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STRICTLY LIABLE VICARIOUSLY

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Introduction

1 The general rule is that a person is not liable for the negligent conduct of another. Vicarious liability is an exception to this rule. It describes a form of strict liability. The defendant is liable to pay damages for loss caused by the negligence of someone else.

2 This form of liability applies to a restricted number of identifiable, but unrelated, categories of relationship of defendant and negligent party. They include employer and employee, principal and agent, owner or bailee of car and driver, and ship owner and ship's pilot.

3 A related notion is non-delegable duty of care. It too is a form of strict liability. Discussion of non-delegable duty of care may be found in cases that also consider an aspect of vicarious liability. Both are potential means of making a resourced or insured defendant liable for the direct negligence of another party.

4 Cases where a plaintiff has endeavoured to establish liability by invoking principles of vicarious liability or non-delegable duty include deliberate, and sometimes criminal, conduct of another party.

5 A review of the decided cases suggests an apparent reluctance by the High Court to extend either form of strict liability to new categories of relationship.

Lack of unifying principle

6 Vicarious liability has been said to be a doctrine or series of doctrines lacking any single unifying and principled explanation: ***Leichhardt Municipal Council v Montgomery*** [2007] HCA 6, (2007) 230 CLR 22 [156] Hayne J. The courts have not identified a unifying principle: ***Prince Alfred College Incorporated v ADC*** [2016] HCA 37 [44]-[46]; (2016) 335 ALR 1. Accordingly a general principle cannot be applied to resolve new classes of case. The orthodox method is to consider whether the approach taken in decided cases furnishes a solution to further cases as they arise: ***Ibid*** [46].

Origin and rationale of vicarious liability

7 It has been suggested that vicarious liability derived from medieval notions of headship of a household, including wives and servants. Their status in law was absorbed into that of the master. The liability of the master for the wrongs of his servants thereafter became limited to acts he commanded or later ratified, and was then supplemented by the notions of "the course of employment" and of "control": ***Scott v Davis*** [2000] HCA 52; (2000) 204 CLR 333 [230] per Gummow J.

8 Notions of vicarious liability may have derived from medieval notions of headship of a household which in turn depended upon the application of analogies drawn from Roman law: ***Sweeney v Boylan Nominees Pty Limited*** [2006] HCA 19 [20]; 226 CLR 161. Responsibility for the acts of a servant originated when a servant was a slave whom the master was obliged to keep in order as he was his cattle. Oliver Wendell Holmes Jr said

that "there is no adequate and complete explanation of the modern law, except by survival in practice of rules which lost their true meaning when the objects of them ceased to be slaves": ***Ibid***.

9 In ***New South Wales v Lepore*** [2003] HCA 4, (2003) 212 CLR 511, [302] Kirby J said that the principles of vicarious liability, and its application, have not grown from a single logical legal rule but from judicial perceptions of individual justice and social requirements that vary over time: [300].

10 Bases for imposing vicarious liability have included fair and efficient compensation for wrongful conduct and deterrence of future harm: ***Lepore*** [302] per Kirby J. Considerations of insurance and the relative capacity of the employers and employees to pay damages have had a significant influence on the development of vicarious liability, even if they have not provided a unifying or sufficient justification for the rules that have developed: ***Scott*** [300] per Hayne J.

11 The decisions in ***Scott***, ***Hollis v Vabu Pty Ltd*** [2001] HCA 44; (2001) 207 CLR 21, and ***Lepore*** have been said to reflect two considerations. First, a fully satisfactory rationale for the imposition of vicarious liability and the employment relationship has been slow to appear in the case law. Secondly, the modern doctrine respecting the liability of an employer for the tort of an employee was adopted not by way of an exercise in analytical jurisprudence but as a matter of policy: ***Sweeney*** [11] and see ***Hollis*** [35] and [34].

12 In ***Scott*** [263] Gummow J gave as a reason for not extending ***Soblusky v Egan*** (1960) 103 CLR 215 (on vicarious liability of an owner or bailee of a car for the acts of a driver) that the case rested upon insecure and unsatisfactory foundations in principle.

13 Absent a satisfactory principled foundation for vicarious liability it would be reasonable to expect judicial reluctance to extend vicarious liability from existing areas of application. The decisions of the High Court seem to reflect a reluctance to extend departures from the general rule that liability is not strict.

Employer and employee

14 The best known category of relationship where vicarious liability may be imposed is employer and employee. Vicarious liability will be imposed on the employer for the negligent conduct of an employee in the course of the employee's employment: ***Scott*** [301] per Hayne J. The distinction between the relationship of an employer and an employee and that of employer and independent contractor is significant. Vicarious liability will not be imposed on the employer for the latter case: ***Ibid***.

