

TOPIC 7: Vicarious Liability (V.L) and Non-delegable duties

Intro:

- V.L helps to determine whether or not the employer should be legally liable for any breaches by an employee in the scope of their employment
- If a non-delegable duty is owed, then the employer/principal is personally liable for any negligence that is occasioned in connection with the primary entity
- Lord Millett in the case of *Lister v Hesley Hall* called V.L 'a species of strict liability': best seen as a 'loss-distribution device' - loss being taken from employee and placed on employer as they are in a better position to cover costs
- V.L= employer merely takes responsibility for a tort committed by the employee, so that tort is therefore committed by the employer, not the employee
- *Southern Properties* case: 'Either the employer is V.L because the acts and omissions of the employee are imputed to the employer (master tort theory), or because the employer is answerable for the employee's tortious liability (servant tort theory)
- *Soblusky v Egan*: provides a narrow example of V.L outside the employer-employee relationship: HCA held that the owner of a motor vehicle is V.L for the negligence of those who drive the vehicle with their permission
- Although other examples of V.L do exist, the employer/employee relationship is the most important in practice and in theory as it provides what qualities of a relationship give rise to V.L and also as it is the most common relationship giving rise to the V.L in practice
- For V.L, need to prove employee (or agent) was wrongful of negligent
- Employer may be negligent due to no policies nor safety measures in place
- Non-delegable duties= a personal duty between an entity/business and the individual
- Historically: servants were employed by their employers under a contract of service- in more times the relationship was transformed to employer/employee relationships
- **Two main questions when determining whether an employer is V.L for torts committed by employee**
 - 1) Was the Tortfeasor the D's employee at all?
 - 2) Was the tortfeasor acting in the course of their employment at the time the tort was committed?
- Need to establish they are in an employee/employer relationship
 - Tests include a control test: employers have a lot of control over their employees compared to independent contractors (I.C) and other tests such as whether the individual is paid super, pays taxes and so on

Tests for V.L

- Must be in an appropriate relationship (usually employer/employee)
- Acting within the scope of employment (sounds easy- yet difficult to determine)
- Act or omission of the wrongdoer must have been wrongful
- Independent contractor= no V.L

V.L- Existence of a relationship of employer and employee

- General rule: there is V.L for employers, but not for independent contractors
- Zuijs v Wirth: test to determine relationship: courts emphasised the employer's right to control the employee's work- thus if employer could control both what was done by the employee and how it was done, the relationship was one of employment and the contract was one of service
- Hollis case: HC said there should be V.L when the D conducts an enterprise: 'in which persons are identified as representing that enterprise'
- Though in case of Sweeny v Boylan concludes that it is wrong to think there is V.L whenever one person represents the interests of another

Stephens v Brodribb Sawmilling Co (1986)

- Logging accident
- Hazardous workplace
- While Gary was loading logs onto Stephen's truck, one fell off and rolled onto Stephen, causing severe injury
- Three issues: (1) V.L, (2) extra hazardous activity and (3) whether or not there should be a personal or non-delegable duty owned and general duty of care
- Mason J: said it was employee/employer: controlled employee, gave employee equipment, had set work hours and provisions= did owe a duty, but a breach of duty did not occur
- Wilson and Dawson J: I.C: not an extra hazardous activity, no breach
- Deane J (Dissent): said a breach did occur on an ad hoc basis, had obligation to take reasonable care and provide a safe system of work, company provided no system at all to deal with the problem of loading the shorter logs- left problem to be dealt with on an ad hoc basis

Hollis v Vabu (reinvigoration of the control test)

- Crisis courier (bicycle) collided with Mr Hollis- a courier of another company 'team couriers'
- Cyclist left scene and remained unidentified- only identified by the livery (uniform) of 'crisis couriers'
- Went to sue Vabu rather than trying to find the individual courier
- HC found an employer/employee relationship: wore uniforms, had some control, Vabu knew that a significant number of employees were performing their work in a dangerous manner (knowledge is a significant issue), restrictions on annual leave, insurance= V.L
- Making money from someone= a higher standard of care
- Crennan J: Imposing employee/employer relationship without the rigidities of contract of service may destroy an avenue of work for some= I.C provides flexibility

