LAWS5006: TORTS + CONTRACTS II

VICARIOUS LIABILITY AND NON DELEGABLE DUTIES

Vicarious Liability for Employees

Vicarious Liability

- It is the imposition of liability on an otherwise blameless party who has some sort of responsibility over the tortfeasor.
- **Will only be imposed if:**
  - There is a requisite relationship between the defendant and the tortfeasor
  - The negligence occurred within the course of employment
  - The tortfeasors conduct was tortious (as in, passes the usual tests of negligence)
- Vicarious liability is a form of joint liability - both the employer and employee are liable for the one wrongful act
- The vicarious liability of an employer does not affect or limit the personal responsibility of the employee who committed the tort as between the employee and the tort victim, although the employee may be entitled to be indemnified by the employer
- An employer is vicariously liable whenever an employee (but not an independent contractor) commits a wrongful act in the course of employment
- **Three Elements**
  - Was the wrongful act tortious?
    - The employee must be at fault
    - There does not need to be any personal fault on the part of the employer
  - Is the tortfeasor an employee or independent contractor?
  - Was the act in the course of employment?
    - An act authorised by the employer, or
    - An act constituting an unauthorised mode of performing an authorised act
      - Where an express prohibition has been issued, does the prohibition limit the sphere of employment or only deal with conduct within the scope of employment?
- The rationale is that the deterrence of future harm is much more effective if the burden is on the employers rather than the employees → *Holis v Vabu*
- Australian law does not recognise any concept of dual vicarious liability (ie, two employers cannot both be vicariously liable for the same employees conduct) → *Day v The Ocean Beach Hotel Shellharbour*

***Civil Liability Act 2002* (NSW)**

- **S 3C → Act operates to exclude or limit vicarious liability**
  - Any provision of this act that excludes or limits the civil liability of a person for tort also operates to exclude or limit the vicarious liability of another person for that tort
- The scope of the employer's liability will be limited to the original tortfeasor will be liable

Relationship of Employer and Employee

- An employer is vicariously liable for the tortious acts of an employee but that a principal is not liable for the tortious acts of an independent contractor → *Sweeney v Boylan Nominees* (2006); *Hollis v Vabu* (2001)

- Whether the relationship can be regarded as a contract for service depends on the degree of the control exercised by the employer upon the employee. It may be inferred from multiple facts → *Zujis v Wirth Brothers* (1955)
- Where an employer conducts an enterprise in which persons are identified as representing that enterprise this indicates that those persons are employees → *Hollis v Vabu* (2001)
- The circumstance that the business enterprise of a party said to be an employer is benefited by the activities of the person in question cannot be a sufficient indication that this person is an employee. Other factors should be taken into consideration → *Sweeney v Boylan Nominees* (2006); *Hollis v Vabu* (2001)
- **Control Test**:
    - Traditionally, the formula for whether a worker was an employee or independent contractor was control:
        - If the employer can control both what the person does and how they do it, then the relationship is between employee and employer
        - If the employer can only determine what the person does but not how they do it, it is relationship of an independent contractor
    - Now, the existence of control is not the sole criteria → *Stevens v Brodribb*
- **Multifactorial Test**
    - Courts will consider the totality of the relationship between the two parties, and the express intention of the parties is not determinative → *Hollis v Vabu*
    - See table of relevant factors below
- Borrowed employee → *Mersey Docks and Harbour Board v Coggins and Griffith*
    - There is a strong presumption that a worker remains the employee of the permanent employer even where another employer borrows the services of the worker
    - The question is who was entitled to give the orders as to how the work should be done

Course of Employment

- Acts committed in the course of employment include → *Starks v RSM Security*
    - Acts authorised by the employer, and
    - Acts that constitute unauthorised modes of performing an authorised act
- There must be a sufficient nexus between the act and the employment
    - The conduct must be during the authorised period of service or a period which is not unreasonably disconnected from the authorized period → *Joel v Morrison*
    - Acts that are personal to the employee or unconnected to the employment are not in the course of employment, even if they occur on the employer's premises or when otherwise carrying out employment duties → *Deatons v Flew*
    - If the authorisation of the employer is necessary for the employee to commit the act, it may be characterised as an unauthorised method of carrying out work → *NSW v Lenore*
- Where the act is prohibited or against the instructions of the employer:
    - An instruction or prohibition will limit the sphere of employment if the violation makes conduct so distinctly remote and disconnected from his employment as to put him in the position of a stranger → *Bugge v Brown*
    - An employee who goes against his employer's commands as a detour while driving for the employer's business will be acting in the course of his employment; an employee who goes on a frolic of his own, unconnected to his employer, will not → *Joel v Morrison*
- An act may be in the course of employment despite being a criminal act → *Starks v RSM Security*