15 The "course of employment" is the limiting or controlling concept for the imposition of vicarious liability. The best known formulation of the test to be applied is found in Salmond *Law of Torts*, 1st Edition, 1907, to the effect that an employer is liable for unauthorised acts if they are so connected with authorised acts that they be regarded as modes, although improper modes, of doing them, but the employer is not responsible if the unauthorised and wrongful act is not so connected with the authorised act as to be a mode of doing it, but is an independent act: ***Lepore*** [42] per Gleeson CJ.

16 Conduct occurring within working hours is not necessarily in the course of the employment but wrongdoing away from the workplace or outside normal working hours might be: cf ***Lepore*** [40] per Gleeson CJ. The antithesis of conduct "in the course of employment" is conduct within the expression "on a frolic of his own": ***Lepore*** [41] per Gleeson CJ.

17 Control over the way something is done may be relevant to the imposition of vicarious liability. If A stipulates having the right to control the way B performs a task it may be likely that A will be held to be vicariously responsible for the negligence of B in the course of performance of that task. In contrast if A stipulates only for the performance of the task and, under the agreement, has no right to control how B does it, A would ordinarily not be vicariously responsible for B's negligence: cf ***Scott*** [301] per Hayne J. However an employer may not have the capacity or skill to control the manner of work

of an employee: ***Zuijs v Wirth Brothers Pty Ltd*** (1955) 93 CLR 561 (trapeze artist); ***Scott*** [71] per McHugh J.

18 The fundamental concerns underlying the doctrine of vicarious liability include, but are not confined to, "control" of the employee: ***Hollis*** [44]-[45] per Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ.

19 Vicarious liability may arise where the wrongful act is done in the intended pursuit of the employer's interests or in intended performance of a contract of employment. Vicarious liability may be imposed where the wrongful act is done in ostensible pursuit of the employer's business or the apparent execution of the authority which the employer holds out the employee as having: ***Lepore*** [231] Gummow and Hayne JJ.

20 In some cases and employer might be vicariously liable for unauthorised deliberate wrongful, or even criminal, conduct. In ***Lepore*** [73] Gleeson CJ said that conduct amounting to theft, fraud or physical violence, even in breach of express or implied terms of the employment and inimical to the purpose of the employment, may amount to conduct in the course of employment. The difficulty is in identifying a test that sets the line between those cases that do and those that do not impose vicarious liability.

21 In ***Lloyd v Grace, Smith & Co*** [1912] AC 716 an employer was found to be vicariously liable for the unauthorised fraud of an employee. The wrongful act was committed by a clerk of a firm of solicitors who defrauded a client of the firm when conducting business that he had a right to conduct honestly, and was instructed to conduct, on behalf of the principal.

22 In ***Morris v CW Martin & Sons Ltd*** [1966] 1 QB 716 the employer, a sub-bailee for reward of a fur, was held liable for damages when the fur was stolen by an employee who had custodial responsibility for it.

23 Cases in Canada, United Kingdom and Australia show that a school authority is capable of being held vicariously liable for sexual abuse perpetrated on a pupil by a teacher: eg

Bazley v Curry [1999] 2 SCR 534 (Supreme Court of Canada); ***Lister v Hesley Hall Ltd*** [2001] AC 2001 (House of Lords); ***Prince Alfred College***. No single principle can be identified as underpinning the decision in ***Lister*** [2002] 1 AC 215: ***Lepore*** [208].

24 An employer will not necessarily incur liability for deliberate wrongful conduct by an employee at the workplace during work hours. In ***Deatons Pty Ltd v Flew*** (1947) 79 CLR 370 the employer of a hotel barmaid was held not to be vicariously liable for her conduct in throwing the contents of a glass of beer and then the glass itself into the face of the plaintiff who lost an eye. Her conduct was a gratuitous unprovoked act or personal retribution. It was not her job to keep order in the bar. She was merely employed to serve drinks.

25 ***Deatons*** establishes that an intentional tort committed by an employee at work and during ordinary working hours will not always suffice to establish vicarious liability: ***Lepore*** [228] Gummow & Hayne JJ. Conduct that is in breach of the law may not be sufficient to deny vicarious liability: ***Ibid***.

26 There is no "bright line test" for deciding whether vicarious liability is to be found: ***Lepore*** [2012] per Gummow and Hayne JJ. Tests of the extent ("sufficiency") of the relationship between the employee's authorised conduct and the wrongful act, or the "closeness of the connection" between the employment relationship and the wrongful act, are restatements of the problem presented by the concept of "course of employment": ***Lepore*** per Gummow & Hayne JJ [213].

