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VICARIOUS LIABILITY

Discussion Paper
WP 48

Queensland Law Reform Commission
July 1995

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VICARIOUS LIABILITY

**Discussion Paper
WP 48**

HOW TO MAKE COMMENTS AND SUBMISSIONS

You are invited to make comments and submissions on the issues and on the preliminary proposals in this Paper.

Written comments and submissions should be sent to:

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It would be helpful if comments and submissions addressed specific issues or preliminary recommendations in the Paper.

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CHAPTER 1

INTRODUCTION

1.1 TERMS OF REFERENCE

This reference was given to the Commission by the Attorney-General in its Fourth Program of work.¹ The full terms of the reference are set out in Item 2 of the Program:

Examine the law of vicarious responsibility, with particular reference to:

- (a) parent/child relationships;**
- (b) teacher/pupil relationships;**
- (c) employer/employee relationships;**
- (d) adult supervisor/child relationships.**

Vicarious responsibility or liability² is explained in detail later in this Paper.³ For present purposes, however, vicarious liability is the liability of a person for the wrongdoing of another, even if the first person has done nothing wrong.

The Commission considers that the question of vicarious criminal liability is beyond the scope of this Paper.⁴ The whole question of criminal responsibility was recently the subject of a comprehensive review of the Criminal Code.⁵

¹ September 1990.

² The terms "vicarious liability" and "vicariously liable" will be used throughout the Paper as the recognised terms in this area of the law.

³ See Ch 2 below.

⁴ See note 14 below.

⁵ Criminal Code Review Committee (RS O'Regan QC, Chair) Final Report (1992) at 50-53 & 184-191. In December 1994 the Attorney-General released for public discussion a draft *Criminal Code Bill 1994*. The new *Criminal Code* (Qld) was assented to on 16 June 1995. The commencement of some sections of the Criminal Code will be on a date still to be fixed by proclamation.

1.2 PURPOSE AND STRUCTURE

The purpose of this Paper is to outline the present law of vicarious liability, to identify potential areas of difficulty and to identify issues in the law which require resolution. Public comments and submissions on these (and any other) issues will assist the Commission in formulating recommendations for reform.

The Paper first examines the history, content and rationale of the rules of vicarious liability, and reviews related bases of liability.⁶ It then considers the application or possible application of vicarious liability to the relationships mentioned in the terms of reference. As the established category in which vicarious liability has attached at common law, employment receives separate and detailed treatment.⁷ Because there has historically been no vicarious liability in the other three relationships, those chapters venture beyond the strict legal notion of vicarious liability and look at general situations in which parents, teachers and supervisors might become liable (principally in negligence) for the misdeeds of their charges.⁸ The Paper looks at some unusual situations to which the application of the general principles of vicarious liability have presented difficulties in the past.⁹ Finally, the effect of employers' indemnities and subrogation is the subject of a separate chapter.¹⁰

The glossary in Appendix 6 explains some of the terms and abbreviations used in this Paper. Glossary expressions are printed in **bold type** where they first occur.

1.3 CONSULTATION

Preliminary consultations have been held with a number of organisations and individuals in the preparation of this Discussion Paper. The Commission now seeks further comments and submissions from persons and organisations with a particular interest in the law of vicarious liability as well as from the general community. Submissions should reach the Commission by 30 September 1995. A final report will be made once those submissions have been considered. Submissions can be made in accordance with the instructions inside the front cover of this Paper.

⁶ Chs 2 & 3.

⁷ Chs 4 & 5.

⁸ Chs 6, 7 & 8.

⁹ Ch 9.

¹⁰ Ch 10.

CHAPTER 2

WHAT IS VICARIOUS LIABILITY?

2.1 TORTS

The law of **torts**¹¹ is sometimes described as the law of civil wrongs. That is, it delineates certain conduct as wrongful, and attaches civil (as opposed to criminal) sanctions (most often, **damages**) to that conduct.¹² In Queensland, much of the law of torts is common law, that is, it is ascertained not by reference to statute law but to the cases decided in the courts.

The law of torts is based on a number of **duties**. Tort law imposes on persons certain duties to certain other persons. Thus, defamation law imposes a duty not to publish defamatory material concerning another. The law of nuisance effectively imposes a duty not to cause or allow a nuisance to affect other persons. Trespass creates a duty not to interfere intentionally with another person's body, land or personal property. The law of **negligence** imposes a duty to take care (whether in driving a vehicle, running a business or in any other pursuit) in relation to persons who might foreseeably suffer damage if care is not taken.

The law of torts comes into play when there is a **breach** of one of these duties. A person who suffers loss or damage as a result may sue the person in breach of the duty in the courts. A person who commits a tort (that is, who breaches a duty imposed by the law of torts) is called a **tortfeasor**. A tortfeasor is liable for the tort to the person who suffers loss or damage unless the tortfeasor has a defence. More than one tortfeasor may be liable for the same tort. Although there are exceptions,¹³ a person is only liable for a tort if the person is somehow at fault.

A person who sues in court is called a **plaintiff** and the person who is sued (that is, the tortfeasor) is called the **defendant**. If the plaintiff is successful, the usual remedy awarded by the court is damages although in some cases other remedies such as **injunctions** are available.

¹¹ See Appendix 6 for glossary of terms appearing in bold type.

¹² Well known torts are defamation, negligence, nuisance and trespass.

¹³ Vicarious liability itself is one exception.

At **common law**, vicarious liability developed as a branch of the law of torts. It has more recently been applied to other branches of the law such as criminal law.¹⁴ There has also been some statutory expansion of vicarious liability in torts.¹⁵

2.2 WHAT IS VICARIOUS LIABILITY?

It will be seen later that the nature of **vicarious liability** is disputed by legal historians and scholars.¹⁶ This is because, like much of the common law, it developed incrementally and without attention to the possible application of emerging principles to future conditions. It is generally believed that vicarious liability began with the mediæval notion that an **employer** was responsible for the wrongs of his¹⁷ household, including those of his family and his servants. The rationale is said to have been the protection of plaintiffs' rights against impecunious spouses, children and servants at a time when both spouses and **servants**, as well as children, were financially dependent on the **master**.¹⁸

A husband's liability for the acts of his wife was abrogated by married women's property legislation. In Queensland, this took the form of the *Married Women's Property Act 1890* (Qld).¹⁹ In the same vein, in Queensland parties to a marriage

¹⁴ As to vicarious liability in the criminal law, see PW Nichols "Vicarious Liability in the Code States" (1978) 2 *Crim LJ* 130; LH Leigh *Strict and Vicarious Liability: A Study in Administrative Criminal Law* (Law Book Co 1982); B Fisse "Corporate Criminal Responsibility" (1991) 15 *Crim LJ* 166; *In re Supply of Ready Mixed Concrete* [1992] QB 213 (commented on by PW Young "Contempt of Court ... Vicarious Liability for Employees' Conduct" (1992) 66 *ALJ* 229); and the *Racial Discrimination Act 1975* (Cth) s18A (and comment by P Tahmindjis "The Effect in Queensland of Recent Amendments to the Racial Discrimination Act" (1991) 21 *QLSJ* 169). In *S & Y Investments (No 2) Pty Ltd (in liq) v Commercial Union Assurance Co (Aust) Ltd* (1986) 85 FLR 285 Asche J (with whom Kearney J agreed) drew a clear distinction between an employer's *culpability* for an employee's criminal acts and vicarious *liability* for civil wrongs. The Commission considers that vicarious criminal responsibility is outside the scope of this reference: see section 1.1 above.