Police Torts

- At common law, the Crown cannot be sued for the tortious acts of employees. This has been altered by legislation which renders the Crown, as employer, opens to claims of vicarious liability → *Law Reform (Vicarious Liability) Act* s 8(1)
- Where the employee is carrying out a duty independently cast upon him by law (eg. under statute), they are not acting in the course of their employment
- Where torts are by police officers in the exercise of their duty, the Crown will be vicariously liable and proceedings may not be brought against the individual officer, even if they behaved in exercise of an independent function → *Law Reform (Vicarious Liability) Act* s9B

Relationship of Employer and Employer Table

Relevant Factors	Employee	Independent Contractor
Extent of the employer's control over the delegate and over the manner in which the work was to be performed → *Stevens v Brodribb*	High	Low
Mode of remuneration → *Stevens v Brodribb*	Salary Based	Based on Work Performed
Power to delegate work → *Stevens v Brodribb*	No	Yes
Provision and maintenance of equipment → *Stevens v Brodribb*	Provided by Employer	Provided by Delegate
Hours of work → *Stevens v Brodribb*	Decided by Employer	Decided by Delegate
Type of Employment Contract	Permanent or Part-Time	Casual
Special skills and qualifications required for the work to be performed → *Hollis v Vabu*	No	Yes
Whether delegates are entitled to choose the work to take on → *Stevens v Brodribb*	No	Yes
Freedom to work for other employers or freelancing → *Stevens v Brodribb*	No	Yes
Scope to bargain for rates of remuneration → *Hollis v Vabu*	Low	High
Employer has a right to dismiss → *Zuijs v Wirth Brothers*	Yes	Yes
Whether the work is performed as a representative of the employer or as representing themselves → *Hollis v Vabu*	Representing the Employer	Representing Themselves

Zuijs v Wirth Brothers (1955) 93 CLR 561

Facts	- The plaintiff was an acrobat who got injured while working in the defendant's circus - The employer had power over number and times of rehearsal, costume, safety regulations and selecting the person engaged - Remuneration took the form of wages instead of being paid for the event - Master had the ability to dismiss the employee due to misconduct - Thus, the performer was an employee

Held	- An indicia of the relationship of employer and employee is that the employer lawfully may command the employee as to **the manner in which the employee is to do his or her work.** It is **not material to the existence of the relationship of employer and employee,** that, in the case of employees who are employed to perform specialised functions, there may be little scope for the exercise by the employer of his power of command
	- **Dixon CJ, Williams, Webb and Taylor JJ**
	  - All the evidence pointed to an employment relationship because **although there was no control over the actual technique of the act performed, there was control over:**
	  - Initial selection of the person for the contract
	  - Remuneration in wages
	  - Right to suspend or dismiss for misconduct
	  - Where the performance took place in the circus program; safety issues; the number, time and manner of rehearsals; the costume of the performers and conduct before the audience' and participation in the grand parade
	  - A wide field of conduct that would be involved in a touring circus
	  - Query whether or not the employer has exercised some control over somebody

Principle	- There may be situations where the duties to be performed require such skill and knowledge that there is little room for control
	- Number of relevant factors in determining whether the relationship is between an employer and employee or contractor:
	  - Does the employer have the power to select who is going to do the work, and can the employee delegate the work to somebody else
	  - Does the employer have a right to control the manner in which the servant fulfils his obligation
	  - Does the employer have the ability to suspend or dismiss the employee for misconduct
	  - Was the remuneration in the form of wages or a lump sum

Hollis v Vabu (2001) 207 CLR 21

Facts	- A bicycle courier knocked the plaintiff over while on his bike - The plaintiff sued the owner of the business for injuries suffered when knocked over - The bicycle courier was an employee - The courier was not providing skilled labour