27 Common law courts have struggled to identify a coherent basis for identifying the circumstances where an employer should be held vicariously liable for negligent acts of an employee, let alone for intentional criminal acts. Concerns have been expressed about imposing an unfair burden on employers who are not themselves at fault and on their business enterprises. On the other hand the circumstances of some cases have caused

judges to explain that it would be "shocking" if the defendant employer were not held liable for the act of the employee: ***Prince Alfred College*** [39].

28 The majority in ***Prince Alfred College*** considered that, no doubt largely because of those tensions, vicarious liability had been regarded as an unstable principle for which a fully satisfactory rationale for its imposition had been slow to appear in the case law: ***Ibid*** [39].

29 In ***Prince Alfred College*** [42]-[43] the majority (French CJ, Kiefel, Bell, Keane, and Nettle JJ) said that the test proposed by Salmond appears to have provided the courts of Canada and the United Kingdom with a "springboard for the development of tests which have regard, more generally, to the connection between the wrongful act and the employment and, in the United Kingdom, to what a judge determines to be fair and just". These new tests were devised to explain cases involving the sexual abuse of children in educational, residential or care facilities by employees having special positions in respect to the children and also to serve as a basis for vicarious liability that might apply more generally: ***Ibid*** [43].

30 However, the majority considered that the identification of a general principle for vicarious liability has eluded the common law for a long time: ***Ibid*** [44]-[46]. The majority preferred what they described as the "orthodox route of considering whether the approach taken in decided cases furnishes a solution to further cases as they arise": ***Ibid*** [46]. That process commenced with the identification of features of the employment role in decided cases which, although they may be dissimilar in many factual respects, explain why vicarious liability should or should not be imposed: ***Ibid*** [47].

31 The majority considered that a theory of liability stated in ***Bazley*** was largely based on considerations of policy and had found no real support in Australia or the United Kingdom: ***Ibid*** [59]. The theory was that it was appropriate to impose liability where

there was "a significant connection between the creation or enhancement of a risk and the wrong that accrues therefrom".

32 The majority in ***Prince Alfred College*** [75] considered that in ***Lepore*** there were different approaches taken by the members of the court to the question of vicarious liability:

32.1 Gleeson CJ appears to have been disposed to consideration of whether the sexual abuse could be regarded as sufficiently connected with the responsibilities given to persons associated with the school so as to give rise to vicarious liability;

32.2 The approach of Gaudron J was to found liability on a person being estopped from asserting that the person whose acts are in question was not acting as the employee, agent or representative of the first person when the acts occurred;

32.3 McHugh J rested his judgment on the issue of the existence of a non-delegable duty of care;

32.4 Gummow and Hayne JJ considered that recovery against an employer should not be extended beyond what was taken as the two kinds of cases identified by Dixon J in ***Deatons*** – namely, where the employee acted in intended pursuit or performance of the contract of employment or whether conduct occurred in the ostensible pursuit or apparent execution of authority which the employer held out the employee as having.

33 Another basis for liability, identified by the majority in ***Prince Alfred College***, to which Dixon J referred in ***Deatons***, was the "occasion" which the apparent performance of the employment provided for the wrongful intentional act to be committed.

34 The majority held that the role given to the employee and the nature of the employee's responsibilities may justify the conclusion that the employment not only provided an opportunity but also was the occasion for the commission of the wrongful act. It may be sufficient to hold an employer vicariously liable for a criminal act committed by an

employee where, in the commission of that act, the employee used or took advantage of the position of which the employment placed the employee, *vis a vis* the victim: ***Prince Alfred College*** [80].

35 Accordingly, in cases of this kind the relevant approach is to consider any special role that the employer has assigned to the employee and the position in which the employee is placed *vis a vis* the victim. In determining whether the apparent performance of the role may be said to give the "occasion" for the wrongful act, particular features may be taken into account. They include authority, power, trust, control and the ability to achieve intimacy with the victim. The latter feature may be especially important. Where, in those circumstances, the employee takes advantage of his or her position with respect to the victim, that may suffice to determine that the wrongful act should be regarded as committed in the course or scope of employment and render the employer vicariously liable: ***Ibid*** [81].

36 The majority considered that a test of vicarious liability that required no more than sufficiency of connection, unconstrained by the outer limits of the course or scope of employment, was likely to result in the imposition of vicarious liability for wrongful acts for which the employment provided no more than an opportunity: ***Ibid*** [83].

