

Torts Laws 1012 Notes

Topic 2: Vicarious Liability

It is widely accepted that an employer is liable for the torts committed by an employee if it is in the course of employment → **Hollis v Vabu**

It is also accepted that an employer is NOT liable for the torts committed by an independent contractor → **Sweeney v Boylan Nominees**

Just because an employer may be liable for the employees tort, this does not necessarily reduce or negate the tortfeasors liability.

Determining whether an individual is an independent contractor or employee:

Distinction can be determined by the **Multiple Indicia test:**

This involves looking at various factors to determine in which category an individual falls into:

Some factors to consider:

- **Zujis v wirth brothers:** Can the employer control what the employee does and the manner in which it is performed?
- **Hollis v Vabu:** Factors such as a uniform, stipulation as to pay, little scope as to how to carry out work → All indicate employment rather than a contractual relationship.
- **Organisation test:** Does the person work for themselves or do they work for an organisation 'the employer'

Note: **Day v The Ocean Beach Hotel Shellharbour** → Australia does not recognise the concept of dual vicarious liability. That is, two people/employers cannot be vicariously liable for the torts of an employee/contractor

Determining whether a tortious act is within the course of employment:

The traditional test for determining whether a tortious act is in the course of employment is the **Salmond test** which states that a tort will be committed in the course of employment if it is either:

- (a) a wrongful act authorised by the master, or
- (b) a wrongful and unauthorised mode of doing some act authorised by the master.

BUT an employer is not responsible for wrongful acts by the employee which are totally unconnected and acts to which the employee is a 'stranger' to his employer.

To determine if the employee is a 'stranger' we turn to these cases:

Joel v Morrison → An employer is not responsible for the torts committed by an employee if they are on a 'frolic of their own'

Bugge v Brown → Where an employee is doing something prohibited (ie. the manner/method), it could still be in the course of employment if the employee is doing what they were employed to do.

The employee must be a 'total stranger' from the act they were employed to do in order to deem that an act is **not** in the course of employment.

Deatons v Flew → An act committed which is unconnected with what is to be done as part of a person's job is **NOT** in the course of employment even though the employer provided the occasion for it to occur.

ie. The employer will not be liable where the employee was not doing what they were employed to do.

Starks v RSM Security → An employer may be vicariously liable for a criminal assault committed by an employee where the act of the employee is an unauthorised mode of doing what the employee was employed to do.