Sweeny v Boylan

- Appellant (A) opened fridge door to get milk, door came off and hit her in the head
- 4-5 hours before the incident, mechanic came and tightened the hinges and said the door was fixed
- Q was whether mechanic an employee of respondent?
- Gleeson, Gummow, Hayne, Haydon and Crennan believe mechanic was I.C: supplied own skills and equipment, respondent did not control the way mechanic worked
- Kirby (dissented) believed it was employer/employee: performed work for respondent on a daily basis and did other work just like employees

V.L- Acting in course of employment

- An employer is not V.L for all the torts committed by their employee- only those torts that are committed in the course of the employee's employment
- Employer not reliable for torts committed by the employee while 'on a frolic of his own'
- Case of Bugge makes it clear that an employee may be acting within the scope of employment if they perform an authorised task in an unauthorised manner.
- In some cases though, what the employee has done is different from what they were employed to do that it cannot even be regarded as an unauthorised mode of performing an unauthorised task
- Authorised act= V.L
- Authorised act done in unauthorised manner= V.L
- Unauthorised act= no V.L

Bugge v Brown 1919

- Instructed to cook raw steak in a nearby cottage, decided to cook it on an open fire
- Fire became out of control and burnt down neighbours house
- Though acted within scope of employment- authorised act in unauthorised manner
- Still V.L

Phoenix: 1997

- P injured as car collided with bus
- Bus driver drunk, employer knew this had occurred in the past
- Bus driver still in scope of D.O.C
- Authorised act (driving bus) done in unauthorised manner (intoxicated)= employer V.L

V.L- Employers indemnity from the employee

- If a P sues an employer who is held to be V.L, the employer may then sue the wrongdoing employee to recover an indemnity for the sums the employer has to pay the P
- Legal basis for this right of indemnity is the employee's contract of employment: there is an implied term in that contract to the effect that the employee will not perform their duties in such a way as to cause the employer to be held V.L
- If employer has liability insurance, the insurer may enforce the right of indemnity against the employee in the employer's name (lister v Rumford Ice and Cold Storage)
- Employer's right of indemnity has been abolished by the legislation in NSW, SA and NT, except where the employer's right of indemnity has been abolished throughout Australia by the Insurance Contracts Act 1984

Non-delegable duties:

- Although D is not V.L for the torts committed by an Independent contractor, they may in some cases be directly liable to a P who is injured as a result of what the I.C has done

- A non-delegable duty may arise where a D not only owes a P a duty to take reasonable care, but also a duty to ensure that reasonable care is taken by others
- More broad than V.L as it includes I.C
- A D may breach their non-delegable duty of care if an independent contractor does not take reasonable care- compared to V.L
- See Mason J in Kondis, a D may owe a non-delegable duty if 'there is some element in the relationship between the parties that makes it appropriate to impose on the D a duty to ensure reasonable care and skill is taken for the safety of persons to whom the duty is owed'.
- When will a non-delegable duty be owed?
 - Hospitals: owe a non-delegable duty to patients as have specialists coming in and working in hospital, and since patients are in a special need of care
 - Schools: children vulnerable – owe a special responsibility to children
 - Employers: special duty because they have to ensure their safety
 - Why do hospitals, schools and employers owe this 'special duty'?
 - Mason J in Kondis: 'a special duty arises because the person on whom it is imposed has undertaken the case, supervision or control of the P... or is so placed... to assume a particular responsibility for their safety, in circumstances where the person affected might reasonably expect that due care will be exercised'
 - In Kondis, a non-delegable duty was owed because the employer had 'exclusive responsibility' for the safety of the equipment, place of work and system of work
 - Note- In Leighton Contractors V Fox, no non-delegable duty was owed to an I.C.
 - Note in relation to schools- even though a school owes a non-delegable duty of care to its students, that duty cannot be breached by a deliberate and intentional act. The duty can only be breached by a failure to take reasonable care (NSW v Lepore)
- D is held liable for the breach of their own non-delegable duty

NSW v Lepore:

- Sexual assaults in school
- Non-delegable duty between department of education and school pupils
- Key Question- whether or not sexual assault was within the non-delegable duty owed directly to the pupils and was an authorised act? NO
- 6:1 decision that scope owed by school to students does not extend to the deliberate act of sexual assaulting a child

French v Sestil 2007

- Applied Lepore
- P quadriplegic in motor vehicle accident
- Relied on carers from D's organisation
- One carer used P's credit cards and committed fraud
- P sued due- V.L for carer's actions
- Held D was V.L and carer though negligent, was acting within her scope of employment