	- The control which the company exercised was not merely incidental but involved the marshalling and direction of the couriers' labour, making up the very essence of their business - The uniforms represented the couriers as emanations of the company to the public - The company superintended the couriers' remuneration - While the couriers provided their own bicycles, this cost was not substantial

Held	- Where an employer conducts an enterprise in which persons are identified as **representing that enterprise**, this indicates that those persons are employees. On the other hand, an independent contractor carries out his or her work as a principal, not as a representative of the employer
	- In general, under contemporary Australian conditions, the conduct by the defendant of an enterprise in which person are identified as representing that enterprise should carry on obligation to third persons to bear the cost of injury or damage to them which may be fairly said to be characteristic of the conduct of that enterprise
	- An employer is vicariously liable for the tortious acts of an employee but that a principal is not liable for the tortious acts of a independent contractor
	- The circumstances that the business enterprise of a party said to be an employer is benefited by the activities of the person in question cannot be a sufficient indication that person is an employee
	- **In the present case, additional concerns are made upon:**
	  - The couriers were not providing skilled labour or labour which required special qualifications
	  - The couriers had little control over the manner of performing their work
	  - They were presented to the public and to those using the service as emanations of Vabi
	  - They were to wear uniforms with Vabu's logo
	  - There is a matter of deterrence
	  - Vabu had knowledge as to the dangers to pedestrians presented by the couriers and the failure to adopt effective means for the personal identification of those couriers by the public
	  - Vabu superintended the couriers finances
	  - There was no scope for the couriers to bargain for their rate of remuneration
	  - The situation in respect of tools and equipment provided by Vabu also favors
	  - Although a more beneficent employer might have provided bicycles for its employees and undertaken the cost of their repairs, there is nothing contrary to the relationship of employment in the fact that employees here were required to do so
	  - This is not a case where there was only the right to exercise control in incidental or collateral matters
	  - Vabu's whole business consisted of the delivery of documents and parcels by means of couriers
	  - It was not the case that the couriers supplemented or performed part of the work undertaken by Vabu or aided from time to time

Principle	- Just because a relationship is characterised as one of employer and employee or for other legal purposes (eg. superannuation), does not mean they are automatically in an employer-employee relationship for the assignment of vicarious liability - Employees usually represent the enterprise to the public, and may be expected to buy some equipment for their work

Stevens v Brodribb Sawmilling Co (1986) 160 CLR 16

Facts	- The plaintiff experienced severe injured caused by the negligence of Gray while they were both working for the defendant - Gray was an independent contractor. He provided and maintained his own equipment, set his own hours of work and they received payment in amounts determined with reference to the volume of timber they delivered - He employed his son as a driver, a sign that he regarded the relationship as one of independent contract

Principle	- The existence of control, whilst significant, is not the sole criteria by which to gauge whether a relationship is one of employment
	- The totality of the relationship must be considered, including:
	  - The ability to exercise control (as well as actual control)
	  - Mode of remuneration
	  - Provision and maintenance of equipment
	  - Obligation to work, hours of work and the provision for holidays
	  - The deduction of income tax and the delegation of work by the putative employee

Sweeney v Boylan Nominees (2006) 227 ALR 46

Facts	- The defendant, Boylan, was the owner of a commercial refrigerator which was placed in the convenience store area of a suburban service station - At the request of the service station, the defendant arranged for a mechanic, Mr Comninos to repair a defect in the fridge door - The repairs were carried out negligently by Mr Comninos wit the result that Mr Sweeney suffered personal injury when the door fell on her as she opened the door to buy a carton of milk - Evidence established Mr Comninos carried on his business and was not an employee of the defendant - His van carried his own company name and the D did not provide him with a uniform or equipment - He was paid by the D upon submitting an invoice for work performed and for spare parts - The plaintiff commenced proceedings against the D for vicarious liability
Held	- **Appeal dismissed → the D was not liable to the P's injury arising from the negligent act of the independent contractor**

