

# Extending Liability

## Vicarious Liability

- A form of strict liability in that it is not dependent on the employer's personal fault, but does depend on fault for the employee's liability (consequently, CLA s 3C, limits on primary liability modify secondary liability. Here, we focus on employee-employee: generally an employer is liable for the acts of an employee in course of employment, but not for the acts of an independent contractor. *Day v The Ocean Beach Hotel Shellbarbour*, only one employer can be liable under Australian law.
- Scaffold – is an employer vicariously liable?
  - First, check non-delegable duties scaffold to determine if liability for what has occurred is seated in the employer without exception.
  - Was the party who has done the wrong an employee or independent contractor?
    - Employee – continue; independent contractor – not vicariously liable, but perhaps the employer is liable under a non-delegable duty.
    - Test is a Multifactorial Approach:
      - *Zuis v Wirth Bros*: does the employer have the right to control the manner of fulfilling the obligation, safety, costume, conduct, location, nature of payment, discipline, can they delegate duties?
      - *Hollis v Vabu*: is the work skilled, does the party run their own enterprise, do they control their work (i.e. can they work for other employers), how do they appear to the public? Policy interest: where companies primary trade is carried through a party, liability is preferable.
      - *Sweeney v Boylan Nominees*: the ultimate indicator of liability is whether they are an independent contractor. Here, they were acting in their own right, even though they were under an obligation to the service station operator to repair a defect.
  - Was the act in the course of employment?

- *Joel v Morrison*: Includes conduct authorised by employer, and that which was done by an unauthorised mode. Excludes conduct not connected to employment. No test, but turns on facts.
- *Bugge v Brown*: act must be so anathema it makes the employee effectively a stranger to employer. Unauthorised mode of conduct is OK.
- *Deatons v Flew*: outside employment as retribution, not self-defence, but in certain cases self-defence can fall in course of employment. It does not matter that the act was during employment, but rather if it is connected to what they are employed to do.
- *Starks v RSM Security*: cf. *Deatons v Flew*, an ejection can be criminal but the employer can still be liable. Starks was hired to eject people, that is what he did.
- Intentional criminal acts:
  - *New South Wales v Lepore*: sexual assault at school in school hours is outside course of employment, save where the teacher's employment responsibilities place the teacher in a position of power and intimacy.
  - *A, DC v Prince Alfred College*: regarding sexual assault cases, relevant approach is to consider any special role the employer gave the employee, and the position in which the employee is placed to the victim. This is not accepting the Canadian proximity test, but rather focusing on factors such as authority, power, trust, control and intimacy.

## Non-Delegable Duties

- Duties for which, while performance can be delegated, liability cannot (i.e. *Civil Liability Act s 5Q*). This is liability for an employee or independent contractor. Several uncontroversial categories: *Hospital to own patients, employers to employees on workplace safety, schools to pupils*. These do not apply to intentional torts, only to negligence: *NSW v Lepore*.
- Scaffold: non-delegable duties,
  - Does a category arise?