

# THE FPCT NEWS

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## New Jersey Expands Employer Liability

### Supreme Court Lowers Bar to Suits for Workplace Injuries

**D**o you think you're immune from suit by an employee injured on your property because you maintain workers compensation insurance? Think again. The Supreme Court of New Jersey recently expanded employer liability in the workplace when it decided *Laidlow v. Hariton Machinery Co.*. The Court held that a jury could find the employer, AMI-DDC, Inc., directly liable for an employee's workplace injury even though the employer maintained workers compensation insurance and the injured worker received workers compensation benefits. According to the allegations in the employee's law suit, the employer for over twelve years kept the safety guard disabled on a piece of machinery, despite numerous "near misses" and requests by the employee to his shift supervisor that the guard be used. The only time the employer allowed the guard to be used was when OSHA inspectors visited the plant. After OSHA left, the employer again disabled the guard.

The Court ruled the employer's conduct, if proven true at trial, satisfied the long-standing "intentional injury" exception to employer immunity under the New Jersey Workers Compensation Law. The Court used a two-part test to determine when an employer's acts constituted intent to injure: An employer is not immune from suit when (1) the employer's conduct indicates knowledge that injury to a worker is "substantially certain;" and (2) the conduct is beyond the "purview of the conditions the Legislature could have intended to immunize." While both parts are fact-sensitive, the question of "substantial certainty" will be for a jury to decide. A judge decides whether the facts, if proven, fall outside the Legislature's intentions.

The impact of this case on employers remains to be seen, but the Court's decision may be applied to any work place that is subject to inspection by government agencies, such as building inspectors, and fire code inspectors. We can predict injured employees will file more direct law suits against their employers and that machine manufacturers and sellers will file more third-party claims against employers and machine owners. To be sure, even after the *Laidlow* decision, the threshold for finding an employer liable is still pretty high. The cost of such law suits, however, is not only the potential for a liability finding, but the cost of the defense - lawyers' and experts' fees and the employer's time and energy away from running the business

#### Insurance Coverage in Question.

Most liability policies exclude coverage for injuries that are "intentionally" caused. You must assume you do NOT have coverage for workplace injuries that meet this two-part test. With this expanded definition of "intentional injury", however, your insurance company may be willing to cover you. You should consult with your insurance agent or broker to determine whether your insurance company will adjust the policy to provide coverage for law suits and claims made under this new interpretation of the law. Regardless, if more law suits and third-party claims are made, we believe liability insurance premiums will increase. *Continued ...*

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### Punitive Damages

Left unsaid in the Court's opinion is the potential for the imposition of punitive damages. This is a legitimate concern because an injured person typically seeks punitive damages when he or she claims the injury was "intentionally" caused

Punitive damages are imposed to penalize the wrongdoer and to deter the wrongdoer and others from similar conduct. They can be imposed even though criminal or civil penalties have been imposed by governmental authorities. New Jersey law prohibits insurance coverage for punitive damages.

Under the Punitive Damages Act adopted by the New Jersey Legislature, punitive damages are imposed when the offending conduct is actuated by actual malice or "accompanied by a wanton and willful disregard of persons who foreseeably might be harmed." The Act defines "wanton and willful disregard" as "a deliberate act or omission with knowledge of a high degree of probability of harm to another and reckless indifference to the consequences of such act or omission."

The significance, if any, of the difference in the words chosen by the Supreme Court ("substantial certainty" of harm) and by the Legislature (high degree of probability" of harm) will have to be decided by future court decisions unless the Legislature steps in.

### What To Do To Minimize

#### Exposure For Workplace Injuries

What can you do to minimize your exposure to law suits? While nothing in life is a "sure thing," the *Laidlow* decision appears to suggest the following:

1. Make sure all safety devices, especially guards on machinery and equipment, are in working order.
2. When a manufacturer informs you of an enhanced safety device for your machinery or equipment, use it.
3. Establish and maintain a system for addressing employees' safety concerns.
4. Educate all supervisors about their responsibility for plant safety.
5. If you make special improvements in preparation for an OSHA or DOL inspection, maintain the improvements after the inspection.

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