	- The critical distinction is to be maintained between employees, for whose conduct the employer will generally be vicariously liable, and independent contractor, for whose conduct the employer, the person engaging them, generally will not be vicariously liable
	- It is necessary to always recall that much more often than not, questions of vicarious liability fall to be considered in a context where one person has engaged another to do something that is of advantage to, and for the purposes of, that first person
	- Yet it is clear that the bare fact that the second person's actions were intended to benefit the first, or were undertaken to advance some purpose of the first person, does not suffice to demonstrate that the first is vicariously liable for the conduct of the second person
	- **The P tried to argue Comninos worked for the benefit of the D**
	  - Court held that is not enough
	  - Clearly he had his own business, the business he carried out was totally different to the business the D carried out
	  - In addition, the D was not responsible for Comninos negligence that should be covered by insurance

Principle	- The mere fact that the person acts for the defendants benefit or in discharge of contractual obligations is not sufficient to establish vicarious liability

Joel v Morrison (1834) 172 ER 1338

Facts	- The plaintiff was struck by a horse and cart driven by the defendant's employee while the employee had detoured to visit a friend away from the usual route - The act was committed in the course of employment
Principle	- An employee is vicariously liable if the negligent act was committed in the course of employment - The conduct of the employee is within the scope of employment only during the authorised period of service or a period which is not unreasonably disconnected from the authorised period - An employee who goes against his employer's commands as a detour while driving for the employers business will be acting in the course of employment; and employee who goes on a frolic of his own, unconnected to his employer will not

Bugge v Brown (1919) 26 CLR 110

Facts	- The defendant's employee disregarded its instructions to cook his lunch at a deserted homestead, and instead lit a fire in a location closer to his premises - The fire got out of control and the plaintiff suffered property damage
Principle	- Actions prohibited by the employer may still be in the course of employment. An instruction or prohibition will limit the sphere of employment if the violation makes the conduct so distinctly remote and disconnected from his employment as to put himself in the position of a stranger - Acts that are personal to the employee are not in the course of employment

Deatons v Flew (1949) 79 CLR 370

Facts	- A barmaid employed by the hotelier, angered by a customers foul language threw a glass of beer at the customer - The defendant's action was spontaneous act of retribution done neither in furtherance of the employer's interests nor under his express or implied authority nor as an incident to or in consequence of anything the barmaid was employed to do
Principle	- An act of an employee which is unconnected with what they are employed to do will not be an act in the course of employment even though the act occurs on the employer's premises and while the employee is otherwise engaged in his or her employment duties

Starks v RSM Security [2004] NSWCA 351

Facts	- A bouncer asked a patron to leave. He headbutted the patron as he evicted him, causing significant personal injury - Security guards were permitted to evict people with proportionate necessary force - Here, the action was directly connected to his authorised acts (seeking to have the plaintiff leave the premises) and in supposed furtherance of the employer's interests
Principle	- An employer is vicariously liable where the act is an unauthorised mode of doing what the employee was employed to do - An act may be in the course of employment despite being a criminal act

New South Wales v Lepore (2003) 213 CLR 511

Facts	- Case related to alleged sexual abuse at several state schools
	- **Gleeson CJ and Kirby J:**
	  - The school authority may be vicariously liable, on the basis that there is a sufficiently close connection between the sexual assault and the employment to make it just to treat such conduct as occurring in the course of employment
	- **Gummow, Hayne and Callinan JJ:**
	  - The sexual abuse of school children could never been seen as in any way within the conduct in which the perpetrator might be thought to be authorised to engage

Principle	- Vicarious liability depends on the conduct of the employee being in intended or ostensible pursuit of the employer's interests - An employer will not be liable for an employee who merely grasps the opportunity created by his employment to commit an illegal act. However, if the authorisation of the employer is necessary for the employee to commit the illegal act, it may be characterised as an unauthorised method of carrying out work - There must be a nexus between the employment enterprise and the tort committed

Ellis v Wallsend District Hospital (1989) 17 NSWLR 553

Facts	- The appellant was a patient who heavily relied on a prescription drug to relieve her neck pain - She suffered a serious overdose of drugs in 1974. She was admitted to the hospital in late 1974 on three occasions connected with her drug dependence - Dr Chambers suggested microsurgery to help relieve her pain, however, at this stage he failed to warn her there was a risk of developing paraplegia and a low prospect of achieving pain relief - The appellant was warned only of the risk of some slight numbness is her right hand following the operation - Six days later after the surgery, the appellant developed quadriplegia - In 1978 her second husband divorced her - After he left her, she received no money from him - He sole source of income was an invalid pension - She fell prey to the complications of quadriplegia including a range of urinary infections and body spasm, not to say the total dislocation of her life - She sued the doctor and the hospital - She expressed her causes of action in negligence, contract, and assault