¹⁵ For example, a person is vicariously liable for his or her business partners' wrongs even if not at fault himself or herself: *Partnership Act 1891* (Qld) ss13 & 14, discussed in section 2.2 below and reproduced in Appendix 1.

¹⁶ See section 2.4 below.

¹⁷ The master was, in the domestic context, always male. In the employment context, older authorities use the terms "master" and "servant". In this report, however, "employer" and "employee" are used (see the glossary in Appendix 6).

¹⁸ JG Fleming *The Law of Torts* (Law Book Co 8th ed 1992) (hereafter cited as "Fleming") at 366-369. See also JH Wigmore "Responsibility for Tortious Acts: Its History" (1894) 7 *HLR* 315, 383 & 441 particularly at 330-337 & 383-405. Professor Glanville Williams disputes the supposed domestic basis for the rule, however: "The father has never been liable for his child as such, and Holt owed his inspiration to the law merchant" ("Vicarious Liability and the Master's Indemnity" (1957) 20 *MLR* 220 & 437 at 228 n 23). The reference to Holt is to Sir John Holt, Lord Chief Justice of England at the turn of the eighteenth century. His judgments feature in the earliest cases on vicarious liability, eg *Boson v Sandford* (1691) 91 ER 382; *Turbervil v Stamp* (1698) 90 ER 590; *Middleton v Fowler* (1699) 91 ER 247; *Herr v Nichols* (1701) 91 ER 256; *Wayland's Case* (1707) 91 ER 797.

¹⁹ Now see also *Married Women (Restraint upon Anticipation) Act 1952* (Qld) ss2 & 3.

have, since 1968, had "the like right of action in tort against each other as if they were not married".²⁰

As to the employment relationship, Baker says:²¹

As feudalism lost its grip, the rule was relaxed and it became settled law that a master was liable for his servant's wrongdoing only when it could be proved that the servant had special authority to do the particular act. But when in the late seventeenth century a great expansion took place in commerce and industry, increasing the perils arising from business activities and widening the range of the master-servant relationship, public policy demanded an extension of the employer's responsibility. It was thought ... the loss should fall on him on whose behalf the servant had been acting, but not to the extent that the employer should be responsible for all his servant's acts; that would have placed too much restriction on individual initiative and enterprise; liability was limited to damage caused by acts which he had commanded or which the court considered came within his implied commands ...

Countervailing that trend was a perceived need to avoid undue impediments to industry. This produced legal devices designed to limit the cost to business of workplace accidents:²²

The most common nefarious judicial ploy for reducing the charges on industry was the so-called doctrine of common employment which relieved employers from vicarious liability for accidents caused by the negligence of a fellow servant.

In the twentieth century, the courts strained to avoid the application of the rule of common employment. For example, in *Wilsons & Clyde Coal Co Ltd v English*²³ the House of Lords invented the notion of **non-delegable duty** to avoid the rule.²⁴ In *Holdman v Hamlyn*²⁵ the rule was construed as an implied term in the contract of service, so that the plaintiff who was a **minor** was held to be incapable of

²⁰ *The Law Reform (Husband and Wife) Act 1968* (Qld) s2, based on the *Law Reform (Husband and Wife) Act 1962* (UK) s2. See also *Family Law Act 1975* (Cth) s119 and Fleming at 679-681. The difficulties of applying vicarious liability principles against employers by persons injured by their spouses at work, exemplified in *Broom v Morgan* [1953] 1 QB 597, have therefore been obviated.

²¹ RW Baker "Independent Contractors and the Liability of their Principals" (1954) 27 *ALJ* 546 at 546.

²² Fleming at 515.

²³ [1938] AC 57.

²⁴ The non-delegable duty is discussed in detail in section 3.2 below.

²⁵ [1943] KB 664.

agreeing to it.²⁶ The rule was subject to increasing criticism until its eventual abolition.²⁷

The common law of vicarious liability has remained settled at its core for many years. In recent times, issues which have generated controversy - such as vicarious liability for **independent contractors**, the rules about employers' **indemnity**, and the independent discretionary function principle - are peripherally related to the central principles. Developments in these areas have given rise to a perception that employers' liability (whether strictly vicarious or otherwise) is ever increasing.²⁸ For example, employers may now in some situations be vicariously liable not just for the acts or omissions of their employees, but also for those of independent contractors.

Before considering those issues, however, it is necessary to establish precisely what vicarious liability is. According to Professor Fleming:²⁹

We speak of vicarious liability when the law holds one person responsible for the misconduct of another, although [the first person] is ... free from personal blameworthiness or fault. It is therefore an instance of strict (no-fault) liability.

This does not mean that one person is deemed to have done the wrongful act.³⁰ It means the person is answerable in law for the wrong of another.

At present, the common law recognises vicarious liability only in employment situations. It can arise either in the employer/employee relationship proper, or (in

²⁶ In that case a young boy of ten was asked by the farmer's son, who had full authority to employ labour, to help thresh corn. While his back was turned, the boy pushed a sheath of corn into a machine with his foot, which then became caught, requiring the leg to be amputated. *Du Parcq LJ* at 667 held that the rule of the doctrine of common employment "is based on an implied undertaking by the workman", but as the child was in need of protection against his own childish propensities, the facts of the case, including that the negligence complained of was an omission to guard the boy against a tempting danger, excluded the implication of such a term in the contract of service. The farmer was therefore held to be liable for the negligence of his son. However, *du Parcq LJ* distinguished between the position of an infant workman (that is one under 21 years of age) capable of using intelligence and skill, and a young child who to the knowledge of the defendant's servant and agent could not safely be trusted near dangerous machinery.

²⁷ In Queensland, the rule was abolished by the *Law Reform (Abolition of the Rule of Common Employment) Act 1951* (Qld).

²⁸ Australian Law Reform Commission *Complaints Against Police* (Report No 1 1975) at 61-62; E McKendrick "Vicarious Liability and Independent Contractors - A Re-examination" (1990) 53 *MLR* 770 at 772; J Swanton "Master's Liability for the Wilful Tortious Conduct of His Servant" (1985) 16 *UWALR* 1 at 3; GL Williams "Vicarious Liability and the Master's Indemnity" (1957) 20 *MLR* 220 & 437 at 233.