Independent contractor

37 It has long been accepted as a general rule that an employer is vicariously liable for the tortious acts of an employee but a principal is not liable for the tortious acts of an independent contractor: ***Sweeney*** [12]; ***Hollis*** [32]; see also ***Scott*** [18], [37], [218], [292].

38 An explanation for the dichotomy between these relationships was given by Dixon J in ***Colonial Mutual Life Assurance Society Ltd v Producers and Citizens Co-operative Assurance Co of Australia*** (1931) 46 CLR 41 – in the case of an independent contractor

although the work is done at the principal's request and for his benefit it is considered the independent function of the contractor and not as something done by the principal by his representative standing in his place and therefore identified with him for the purpose of liability arising in the course of his performance.

39 The independent contractor carries out its work not as a representative but as a principal: ***Hollis*** [39]. The difference between the relationships has been said to be rooted fundamentally in the difference between a person who serves the employer in the employer's business and a person who carries on a trade or business of his own: ***Marshall v Whittaker's Building Supply Co*** (1963) 109 CLR 210, 217; ***Hollis*** [40].

40 As will be seen under the later discussion of vicarious liability of a principal for the conduct of an agent problems may arise with the use of the word "agent" or "representative".

41 Liability may also arise where:

41.1 The employer's duty is non-delegable; or

41.2 Workers who appear to present as independent contractors are held to be employees: eg. ***Hollis***.

Principal and agent

42 A principal and agent may be joint tortfeasors where the agent commits a tort on behalf of the principal, as an employer or an employee may be where the employee commits a tort in the course of employment: ***Thompson v Australian Capital Television Pty Ltd*** (1996) 186 CLR 573, 580; ***Scott*** [169] per Gummow J.

43 In ***Colonial Mutual Life*** a principal was held vicariously liable for the wrongful conduct of an agent. The insurance agent in that case solicited proposals in a genuinely representative capacity for an insurer and was treated as if it were conducting a

transaction as the insurer's voice with which the agent defamed a competitor: ***Scott*** [231] per Gummow J.

44 A rationale for the decision given by Gavin Duffy CJ and Starke J in ***Colonial Mutual Life*** was that one is liable for another's tortious act "if he expressly directs him to do it or if he employs the other person as his agent and the act complained of is within the scope of the agent's authority". It is not necessarily that the particular act should have been authorised; it is enough that the agent should have been put in a position to do the class of acts complained of: ***Colonial Mutual Life*** 46.

45 Difficulties arise with the use of the word "agent". It has been said that "no word is more commonly and constantly abused" than the word "agent": ***Colonial Mutual Life*** 50. The term agency has been said to be best used to connote an authority or capacity in one person to create legal relations between a person occupying the position of principal and third parties: ***International Harvester Co of Australia Pty Ltd v Carrigan's Hazeldene Pastoral Co*** (1958) 100 CLR 644 at 652; ***Scott*** [227] per Gummow J, [299] per Hayne J.

46 There is no principle of vicarious liability for the conduct of a "representative". There is no principle that "A is vicariously liable for the conduct of B if B "represents" A (in the sense of B acting for the benefit or advantage of A)": ***Leighton Contractors*** [22]; ***Prince Alfred College*** [22]. In ***Prince Alfred College*** [22] the majority considered that in ***Scott*** the court refused to recognise an "agent" in a non-technical sense as an actor attracting principles of vicarious liability.

47 The word "representative" and its cognate forms are used in many different senses and do not reveal what was the relationship between the parties: ***Sweeney***. [13]-[16] per Gleeson CJ, Gummow, Hayne, Heydon, and Crennan JJ; cf [38] per Kirby J and ***Hollis*** [73] per McHugh J. The majority in ***Sweeney*** said that "words like like "agent", "representative", "for", "on behalf of", are often used in this context (vicarious liability of an employer) as statements of conclusion that mark the limits to which vicarious

liability is extended. But when used in that way, they are statements of conclusion that do not necessarily proceed from an articulated underlying principle that identifies why there should be vicarious liability in one case but not another": ***Sweeney*** [19].

48 The bare fact that a person's actions were intended to benefit another or undertaken to advance some purpose of that other person does not suffice to demonstrate that the latter is vicariously liable for the conduct of the first: ***Sweeney*** [13].

Owner or bailee of motor vehicle

49 There is no general principle that holds an owner of a chattel responsible for the negligence of a user of the chattel: ***Quarman v Burnett*** (1840) 6 M&W 499.