Held	- Appeal dismissed
	- Doctor was working as an independent contractor of the hospital and as a consequence, there was no vicarious liability
	- **Non delegable duties**
	  - Can't be assigned to someone else
	  - This means that when one owes a non-delegable duty towards another, he has a duty not only to take reasonable care himself, but ensure others take care
	  - A defendant who owes a non-delegable duty will be liable for the wrongdoing of others even if they are independent contractors
	- In determining vicarious liability of a hospital for a specialist medical practioner's failure to warn the plaintiff of possible dangers and limited benefits of a proposed procedure, **the issue is whether the relationship between them was one of employer and employee or of principal and independent contractor**
	- Australian courts look at the totality of the relationship between the parties, the alternative manner of ascertaining the existence of the relationship, by the application of the **'organisation test'**, is, as a matter of Australian law, at best one relevant element in discerning the nature of the relationship between the parties
	- **In this case**
	  - The doctor at all material times carried on his own specialist practice of which surgery was an essential incident and required facilities attainable only in a hospital
	  - He undertook to treat free of charge those who applied to the hospital for relief, in return for operating privileges, nursing care and accommodation in respect of his own patients whom he would book into the hospital
	  - He received no remuneration from the hospital
	  - The hospital retained a slight degree of control over the activities of the honorary medical staff necessary to maintain administration efficiency and integrity

	- The totality of the relationship between the parties convincingly suggested the conclusion that in treating the plaintiff the doctor was engaged in his own business and not the hospital - There was no basis for the conclusion he might have fulfilled two roles, being an independent specialist working on his own account in the treatment of his own patients, and working as an employee on the hospitals behalf when treating the hospital's patients - The doctor was never an employee of the hospital, but was always an independent specialist who had an agreement with the hospital
Principle	- While a hospital owes a non-delegable duty to ensure that the treatment which it undertakes to provide is performed with reasonable care that duty depends on the scope and nature of the medical services which the hospital has undertaken to supply and does not extend to treatment which is performed by a medical officer pursuant to a direct engagement with the patient and not on behalf of the hospital

Liability for Agents

Agency

- An agent is a person who is authorised to represent the principal in legal transactions (as opposed to social relationships) → *Scott v Davis*
- A principal is liable for the torts of their agent in two circumstances
    - **Where the principal has expressly given the agent authority to perform the act:**
        - Where a principal delegates authority to another person to negotiate a contract, the principal will be liable for their fraud or negligent misrepresentation
        - A company will be vicariously liable for the torts of a director committed in the course of employment. The director has been held out by the company as a person through which the judicial entity operates.
    - **Car drivers a presumed to be the agents of the car's owner for liability for personal injury or death of third parties** → ***Motor Accidents Act 1988* s 53**; ***Scott v Davis***

Liability for Independent Contractors

Liability for Independent Contractors

- A duty of care is typically delegale in the sense that to employ a reasonably competent contractor is sufficient discharge of the duty → *Caltex Refineries v Stavar*
- A principal is liable for the acts of an independent contractor in four circumstances:
    - The principal authorises the person to commit a tort
    - The tort is one of strict liability (eg. nuisance)
    - The principal fails to take reasonable care in selecting or instructing the independent contractor
    - There is a non-delegable duty