²⁹ Fleming at 366.

³⁰ Although the language used sometimes suggests this: see note 61 below.

some circumstances) in the **principal/contractor** relationship.³¹

In the employer/employee relationship, the employer is vicariously liable for the wrongs of an employee committed in the course of employment.³² In the principal/contractor relationship, the principal is generally not liable for the contractor's torts, although there are now important exceptions to that rule.³³

It is, of course, possible for legislation to extend vicarious liability beyond the relationships recognised at common law. One situation in which vicarious liability presently arises in Queensland under statute law is in the case of business **partners**. Under the *Partnership Act 1891* (Qld) sections 13-15, the partners of a firm are jointly and severally liable for loss or injury caused to any person by the wrongful act or omission (including the misapplication of money) of a partner.³⁴ Like vicarious liability at common law, partnership liability is strict and non-personal.

From the Commission's terms of reference,³⁵ it is clearly the Commission's task ultimately to recommend whether vicarious liability should be extended to the other nominated relationships.

2.3 WHAT IS PERSONAL LIABILITY?

Vicarious liability is to be distinguished from certain forms of **personal liability** whose similarity is deceptive. The hallmark of personal liability is liability for damage caused to others by the breach of one's own duty. Thus, the following cases where a person's duty is breached (even if the damage is actually caused by another person) are cases of personal, not vicarious liability:³⁶

- where A orders B to commit an assault on C (or ratifies it after the event³⁷), A is liable as if A had committed the assault, on the basis

³¹ The distinction is considered in more detail in Chapters 4 and 5, but broadly the employer/employee relationship is one where the employer may control the manner in which the work is to be done; the principal/contractor relationship is any other relationship involving the performance of work for another person.

³² See section 4.2 below.

³³ See Ch 5 below.

³⁴ The provisions are set out in Appendix 1.

³⁵ See section 1.1 above.

³⁶ Some of these examples come from Fleming at 368-369.

³⁷ RWM Dias (ed) *Clerk and Lindsell on Torts* (Sweet & Maxwell 16th ed 1989) at 196.

not of vicarious liability for the torts of B, but of breach of A's duty to C;

- if a parent fails in his or her duty to supervise an infant child who wanders into a busy street and a driver, swerving to avoid the child, has a collision, the parent is liable for the damage, not because of vicarious liability for the infant child, but because the parent owes a personal duty of care to road users to prevent the child escaping into the street;³⁸
- where A lends A's car to B knowing B to be an incompetent driver, A's responsibility for any damage caused by B arises from the breach of A's own duty to other road users not to allow incompetent persons to drive the vehicle.³⁹

Vicarious liability, on the other hand, arises where A is liable for B's tort, even though A might not be personally at fault. It will be apparent that it is therefore possible to be liable both personally and vicariously for a tort. To adapt the third example used above, if an employer, knowing an employee to be an incompetent driver, directs the employee to run a business-related errand in the employer's vehicle, the employer will be personally liable for breach of his or her personal duty to other road users, and vicariously liable for the employee's own breach of duty to other road users.

2.4 THE THEORETICAL BASES OF VICARIOUS LIABILITY

There has been academic and judicial controversy over the nature of vicarious liability.⁴⁰ Two principal theories have emerged.

The "**servant's tort**" theory holds that an employer is liable for the breach by an employee of the employee's duty. The servant's tort theory therefore holds that vicarious liability derives from the liability of the employee. Thus, if the employee's liability is limited or avoided in some way, the limitation or avoidance inures to the benefit of the employer so that he or she will also not be liable vicariously.

³⁸ Compare with *Carmarthenshire County Council v Lewis* [1955] AC 549 discussed in section 9.2 below. There a school authority was held personally liable for an unsafe system which allowed a four year old boy to escape from a schoolyard onto a road, causing the death of a lorry driver who, in steering his lorry to avoid the child, collided with a pole. See further Fleming at 153-154, 682-3.

³⁹ *Ilkiw v Samuels* [1963] 1 WLR 991, criticised by A Barak "Personal and Vicarious Liability" (1964) 27 MLR 94.

⁴⁰ PS Atiyah *Vicarious Liability in the Law of Torts* (Butterworths 1967) (hereafter cited as "Atiyah") at 6-11; Fleming at 366-369; J Swanton "Master's Liability for the Wilful Tortious Conduct of His Servant" (1985) 16 UWALR 1; GL Williams' three articles "Vicarious Liability: Tort of the Master or of the Servant" (1956) 72 LQR 522; "Vicarious Liability and the Master's Indemnity" (1957) 20 MLR 220, 437; and "Liability for Independent Contractors" [1956] CLJ 180; *Australian Torts Reporter* (CCH looseleaf) at 13-340.

The "master's tort" theory, on the other hand, holds that the employer is liable because the employee has breached the employer's duty; that is, liability arises from the action of the employee, which action is imputed to the employer. The employee committing the tort breaches not his or her own duty, but that of the employer. So any limitation or avoidance of liability by the employee does not vitiate the vicarious liability of the employer.

The majority of academic and judicial opinion⁴¹ adheres to the "servant's tort" theory.⁴² Although, other commentators such as Professor Williams,⁴³ Denning LJ⁴⁴ and some members of the High Court of Australia⁴⁵ have preferred the "master's tort" theory, it would appear that, despite some attractions, the master's tort theory⁴⁶ "has now clearly been rejected".⁴⁷

A proper assessment of the merits of either of these two bases (or of any other) can only be conducted, however, if the policy objectives behind the law of vicarious liability are clarified.

⁴¹ Fleming at 368; CJ Hamson "Master's Vicarious Liability to Spouse of Servant" [1954] *CLJ* 45; RFV Heuston & RA Buckley Salmond and Heuston on the Law of Torts (Sweet & Maxwell 20th ed 1992) at 445; E McKendrick "Vicarious Liability and Independent Contractors - A Re-examination" (1990) 53 *MLR* 770 at 779-780 (who says that the master's tort theory has now been rejected); KW Wedderburn "Negligence - Standard of Care - Vicarious Liability" [1955] *CLJ* 151.

⁴² However, although Atiyah (at 7) appears to prefer the servant's tort theory, he realistically acknowledges that even if it does make a difference, the court will, in any given case, strive for pragmatic outcomes rather than doctrinaire exegesis. A Barak "Mixed and Vicarious Liability - A Suggested Distinction" (1966) 29 *MLR* 160 suggested a hybrid liability, but this has not been taken up by later scholars or judges.

⁴³ "Vicarious Liability: Tort of the Master or of the Servant?" (1956) 72 *LQR* 522.

⁴⁴ *Broom v Morgan* [1953] 1 *QB* 597.