50 Exceptionally, an owner or bailee of a motor vehicle might be vicariously liable for the driver's negligence: ***Soblusky v Egan*** (1960) 103 CLR 215. Liability may arise where the owner or bailee is in possession of the vehicle and has full legal authority to direct what is done with it, can always assert his power of control, and appoints another to drive it on behalf of the owner or bailee. The driving is said to be by agent. The principle is that the management of the vehicle is done by the hands of another and is in fact and law subject to direction and control: ***Ibid*** 231.

51 The owner or bailee must be in the vehicle or otherwise able to assert control over the driver: ***Kondis v State Transport Authority*** (1984) 154 CLR 672, 692 per Brennan J.

52 The principle is derived from cases in the 19th Century of collisions by horse drawn carriage: see ***Scott*** [285]-[294] per Hayne J. By the middle of the 19th century authorities suggested that to hold an owner liable for the acts of another who drove the owner's carriage and who was not an employee of the owner it was necessary to establish that the owner in fact had controlled the driver's conduct: ***Scott*** [294] per Hayne J.

53 The principle has been expressed in terms of agency: for example in ***Christmas v Nicol Bros Pty Ltd*** Jordan CJ said that "in order to fix with vicarious liability a person other

than the negligent driver himself, it is necessary to show that the driver was at the time an agent of his, acting for him and with his authority in some matter in respect of which he had the right to direct and control his course of action. If this is proved, liability is established on the part of the other person, and it is immaterial whether he is the owner of the vehicle or has begged, borrowed or stolen it": (1941) 41 SR (NSW) 317, 319-320; ***Scott*** [13].

54 The principle has not been extended so as to make the owner of a "family car" vicariously liable where the car is used by other family members: ***Morgans v Launchbury*** [1973] AC 127.

55 Nor has it been extended so as to make the owner of an aircraft vicariously liable for the negligence of a pilot when the pilot was operating the aircraft with the owner's consent and for a purpose in which the owner had some concern: ***Scott*** esp [311] per Hayne J.

Ship's pilot

56 At common law where a ship owner was compelled by law to engage a ship's pilot the owner was not vicariously liable for the conduct of that pilot: ***Steamship "Beechgrove" Co Ltd v Aktieselskabet "Fjord" of Kristiania*** [1916] 1 AC 364, 382-383; ***Oceanic Crest Shipping Co v Pilbara Harbour Services Pty Ltd*** (1986) 160 CLR 626. However where the pilot was voluntarily engaged vicarious liability arose because the relationship was that of employer and employee: ***Steampship "Beechgrove"*** 382-383. See also ***Scott*** [261] per Gummow J.

57 It has been consistently held that a pilotage authority is not vicariously liable for the negligence of a qualified and competent pilot employed by the authority: see ***Oceanic Crest*** 640, 647-648, 683.

58 In ***Oceanic Crest*** (683) Dawson J said that in the case of a pilot in the general employ of the Crown or a harbour authority or its equivalent, it is the very nature of the relationship

and of the status conferred upon the pilot which is inconsistent with the exercise of control by his general employer over the manner in which he carries out his actual duties as a pilot. The High Court (by majority) held that the respondent port authority, a private trading corporation, was not vicariously liable for the negligence of the pilot who was its employee.

59 Section 410B of the (now repealed) *Navigation Act 1912* (Cth) had the effect of imposing upon the ship owner liability for the negligent conduct of the pilot: ***Oceanic Crest*** 641 per Gibbs CJ, 645, 681. It has been said to create a "parallel, statutory liability in the owner or master": ***Oceanic Crest*** 670 per Brennan J (dissenting).

60 Section 326 of the *Navigation Act 2012* (Cth) appears to maintain that position. It provides:

> "326 **Civil liability in relation to a vessel under pilotage**
>
> (1) A pilot who has the conduct of a vessel is subject to the authority of the master of the vessel.
> (2) The master of a vessel is not relieved of responsibility for the conduct and navigation of the vessel only because the vessel is under pilotage.
> (3) The liability of the master or owner of a vessel in relation to loss or damage caused by the vessel or by a fault in the navigation of the vessel is not affected only because pilotage is compulsory under a law of the Commonwealth, a State or a Territory."

Public officer

61 There is a principle that any public officer whom the law charges with a discretion and responsibility in the execution of an independent legal duty is alone responsible for tortious acts which he may commit in the course of his office and that for such acts the government or body which he serves or which appointed him incurs no vicarious liability: ***Little v The Commonwealth*** (1947) 75 CLR 94, 114; ***Oceanic Crest*** 637, 639, 662, 681.