Non-Delegable Duties

- A non-delegable duty is a personal duty of the employer which involves not just a duty to take reasonable care but a duty to ensure that reasonable care will be taken → *Kondis v State Transport Authority*
- It is not discharged merely by the employment of a reasonably competent contractor but includes to ensuring that the independent contractor takes reasonable care
- Liability is determined as if the employer was vicariously liable for the acts of the independent contractor → *Civil Liability Act* s 5Q
- **General Principle** → ***Kondis v State Transport Authority***
    - Non-delegable duties have been recognised where:
        - The principal has undertaken the control or supervision of the person or property of another, and
        - The other party is in a position of special vulnerability such that they depend especially on care being taken
    - The special duty arises because the principal has assumed responsibility for the safety of the other party, in circumstances where the other party might reasonably expect due care will be exercised
- **Recognised Relationships** giving rise to a non-delegable duty:
    - Liability of employers to employees to provide safe premises, safe equipment and a safe system of work → *Kondis v State Transport Authority*
    - Liability of schools to the care and supervision of pupils → *NSW v Lepore*
    - Liability of hospitals to the care and supervision of their patients → *Cassidy v Ministry of Health*
    - Liability of a dangerous user of land and those nearby → *Burnie Port Authority v General Jones*
        - There is a non-delegable duty where:
            - An occupier is in control of the premises and has taken advantage of that control to introduce or retain a dangerous substance or to undertake a dangerous activity
            - A neighbour is in a position of special vulnerability and dependence, and thus exposed by a person or property to a foreseeable risk of danger
        - The activity or substance must be inherently dangerous and not merely dangerous if conducted negligently
- Non-delegable duties should not be extended beyond the existing categories unless there is a sound doctrinal basis → *Leichhardt Council v Montgomery*
- Non-delegable duties do not extend to intentional torts → *NSW v Lepore*
- Where a non-delegable duty exists, the plaintiff must still establish negligence on the part of the delegate → *Bottle v Barclay*

***Civil Liability Act 2002* (NSW)**

- S 5Q → **Liability based on non-delegable duty**
    - **(1)** the tort liability of a defendant for breach of a non-delegable duty to ensure that reasonable care is taken by a person in carrying out work delegated or otherwise entrusted by the defendant, is to be determined as if the liability were the vicarious liability of the defendant for the negligence of the person
    - **(2)** this section applies to an action in tort whether or not it is an action in negligence, despite anything to the contrary in s 5A

Kondis v State Transport Authority (1984) 154 CLR 672

Facts	- The plaintiff was one of a gang of employees of the defendant working on a project at the respondent's railway yard - He was struct on the back by a crane negligently operated by an independent contractor hired by the defendant
Principle	- Non-delegable duties have been recognised in cases which involve special relationships with some special element that makes it appropriate to impose a duty to ensure that reasonable care and skill is taken for others. This occurs where that person has undertaken the care, supervision or control of the person or property of another, or is so placed as to assume a particularly responsibility for safety - Employers are under a non-delegable duty to provide a safe work environment to employees - Hospitals owe a non-delegable duty towards those it has undertaken an obligation to treat

Burnie Port Authority v General Jones (1994) 170 CLR 520

Facts	- Defendant hired an independent contractor in renovating its warehouses - The contractor negligently carried out welding operations close to flammable insulating material, causing a fire - The defendant had taken advantage of its occupation and control of the warehouse. The plaintiff was in a position of special vulnerability by reason of the fact that it had stored a large quantity of frozen vegetables in the warehouse. Therefore, the plaintiff owed a non-delegable duty to General Jones to ensure that the independent contractor took sufficient care to prevent the insulating material being set alight by its welding operations

Principle	- There will be a non-delegable duty where:
	  - An occupier is in control of the premises and has taken advantage of that control to introduce or retain a dangerous substance or to undertake a dangerous activity
	  - A neighbour is in a position of special vulnerability and dependence, and thus exposed by person or property to a foreseeable risk of danger

New South Wales v Lepore (2003) 212 CLR 511

Facts	- Involved cases of sexual assault by teachers
Principle	- A personal or non-delegable duty is generally called in aid when it is sought to make a principal liable for the negligent conduct of an independent contractor - A prerequisite for considering the possible liability of the principal is that they owe a duty of care to the injured person in accordance with ordinary principles of negligence - Non-delegable duties do not extend to intentional acts - Schools owe a non-delegable duty towards their students

Leichhardt Council v Montgomery (2007) 230 CLR 22

Facts	- The plaintiff engaged the independent contractor to lay artificial grass on the footpath. - They negligently laid it over a broken telecommunications put, causing injury to a pedestrian
Principle	- A road authority does not owe a non-delegable liability to road users in respect of an independent contractor maintaining the road - The general rule that a person is not liable for the negligence of an independent contractor, and non-delegable duties should not be extended beyond the existing categories unless there is a sound doctrinal basis