⁴⁵ Atiyah (at 7 n 15) cites *Darling Island Stevedoring and Lighterage Co Ltd v Long* (1957) 97 *CLR* 36 per Webb J (who relied on *Twine v Bean's Express Ltd* [1946] 1 *All ER* 202 which has since been discredited: see note 47 below) at 54; Kitto J (who approved *Twine v Bean's Express Ltd*, *Conway v George Wimpey & Co Ltd* [1951] 2 *KB* 266 and *Broom v Morgan* [1953] 1 *QB* 597) at 60-65; and Taylor J at 70. Fullagar J (who approved *Staveley Iron & Chemical Co Ltd v Jones* [1956] *AC* 627) at 56-58 adhered to the servant's tort theory, but held that a breach of statutory duty was not a "tort" and that the doctrine of vicarious liability had no application (S Chapman "Liability for the Negligence of Independent Contractors" (1934) 50 *LQR* 71 at 75 considered that breach of non-delegable statutory duties would result in the principal being liable to the same extent as if the duty were imposed by common law in tort). In an action arising out of the *HMAS Voyager* disaster, Windeyer J (also cited by Atiyah) preferred the traditional view: *Parker v Commonwealth* (1965) 112 *CLR* 295 at 301. Neither *Darling Island v Long* nor *Parker v Commonwealth* has since been considered by the High Court in this context.

⁴⁶ At least as expressed by Uthwatt J in *Twine v Bean's Express Ltd* [1946] 1 *All ER* 202 and approved by the Court of Appeal in the same case (62 *TLR* 458) and in *Conway v George Wimpey & Co Ltd* [1951] 2 *KB* 266.

⁴⁷ See for example E McKendrick "Vicarious Liability and Independent Contractors: A Re-examination" (1990) 53 *MLR* 770 at 780 n 62 citing *Staveley Iron & Chemical Co Ltd v Jones* [1956] *AC* 627 and *Imperial Chemical Industries Ltd v Shatwell* [1965] *AC* 656.

2.5 THE POLICY BASES OF VICARIOUS LIABILITY

As previously mentioned, the law of torts is mainly fault-based. That is, the law tends not to hold a person liable in tort unless the person has caused or contributed in some way to the damage suffered by a plaintiff. It has been seen that vicarious liability is an exception to that tendency, because an employer will be vicariously liable for an employee's act or omission whether or not the employer is at fault. The tendency towards fault-based liability in tort is increasing: in the recent High Court case of *Burnie Port Authority v General Jones Pty Ltd*⁴⁸ the majority (Mason CJ, Deane, Dawson, Toohey and Gaudron JJ) held that the rule in *Rylands v Fletcher*,⁴⁹ a rule of strict (no-fault) liability, should now be seen as absorbed by the principles of ordinary negligence.⁵⁰ However, there are no signs that the tendency towards fault-based tort liability is likely to threaten the existence of vicarious liability in employment cases.

Vicarious liability is often said to be based on the maxims *respondeat superior*⁵¹ and *qui facit per alium facit per se*.⁵² Fleming⁵³ calls them "tired tags" and quotes Lord Reid in *Staveley Iron & Chemical Co Ltd v Jones*:⁵⁴ "The former merely states the rule baldly in two words, and the latter merely gives a fictional explanation of it." Indeed, taken literally *qui facit* better explains some of the forms of personal liability discussed above.⁵⁵ Why have a rule, the utility of which is often assumed but rarely explained, which makes innocent persons liable in the

⁴⁸ (1994) 179 CLR 520. For comment see RFV Heuston & RA Buckley "The Return of *Rylands v Fletcher*" (1994) 110 LQR 506; S Quinlan "Farewell *Rylands v Fletcher*" (1994) 15 Qld Lawyer 5; and J Holding & C Ryan "The Abolition of the Rule in *Rylands v Fletcher*: Where Do We Go from Here?" (1994) 24 QLSJ 515. England and Australia have diverged significantly: the House of Lords in *Cambridge Water Co v Eastern Counties Leather Plc* [1994] 2 AC 264 held that the rule in *Rylands v Fletcher* has been subsumed by the general law of nuisance. See RFV Heuston "The Return of *Rylands v Fletcher*" (1994) 110 LQR 185.

⁴⁹ *Fletcher v Rylands* (1866) LR 1 Ex 265 (Ex Ch); affirmed *Rylands v Fletcher* (1868) LR 3 HL 330 (HL(E)).

⁵⁰ *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520 at 556. At 555 the majority said: "Once it is appreciated that the special relationship of proximity which exists in circumstances which would attract the rule in *Rylands v Fletcher* gives rise to a non-delegable duty of care and that the dangerousness of the substance or activity involved in such circumstances will heighten the degree of care which is reasonable, it becomes apparent, subject to one qualification [that of nuisance], that the stage has been reached where it is highly unlikely that liability will not exist under the principles of ordinary negligence in any case where liability would exist under the rule in *Rylands v Fletcher*." For an analysis of this case and a discussion of non-delegable duty, see B Mc Donald and J Swanton "Non-delegable duties in the law of negligence" (1995) 69 ALJ 323. As to non-delegable duties in general, see section 3.2 below.

⁵¹ "Let the superior answer."

⁵² "Whoever acts by another acts by himself."

⁵³ At 367.

⁵⁴ [1956] AC 627 at 643.

⁵⁵ Section 2.3.

courts for the misdeeds of others?

Baty, in his book on vicarious liability, proposed nine possible bases for vicarious liability - ⁵⁶

- control (the employer should prevent the employee from acting tortiously);
- profit (the employer profits from the employee's labours, and so should bear the cost of them⁵⁷);
- revenge;⁵⁸
- care in choice of employees;
- identification (the *qui facit* maxim is really a restatement of this principle);
- evidence (a plaintiff ought not to face the sometimes insuperable difficulty of proving which particular employee committed the tort);
- indulgence (similar to profit);
- dangerousness (of the employer's enterprise should be the employer's responsibility); and
- satisfaction (the deserving plaintiff should not be deprived of a remedy merely because of an employee's impecuniosity).

Baty rejected all of them, except perhaps the last,⁵⁹ arguing that there was no basis in justice for strict vicarious liability at all.

Space does not permit an exhaustive examination of all nine possible bases, but a brief consideration of the more important follows.

The courts' concern that a deserving plaintiff should not go uncompensated merely

⁵⁶ T Baty *Vicarious Liability: A Short History of the Liability of Employers etc* (Clarendon Press 1916). These are summarised by YB Smith 'Frolic and Detour' (1923) 23 *Colum L Rev* 444 & 716 at 454-456; and in more detail by Atiyah at 15-22. Baty's book was critically reviewed by Sir Frederick Pollock (1916) 32 *LQR* 226.

⁵⁷ Expressed in the maxim *qui sentit commodum sentire debet et onus* ("whoever enjoys the benefit ought also to bear the burden").

⁵⁸ A now discredited theory of Justice Holmes: Atiyah at 19.