Legal (contractual) employer and (factual) employer *pro hac vice*

62 In exceptional circumstances, where the services of an employee have been hired to a third party (employer *pro hac vice*), the third party rather than the employer may be held vicariously liable for the negligence of the employee. This principle was canvassed by the Western Australian Court of Appeal in ***Kelly v Bluestone Global Ltd (In Liq)*** [2016] WASCA 90.

63 A labour hire company hired the services of an excavator operator to a company that operated a mine. The labour hire company was the employer. Kelly, an employee of the operator of the mine, was injured when the tray of the truck he was operating was struck by the bucket of an excavator. Kelly sued the labour hire company for damages for negligence. He alleged that the labour hire company, as employer, was vicariously liable for the conduct of its employee. The claim failed because the court at first instance found, and the Court of Appeal unanimously agreed, that the operator of the excavator was not negligent.

64 The defendant labour hire company also defended Kelly's claim on the basis that it was not vicariously liable for his negligence because his services had been transferred to the operator of the mine. Kelly challenged the finding of the trial judge that the actual employer was not vicariously liable for the conduct of the excavator operator.

65 By majority, McLure P and Murphy J, the court held that it was open for the trial judge to find that authority to control the discretion exercised by the excavator operator in operating the loader at the relevant time had passed to the mining contractor so that the actual employer no longer had authority to control unloading by the excavator when it was operated by its employee. The employer was not vicariously liable for the conduct of the excavator operator.

66 Where relevant transfer of the services of the employee has occurred the factual employer (*pro hac vice*), rather than the legal employer under the contract of service, is vicariously liable for the employee's negligent acts: ***Kelly*** [57] per McLure P. The burden of establishing that there has been sufficient transfer is a heavy one that can only be discharged in exceptional circumstances: ***Kelly*** [58]. There is no precise formula by which to determine what the circumstances must be but the focus is on who has the right to control the manner in which the act involving the negligence was done: ***Ibid***, see also Murphy J [72]-[74].

67 Murphy J agreed with McLure P.

68 Mitchell J dissented on the question whether services and control of performance of work had been sufficiently transferred. He said that the relevant question is whether the third party is given the exclusive authority or right to direct the employee as to how the relevant work is to be performed. In his view an employer can only avoid vicarious liability by divesting itself of the right to control the manner in which the employee performs the relevant work: [87]. He held that uncertainty as to the relevant terms of the contract between the labour hire company, its employee and the mining contractor meant that the labour hire company had not discharged its heavy onus of proving that it had divested itself of the entitlement to control how the employee did his work: [108].

69 Mitchell considered that the question in the case was whether the actual employer had completely divested itself of the authority to control the manner in which the excavator operator performed his work so as to avoid its vicarious liability for his conduct. It was not whether both the mine operator and the employer were vicariously liable: [110].

"Dual" vicarious liability

70 Kelly sought to argue that a principle of "dual vicarious liability" applied where the contractual employer and the factual employer each had an ability to control the work

done by the employee. Kelly relied on English decisions ***Viasystems (Tyneside) Ltd v Thermal Transfer (Northern) Ltd*** [2006] QB 510 and ***Various Claimants v Catholic Child Welfare Society*** [2012] 3 WLR 319 that recognised that dual vicarious liability may be imposed.

71 The New South Wales Court of Appeal in ***Day v Ocean Beach Hotel Shellharbour Pty Ltd*** (2013) 85 NSWLR 335 concluded that dual vicarious liability is inconsistent with the reasoning of the majority (Gibbs CJ, Wilson and Dawson JJ) in ***Oceanic Crest***. In ***Kelly*** McLure P observed that there is also academic support for that position. However McLure P considered it preferable to leave the determination of this important legal issue to another day [63].

Non-delegable duty of care – origin

72 The general rule is that a person is not liable for an accident that occurs without the fault of that person or of an employee in the course of employment: ***Lepore*** [258] per Gummow and Hayne JJ. A non-delegable duty of care is a departure from the general rule. It is a duty to ensure that reasonable care is taken. It imposes strict liability on a defendant for the negligent conduct of another: ***Lepore*** [257] per Gummow and Hayne JJ; ***Scott*** [248] per Gummow J. The defendant becomes, in effect, the insurer of an activity that is performed by another.

73 The best known example is that an employer owes to an employee a non-delegable duty of care: ***Czatyrko v Edith Cowan University*** [2005] HCA 14; (2005) 79 ALJR 839 [12]; ***Leighton Contractors Pty Ltd v Fox*** [2009] HCA 35; (2009) 240 CLR 1 [21].

