibility etc.
 - (5) Original stated or implied contractual terms can be determinative
 - (6) Actual damages to employer must be proved