⁵⁹ "In hard fact, the real reason for employers' liability is the ninth: the damages are taken from a deep pocket."

because of the tortfeasor's poverty has been a recurring theme since long before Baty's time. This, combined with the control (real or imagined) that an employer may exercise over an employee, has been thought sufficient to justify the rule. So, for example, Sir John Holt (whose legacy has already been mentioned in the context of early judicial attempts to rationalise vicarious liability⁶⁰) said in *Middleton v Fowler* that "[n]o master is chargeable with the acts of his servant, but when he acts in execution of the authority given by his master, and then the act of the servant is the act of the master".⁶¹

One scholar in the 1920s agreed with Baty's rejection of the nine possible bases of justification, before going further and making the (then novel) proposition that the principle of loss distribution could best justify the employer's liability.⁶² Since then, many commentators and judges have reached the same conclusion.⁶³ However, as Atiyah and Williams point out, loss distribution does not explain why it is still necessary to establish fault against an employee.⁶⁴ A related (and much older) rationalisation is that, to the extent that the loss must fall on either the innocent plaintiff or the innocent employer, the latter is better placed to meet (and prevent) the loss. So in *Hern v Nichols*⁶⁵ the defendant, a merchant, sold the plaintiff silk of a lesser quality than that ordered. On trial:

it appeared that there was no actual deceit in the ... merchant, but that it was in his factor⁶⁶ beyond sea: and the doubt was, if this deceit could charge the merchant? And Holt CJ was of opinion, that the merchant was answerable for the deceit of his factor ... for seeing somebody must be a loser by this deceit, it is more reason that he that employs and puts a trust and confidence in the deceiver should be a loser, than a stranger: and upon this opinion the plaintiff had a

⁶⁰ See note 18 above.

⁶¹ (1699) 91 ER 247 at 248. Holt CJ's metaphorical language does not accurately reflect the legal position today in that the employer is not deemed to have done the employee's act; rather the employer is personally liable for the employee's act. See note 30 above.

⁶² YB Smith "Frolic and Detour" (1923) 23 *Colum L Rev* 444 & 716 at 456 ff.

⁶³ Atiyah at 22-28; Australian Law Reform Commission *Complaints against Police* (ALRC 1 1976) at 61-62; E McKendrick "Vicarious Liability and Independent Contractors - A Re-examination" (1990) 53 *MLR* 770; J Swanton "Master's Liability for the Wilful Tortious Conduct of His Servant" (1985) 16 *UWALR* 1 at 7; GL Williams "Vicarious Liability and the Master's Indemnity" (1957) 20 *MLR* 220 & 437 at 440-443 and Denning LJ in the hospital cases (see section 9.3 below) and in *Morris v Ford Motor Co Ltd* [1973] QB 792. Fleming at 367 points to the accident prevention value of vicarious liability.

⁶⁴ Atiyah at 22-28; GL Williams "Vicarious Liability and the Master's Indemnity" (1957) 20 *MLR* 220 & 437 at 440-443.

⁶⁵ (1701) 91 ER 256.

⁶⁶ A "factor" is a mercantile agent.

verdict.⁶⁷

The answer, in light of the present limits of vicarious liability, perhaps lies in the law's pre-occupation with causation. Despite calls for comprehensive no fault compensation schemes,⁶⁸ the general principle as it presently stands, is that the law looks to the person who causes damage to make compensation. This principle may also explain the limitations on vicarious liability, in the sense that the defendant must not only have deep pockets, but also must have some control-like connection with the tortfeasor.⁶⁹

Different considerations may apply where a defendant is in fact a corporation, a not unusual situation. The corporation may be principally liable when the tortious act is an act of a person who is not merely a servant or agent of the corporation (in which case the principles of vicarious liability would apply), but who is a person exercising the general powers of the corporation in such circumstances that the act of that person can be said to be the very act of the corporation itself.⁷⁰ The director of a corporation may be concurrently liable where his or her act or omission constitutes the corporation's tort, in circumstances where that director

⁶⁷ The same sentiment permeates the speeches in *Lloyd v Grace, Smith & Co* [1912] AC 716 especially per Lord Macnaghten at 738 and Lord Shaw of Dunfermline at 740. Professor Williams ("Vicarious Liability and the Master's Indemnity" (1957) 20 *MLR* 220 & 437 at 229) pointed out that in cases such as *Hern v Nichols*, a plaintiff may equally put his trust and confidence in the employee just as much as the employer does. In answer it might be said that the employer was better placed to do something about it before the event than was the plaintiff.

⁶⁸ Such as the comprehensive accident compensation scheme introduced in New Zealand in 1972, revised in 1982 by the *Accident Compensation Act 1982* (NZ) and now further revised and expanded by the *Accident Rehabilitation and Compensation Insurance Act 1992* (NZ). Victoria, Tasmania and the Northern Territory have all introduced systems of "no fault" liability in relation to transport accidents embodied in the *Transport Accidents Act 1986* (Vic), *Motor Accidents (Liability and Compensation) Act 1973* (Tas) and the *Motor Accidents (Compensation) Act 1979* (NT) respectively. See further K Sutton *Insurance Law in Australia* (Law Book Co 2nd ed 1991) at 944-946 and RP Balkin and JLR Davis *Law of Torts* (Butterworths 1991) at 407-413. Under the Victorian legislation, the no-fault traffic accident scheme interacts with the workers' compensation 'accident compensation' scheme. Workers' compensation legislation existent in all Australian states was originally based on the English model under which an injured employee could recover compensation without the need to prove fault on the part of anyone else: see the discussion of Isaacs and Rich JJ in *McGuire v Union Steamship Co. of New Zealand* (1920) 27 CLR 570 at 578-583, especially at 582.

⁶⁹ Hence the rule that an employer is not liable for the wrongs of an employee acting outside the course of employment: see section 4.2 below.

⁷⁰ See HAJ Ford *Principles of Company Law* (Butterworths 6th ed 1992) at 149-150, citing *Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd* [1915] AC 705. Such people, even though they may be said to be servants or agents of the corporation for some purposes, are charged with such a high degree of responsibility for the management of the company that they can be said to be acting as *the corporation* rather than for the corporation: the person or persons who are the "directing mind and will" of the corporation: Ford at 146. RFV Heuston & RA Buckley in *Salmond & Heuston on the Law of Torts* (Sweet & Maxwell 20th ed 1992) state, at 422, that every act done, authorised, or ratified on behalf of a corporation by its governing authority, or by any person or body of persons to whom the general powers of the corporation are delegated, is for the purpose of the law of torts the act of the corporation itself, and the corporation will therefore be liable for that act or any tort committed in respect of it by any agent or servant of the corporation within the scope of his authority or employment.

has procured or directed the company to perform the tortious act.⁷¹

Whatever theoretical or policy considerations are advanced for (or against) vicarious liability, the best view is that vicarious liability is not a fine doctrinal point of law, but rather a policy device developed from what Lord Pearce termed "social convenience and rough justice".⁷² Ultimately, vicarious liability reflects the courts' consistent concern that an injured person should not be deprived of a legal remedy simply because of the poverty of the wrongdoer. In this, it reflects its origins.⁷³

2.6 ISSUES

- (a) Should there be any strict (no-fault) vicarious liability in our law?
- (b) If so, should the basis of such liability be:
 - (i) the financial responsibility of the putative defendant; or
 - (ii) the putative defendant's control over (or ability to hire; or fire; or direct; or pay) the tortfeasor; or
 - (iii) the fact of the tortfeasor's membership of the putative defendant's organisation (irrespective of the measure of control); or
 - (iv) some other matter?
- (c) Should the general principles of vicarious liability at common law be altered?