74 Professor John Fleming has described a non-delegable duty as a disguised form of vicarious liability: ***Lepore*** [152] per McHugh J. According to Kirby J in ***Leichhardt*** [82] the late Professor Fleming was inclined to view non-delegable duties as a fictitious guise

of vicarious liability and to attribute the very reason for importing strict liability to a special concern to ensure safety or else compensation.

75 The doctrinal roots of non-delegable duties are not deep or well established. Prof Glanville-Williams has described the imposition of non-delegable duties as reaching a desired result "by devious reasoning and the fictitious use of language": ***Leichhardt*** [155] per Hayne J; see also ***Lepore*** [252] per Gummow and Hayne JJ.

76 Early English cases that first identified non-delegable duties to ensure that reasonable care was taken offered no reason for departing from the generally accepted rule: ***Lepore*** [258] per Gummow and Hayne JJ. In ***Lepore*** [146] McHugh J suggested that the defendant under a non-delegable duty is liable for the conduct of employees and independent contractors because the defendant has expressly or impliedly undertaken to have the duty performed.

77 The concept of non-delegable duty traces its roots to ***Dalton v Angus*** (1881) 6 App Cas 740, 829, and a statement by Lord Blackburn that a person causing something to be done, the doing of which casts on him a duty, cannot escape from the responsibility of seeing that duty performed by delegating it to a contractor: ***Lepore*** [248] per Gummow and Hayne JJ.

78 ***Dalton v Angus*** is authority for the proposition that where a plaintiff owner of land has a right of support for buildings on the plaintiff's land an adjoining owner of land may be held liable for damage caused by loss of support from excavation work carried out by independent contractors.

79 In ***Lepore*** [247] Gummow and Hayne JJ said there was the need for considerable caution in developing any new species of the genus of liability based on imposition of a non-delegable duty.

Non-delegable duty – categories

80 Non-delegable duties of care have been identified in cases where the defendant has undertaken the care, supervision or control of the person or property of another and in cases where the defendant is so placed in relation to the person or property of the plaintiff as to assume a particular responsibility for the plaintiff's safety, and in each case where the plaintiff might reasonably expect the exercise of due care: ***Kondis v State Transport Authority*** (1984) 154 CLR 672, 687; ***Scott*** [248] per Gummow J.

81 Several categories of cases where a duty to take reasonable care was non-delegable were identified by Mason J in ***Kondis*** [679]-[687] (see ***Lepore*** [255] per Gummow and Hayne JJ):

81.1 Adjoining owners of land in relation to work threatening support of common walls;

81.2 Employer and employee in relation to a safe system of work;

81.3 Hospital and patient;

81.4 School authority and pupil; and

81.5 Occupier and invitee.

82 A further category is an owner of land who allows a dangerous substance to be brought onto the land or who allows a dangerous activity to be performed there to persons who may be exposed to the danger: ***Lepore*** [150]-[151] per McHugh J.

83 Non-delegable duties were discussed generally by the High Court in ***Burnie Port Authority v General Jones Pty Ltd*** (1994) 179 CLR 520, 550-554. The majority (Mason CJ, Deane, Dawson, Toohey and Gaudron JJ) held that a person who introduces or allows another to introduce a dangerous substance, or undertakes or allows another to undertake, a dangerous activity on premises which he or she controls owes to a person outside the premises, whose person or property is exposed to foreseeable risk of danger, a non-delegable duty to ensure that reasonable care is taken.

84 In that case the appellant owner of a building retained an independent contractor to work on extensions to the building. The work included welding activities in close proximity to cardboard cartons that contained an insulating material that burned fiercely if brought into sustained contact with flames. The negligent work of the contractor caused the insulating material to burn and an ensuing fire spread to an area of the building occupied by the respondent. The majority held that the owner breached a non-delegable duty of care.

85 Another example of a circumstance where a non-delegable duty of care would arise from a dangerous activity is where the owner lights, or causes to be lit, a fire on the owner's land: ***Burnie Port Authority*** 552-553.

86 The majority in ***Burnie Port Authority*** said that it has long been recognised that there are certain categories of cases in which a duty to take reasonable care to avoid a foreseeable risk of injury to another will not be discharged merely by the employment of a qualified and ostensibly competent independent contractor. In those categories of cases the nature of the relationship of proximity gives rise to a duty of care of a special and more stringent kind. It is a duty to ensure that reasonable care is taken: 550.