⁷¹ *C Evans & Sons Ltd v Spritebrand Ltd* [1985] 1 WLR 317, approved by Thomas J in *Kalamazoo (Aust) Pty Ltd v Compact Business Systems Pty Ltd* [1990] 1 QdR 231; *Mancetter Developments Ltd v Garmanson Ltd* [1986] QB 1212.

⁷² *Imperial Chemical Industries Ltd v Shatwell* [1965] AC 656 at 685; see also Scarman LJ in *Rose v Plenty* [1976] 1 WLR 141 at 147; Fullagar J in *Darling Island Stevedoring and Lighterage Co Ltd v Long* (1957) 97 CLR 36 at 57; Fleming at 367; Atiyah at 7.

⁷³ See section 3.2 below.

CHAPTER 3

RELATED LIABILITY: NEGLIGENCE

The law of negligence has already been referred to. In some cases, it has been used, in the guise of a "non-delegable duty", to extend liability for the actions of others. In this respect the non-delegable duty is related to vicarious liability. There are important differences, however, which will be investigated in due course. First, however, the basic principles of negligence, and the non-delegable duty, should be indicated.⁷⁴

3.1 NEGLIGENCE

The law deems certain persons, by virtue of their relationship or "proximity" to other persons, to have a duty to take reasonable care to avoid foreseeable injury to those other persons.⁷⁵ The "**duty of care**"⁷⁶ is useful because it does not depend on any particular relationship, such as that of employer and employee; it can apply in any field of human endeavour.

If a person who owes a duty of care to another breaches the duty, and that breach causes damage to the other person, the other person can sue in negligence to be compensated for the damage. This is an instance of personal liability. (If the person who causes the damage is an employee, the person's employer may also be vicariously liable for the damage.)

3.2 NON-DELEGABLE DUTY

The general rule is that a person is not liable for the wrongs of another person. In recent years, however, despite the trend towards fault-based liability in tort,⁷⁷ courts have increasingly attached liability to employers or principals (both where

⁷⁴ Vicarious liability may be liability for any tort, not just negligence. Negligence is singled out here because of the practical importance it has had.

⁷⁵ This duty, imposed by law, is to "take reasonable care to avoid acts or omissions which [I] can reasonably foresee would be likely to injure ... persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question" per Lord Atkin in *Donoghue v Stevenson* [1932] AC 562 at 580. This statement was refined by Lord Wilberforce in *Anns v Merton LBC* [1978] AC 728 at 751-752. The circumstances in which a duty of care arises have been further examined by the High Court of Australia in cases such as *Wyong Shire Council v Shirt* (1980) 146 CLR 40 per Mason J at 44; *Jaensch v Coffey* (1984) 155 CLR 549 per Brennan J at 576 and per Deane J at 579-582, and *Sutherland Shire Council v Heyman* (1985) 157 CLR 424.

⁷⁶ See Appendix 6 for glossary of terms appearing in bold type.

⁷⁷ See section 2.5 above.

vicarious liability might have been found, and in cases where it might not) on the basis of a "non-delegable duty of care".⁷⁸ The non-delegable duty of care is more stringent than the duty to take reasonable care: it requires the person who owes the duty to ensure that care is taken.⁷⁹ What this means is that if A owes a non-delegable duty of care to B, A cannot escape liability for breach of the duty simply by "delegating" performance of the duty to C. A's duty is not discharged unless C in fact provides the reasonable care which A is required to ensure is taken. If C, through failure to take reasonable care, causes damage to B, A will be liable personally to B. This liability applies whether or not A and C are employer and employee.⁸⁰ For example, a hospital authority⁸¹ owes a duty of care to its patients. It will be liable for damage caused by the negligence of its staff, even if the authority employed with reasonable care skilled professional staff to whom performance of the duty is "delegated".

The non-delegable duty has its origin in the remark of Lord Blackburn in the United Kingdom, House of Lords case of *Dalton v Henry Angus & Co*⁸² that "a person causing something to be done, the doing of which casts on him a duty, cannot escape from the responsibility attaching on him of seeing that duty performed by delegating it to a contractor". There it was held that the defendants (the owner of a property and the contractor retained by the owner to undertake excavation works upon that property) were both liable for the damage caused to the plaintiff's adjoining property by a sub-contractor (who had been retained by the contractor to perform the excavation works). The owner had argued that the contractor and sub-contractor were liable, while the contractor had argued that the sub-contractor alone was responsible.

In a later case, his Lordship expanded on the notion:⁸³

If [a non-delegable] duty was cast upon the defendant he could not get rid of responsibility by delegating the performance of it to a third person. He was at liberty to employ such a third person to fulfil the duty which the law cast upon himself, and, if they so agreed together, to take an indemnity to himself in case

⁷⁸ See Ch 5 below. This concept involves a breach of a personal duty said to be owed by the principal/employer to the injured party, and therefore imports notions of "fault", as opposed to strict liability.

⁷⁹ *Kondis v State Transport Authority (Vic)* (1984) 154 CLR 672 per Mason J at 686; *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520 at 550.

⁸⁰ *Kondis v State Transport Authority (Vic)* (1984) 154 CLR 672 per Deane J at 694.

⁸¹ See section 9.3 below.

⁸² (1881) 6 App Cas 740 at 829. See also the remarks of Lord Watson at 831-832. The other members of the House of Lords (Lord Selborne LC, Lord Coleridge and Lord Penzance) did not consider the liability of principals for contractors.

⁸³ *Hughes v Percival* (1883) 8 App Cas 443 at 446 (Lord Watson and Lord FitzGerald agreeing). The passage was cited with approval by Mason CJ, Deane, Dawson Toohey & Gaudron JJ in *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520 at 550.

mischief came from that person not fulfilling the duty which the law cast on the defendant; but the defendant still remained subject to that duty, and liable for the consequences if it was not fulfilled.

The leading modern United Kingdom case on the non-delegable duty is *Wilsons & Clyde Coal Co Ltd v English*.⁸⁴ There Wilsons & Clyde Coal employed an "agent" to manage its mines.

Owing to the agent's negligence, a safe system of work was not provided; as a result English, an employee in the mine, was injured. The members of the House of Lords considered the case to be one of competition between the principles of vicarious liability (the "agent" was considered to be an employee) and common employment.⁸⁵ Their Lordships held that Wilsons & Clyde Coal was under a duty to provide a safe system of work, and that the duty was not discharged by the employment of the agent. Therefore, even though Wilsons & Clyde Coal's directors were not aware of the unsafe system, they were held liable for English's injury.

There are limits to the scope of the non-delegable duty, however. In the United Kingdom case of *Davie v New Merton Board Mills Ltd*⁸⁶ Davie, who was injured as a result of using a defective tool, sued his employer, New Merton Board Mills, and later joined the manufacturer of the tool as a defendant in an action for negligence. The tool had a latent defect which, although caused by negligent manufacture, could not reasonably have been discovered by New Merton Board Mills after it purchased the tool from the manufacturer. Davie obtained judgment against both the employer and the manufacturer at first instance; on appeal the Court of Appeal held that the employer, New Merton Board Mills, was not liable. Davie then appealed to the House of Lords seeking to make his employer also liable. Davie's argument, based on *Wilsons & Clyde Coal Co Ltd v English*,⁸⁷ was that New Merton Board Mill's duty to provide proper equipment was absolute; it could not be delegated by relying on the fact the equipment was purchased from a reputable manufacturer. The House of Lords rejected the propositions that the manufacturer was New Merton Board Mill's delegate⁸⁸ and that the liability of the kind imposed on the employer in *Wilsons & Clyde Coal* could attach "beyond persons who could properly be said to have been employed by the master to act

⁸⁴ [1938] AC 57.

⁸⁵ As to the defence of common employment, see section 2.2 above.

⁸⁶ [1959] AC 604.

⁸⁷ [1938] AC 57.

⁸⁸ Per Viscount Simonds at 625, Lord Morton of Henryton at 629, Lord Tucker at 647 and Lord Keith of Avonholm at 648.

on his behalf.⁸⁹

In *Commonwealth v Introvigne*,⁹⁰ the High Court of Australia found a school authority liable for an injury to a student on the basis of the authority's non-delegable duty not only to take care for the student's safety, but to ensure that care was taken.⁹¹

Kelly examines *Introvigne* closely and concludes that "[w]here the employer has done everything that is reasonably possible to ensure an adequate or safe system, the attribution of 'personal' liability is, in the words of Glanville Williams, 'a logical fraud'".⁹² However, on the authority of *Introvigne* and *Kondis v State Transport Authority (Vic)*,⁹³ and more recently *Burnie Port Authority v General Jones Pty Ltd*,⁹⁴ it would seem that the non-delegable duty is part of Australian law.⁹⁵

In *Kondis v State Transport Authority (Vic)*⁹⁶ the principle of non-delegable duty was applied by the High Court of Australia in relation to an employer's duty to provide a safe system of work, so that an employer was liable for injuries sustained as a result of the negligence not of an employee but of an independent contractor. Mason J, with whom Deane and Dawson JJ agreed, sought to identify the categories of cases in which the duty of care is non-delegable:⁹⁷

... when we look to the classes of case in which the existence of a non-delegable duty has been recognized, it appears that there is some element in the relationship between the parties that makes it appropriate to impose on the defendant a duty to ensure that reasonable care and skill is taken for the safety of the persons to whom the duty is owed....The element in the relationship between the parties

⁸⁹ Per Lord Reid at 636.

⁹⁰ (1982) 150 CLR 258.

⁹¹ See further section 9.2 below. The view that a school authority undertakes to give a child reasonable care had been expressed by Kitto J in the earlier High Court case of *Ramsay v Larsen* (1964) 111 CLR 16 at 28, cited with approval by Mason J in *Commonwealth v Introvigne* (1982) 150 CLR 258 at 271.

⁹² GM Kelly "Prospective Liabilities of Sport Supervisors" (1989) 63 ALJ 669 at 683, citing GL Williams "Liability for Independent Contractors" [1956] CLJ 180 at 193.

⁹³ *Kondis* has also been cited with approval by the House of Lords: *McDermid v Nash Dredging and Reclamation Co Ltd* [1987] AC 906 per Lord Brandon of Oakbrook (with whom Lord Bridge of Harwich, Lord Mackay of Clashfern and Lord Ackner agreed) at 917.

⁹⁴ (1994) 179 CLR 520. See section 2.5 above.

⁹⁵ See further sections 9.2 and 9.3 below.

⁹⁶ (1984) 154 CLR 672; noted by RC Evans "Negligence - Safe System of Work - Vicarious Liability" (1985) 59 ALJ 230.

⁹⁷ *Kondis v State Transport Authority (Vic)* (1984) 154 CLR 672 per Mason J at 687.

which generates a special responsibility or duty to see that care is taken may be found in one or more of several circumstances. [His Honour instanced hospitals, schools, inviters and landlords, and continued:] In these situations the special duty arises because the person on whom it 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 its safety, in circumstances where the person affected might reasonably expect that due care will be exercised.

This statement was cited with approval by the majority (Mason CJ, Deane, Dawson, Toohey and Gaudron JJ) in *Burnie Port Authority v General Jones Pty Ltd*,⁹⁸ who referred to the common element in the relationship between the parties as "the central element of control".⁹⁹ In that case the Authority was held to have breached a non-delegable duty owed to the plaintiff, General Jones, to ensure that the Authority's independent contractor took reasonable care to prevent Isolite, a highly flammable insulating material, being set alight as a result of welding activities the independent contractors were performing in the course of installing additional refrigeration, for which purpose the Authority had engaged them. Due to the negligent manner in which the welding was performed, a spark ignited the Isolite. As a result the plaintiff suffered damage when frozen vegetables it was storing in cold rooms in a building occupied by it under a licence agreement with the Authority were ruined by a fire which destroyed the building. At first instance judgment was obtained against the contractor and against the Authority. The Authority's liability to General Jones was affirmed by the Full Court of the Supreme Court of Tasmania on the basis of the rule in *Rylands v Fletcher*.¹⁰⁰ On appeal, the High Court also affirmed the Authority's liability, not on the basis of the rule in *Rylands v Fletcher*,¹⁰¹ which the Court held to have been absorbed by the principles of ordinary negligence,¹⁰² but rather on the basis of breach of a non-delegable duty.

As McDonald and Swanton point out,¹⁰³ the decision in *Burnie Port Authority v General Jones Pty Ltd* results in the recognition of a further category of non-delegable duty, concerning the liability of an occupier towards a person outside the

⁹⁸ (1994) 179 CLR 520 at 550-551.

⁹⁹ *Id* at 551.

¹⁰⁰ (1866) LR 1 Ex 265; affirmed (1868) LR 3 HL 330.