87 The principal categories of cases which the duty to take reasonable care under the ordinary law of negligence is non-delegable were identified by Mason J in ***Kondis***: ***Burnie Port Authority*** 550. In most, but conceivably not all, of the categories of cases the common element in the relationship between the parties that generates the special responsibility or duty to see that care is taken is that the person on whom the duty is imposed has undertaken the care, supervision or control of the person or property of another or is so placed in relation to that person or his property as to assume a particular responsibility for his or her safety in circumstances where the person affected might reasonably expect that due care will be exercised. It is convenient to refer to that common element as the central element of control. The relationship of proximity giving

rise to the non-delegable duty of care in these cases is marked by special dependence or vulnerability on the part of the person affected: ***Burnie Port Authority*** 550-551.

88 Each category is identified as a relationship in which the person owing the duty either has the care, supervision or control of the other person or has assumed a particular responsibility for the safety of that person or that person's property: ***Lepore*** [255] per Gummow and Hayne JJ. All relationships that display those characteristics do not necessarily import a non-delegable duty: ***Ibid***.

89 There have been judicial expressions of reluctance to expand the categories of non-delegable duties. In ***Lepore*** Gummow and Hayne JJ expressed the view that a non-delegable duty should not be extended to include responsibility for intentional defaults by the delegate: [265]. In that case Kirby J resisted efforts to expand the categories of non-delegable duties because difficulties arise in identifying "the precise characteristics of relationships said to justify the imposition of the exception of non-delegable duty of care": [289].

Creating a danger

90 A defendant who creates a danger may owe a non-delegable duty of care to protect from harm a person who may be exposed to that danger: eg. ***Pickard v Smith*** (1861) 10 CB(NS) 470; see also ***Lepore*** 567 and ***Burnie Port Authority***.

Liability of roads authority

91 A roads authority owes a duty to exercise reasonable care to prevent injury to a person from the carrying out of road works. The notion that the duty is non-delegable was rejected by the High Court in ***Leichhardt***.

Conclusion

92 Strict liability for negligent conduct by a person other than the defendant finds expression in the rules of vicarious liability and non-delegable duty of care. These rules are exceptions to general rules that:

92.1 A person is not liable for the negligent conduct of another person;

92.2 An owner or bailee of a chattel is not liable for negligent use of that chattel by another person;

92.3 A principal is not liable for the negligence of an independent contractor.

93 There is no unifying principle that explains the departures from general rules and creation of strict liability. Their existence appears to be explained only by considerations or developments that are historical.

94 The absence of a unifying principle makes it difficult to determine or predict whether strict liability, in some form, will apply in a new category of case. In addition, within the existing categories of case there is no “bright line test” that can be applied to decide whether a case falls on one side or the other in terms of the application of vicarious liability.

95 We are left with a set of classes of case where the strict liability principles have been applied and the necessity of examining the considerations that applied in those cases to determine why vicarious liability applied or a non-delegable duty of care arose in order to draw parallels that might be applied to arrive at a decision in a new case. Each category must be considered separately given the absence of a unifying principle that would make decisions in other categories of case relevant.

96 Within the exceptional cases particular conditions that must be fulfilled before a finding of strict liability may be made. Those conditions must be identified for each category of case.

97 The categories where vicarious liability has been found include:

97.1 Employer and employee acting in the course of employment;

97.2 Principal and agent (strictly so called);

97.3 Owner or bailee of motor vehicle and driver;

97.4 Ship owner and ship's pilot.

98 Strict liability from a non-delegable duty of care may also be found in a limited number of identifiable categories of relationships:

98.1 Owner of land that provides support to adjoining land and the owner of the adjoining land;

98.2 Employer and employee;

98.3 Hospital and patient;

98.4 School authority and pupil;

98.5 Occupier and invitee;

98.6 Person who creates a danger on land that may expose the person or property of another person to risk of harm.

99 Questions of both vicarious liability and non-delegable duty of care may arise in cases of school authority and pupil.

100 It may be difficult to predict whether a defendant will be held to be vicariously liable, or to have breached a non-delegable duty of care, in relation to criminal conduct of an employee. This is particularly so in the case of sexual abuse of children by staff of a school or institution that cares for children.

101 It is clear that these notions will not apply to create strict liability in certain identifiable classes:

101.1 Port authority and ship's pilot;

101.2 Aircraft owner and pilot (who is not an employee);

101.3 Principal and independent contractor (who is not acting as a strict agent of the principal);

101.4 Owner of family car and member of family as driver (not driving under the direction and control of the owner);

101.5 Contractual employer where control of the way relevant work is to be done has been transferred to a third party.

102 Given that the rules that impose strict liability are exceptions to general rules, derive from distinct historical paths, and lack a unifying principle it is not surprising to find in the decided appellate level decisions apparent expressions of reluctance to extend the principles to new cases.

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