¹⁰¹ A rule which the majority (Mason CJ, Deane, Dawson, Toohey and Gaudron JJ) described as one with "difficulties, uncertainties, qualifications and exceptions" at 556.

¹⁰² The majority said at 556: "Under those principles, a person who takes advantage of his or her control of premises to introduce a dangerous substance, to carry on a dangerous activity, or to allow another to do one of those things, owes a duty of reasonable care to avoid a reasonably foreseeable risk of injury or damage to the person or property of another."

¹⁰³ B McDonald and J Swanton "Non-delegable duties in the law of negligence" (1995) 69 ALJ 323.

premises in respect of dangerous substances or activities on the premises.¹⁰⁴

Although declining to express a concluded view on whether the duty of care owed to a lawful visitor on the premises is also a non-delegable one, the majority in *Burnie Port Authority v General Jones Pty Ltd* stated that the "ordinary processes of legal reasoning by analogy, induction and deduction would prima facie indicate that it is."¹⁰⁵

The concept of the non-delegable duty has attracted widespread comment.¹⁰⁶ Williams wrote that the use since made of Lord Blackburn's dictum in *Dalton v Angus & Co*¹⁰⁷ "has advanced it to the rank of one of the leading sophistries in the law of torts".¹⁰⁸ He argued that the rule in *Wilsons & Clyde Coal* was designed to circumvent the rule of common employment¹⁰⁹ and that, with the demise of that rule, the rule in *Wilsons & Clyde Coal* is no longer needed in the circumstances in which it originated.¹¹⁰ The state of the English and Australian authorities cited above indicates that the non-delegable duty has outlived the rule of common employment.

Although the non-delegable duty is now an established feature in our legal landscape, disagreement remains about the true nature of the liability arising under it. Some writers and judges,¹¹¹ in keeping with its characterisation as a duty

¹⁰⁴ *Id* at 325. See *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520 at 551.

¹⁰⁵ *Id* at 557.

¹⁰⁶ A Barak "Mixed and Vicarious Liability - A Suggested Distinction" (1966) 29 *MLR* 160; S Chapman "Liability for the Negligence of Independent Contractors" (1934) 50 *LQR* 71; Fleming at 389-390; GM Kelly "Prospective Liabilities of Sports Supervisors" (1989) 63 *ALJ* 669 at 682-685; GL Williams "Liability for Independent Contractors" [1956] *CLJ* 180 at 181.

¹⁰⁷ (1881) 6 App Cas 740 at 829.

¹⁰⁸ GL Williams "Liability for Independent Contractors" [1956] *CLJ* 180 at 181.

¹⁰⁹ See section 3.2 above. This view of the non-delegable duty is supported by Mason J in *Kondis v State Transport Authority (Vic)* 1984 154 CLR 672 at 685.

¹¹⁰ GL Williams "Liability for Independent Contractors" [1956] *CLJ* 180 at 191.

¹¹¹ WP Whippy "A Hospital's Personal and Non-delegable Duty to Care for its Patients - Novel Doctrine or Vicarious Liability Disguised?" (1989) 63 *ALJ* 182 at 182; Mason J in *Commonwealth v Introvigne* (1982) 150 CLR 258 at 269, 270 and in *Kondis v State Transport Authority (Vic)* (1984) 154 CLR 672 at 685; Brennan J in *Kondis* at 694; and Wilson and Dawson JJ in *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16 at 44 noting the review of the issue in Atiyah at 338-339 and the difficulty of identifying situations in which a non-delegable duty would arise. The recent judgment of the High Court in *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520 indicates the Court's willingness to expand the categories of cases in which a non-delegable duty may be found to exist.

(with the implication of fault where it is breached), call it personal while others¹¹² criticise it as vicarious liability in disguise.

Some commentators are of the view that the "exceptions" to the general rule that a person is not liable for the wrongdoings of another are now so many and various that they achieve a result similar to that which would have been achieved by the extension of vicarious liability to independent contractors.¹¹³

The application of the non-delegable duty to various situations is considered in Chapters 5 and 9.¹¹⁴

¹¹² Fleming at 389-390; GM Kelly "Prospective Liabilities of Sport Supervisors" (1989) 63 *ALJ* 669 at 682. GL Williams "Liability for Independent Contractors" [1956] *CLJ* 180 at 192 argues that the negligence of the employer is really imputed negligence rather than personal negligence.

¹¹³ See E McKendrick "Vicarious Liability and Independent Contractors - A Re-examination" (1990) 53 *MLR* 770 at 772.

¹¹⁴ Sections 9.2 and 9.3.

CHAPTER 4

EMPLOYMENT

The basic proposition is that an employer is strictly liable for the wrongs of an employee committed in the course of the employment.¹¹⁵ That apparently simple principle presents difficulties in practice, however. This Chapter considers some of those problems by dealing with what the employment relationship and the "course of employment" are, and then reviewing some ancillary issues.

4.1 EMPLOYMENT RELATIONSHIP

For a plaintiff, the first issue that arises in considering whether an employer is vicariously liable is whether the relationship of employer and employee even exists between the defendant and the tortfeasor.¹¹⁶

Traditionally, the test for the employer-employee relationship was the degree of control exercised by the employer over the employee. This relates back to one of the rationales for vicarious liability, namely that because the employer has control over his or her employees, he or she should be responsible for their misdeeds.¹¹⁷

With the development of industry and technology came changes in employment relationships. Expertise came not to be proportional to seniority, and the "control test" declined in importance in favour of the "organisation test".¹¹⁸ The organisation test looks not to the degree of control over the employee, but to whether the employee is a part of the employer's organisation.¹¹⁹ Relevant matters include how remuneration is paid, where work is carried out, and the permanency and exclusivity of work for the employer. On the basis of the organisation test, the scope of vicarious liability (particularly in hospitals¹²⁰) expanded considerably.

¹¹⁵ Section 2.2 above.

¹¹⁶ With increasing proportions of the workforce working as independent contractors, this is now an important issue. See E McKendrick "Vicarious Liability and Independent Contractors - A Re-examination" (1990) 53 MLR 770.

¹¹⁷ Section 2.5 above.

¹¹⁸ See *Zuijs v Wirth Brothers Pty Ltd* (1955) 93 CLR 561, where an acrobat in a travelling circus was held to be an employee, and *Albrighton v Royal Prince Alfred Hospital* [1980] 2 NSWLR 542 per Reynolds JA at 557.

¹¹⁹ Fleming at 372.

¹²⁰ See section 9.3(a) below.

On the authority of *Stevens v Brodribb Sawmilling Co Pty Ltd*,¹²¹ however, the organisation test as the main determinant of the employment relationship is presently in disfavour in Australia. The preferred approach is to consider the totality of the relationship that exists between the parties, relying on a combination of factors, including the control and organisation tests not as alternative but as cumulative factors, as well as other indicia.¹²²

The facts in *Stevens v Brodribb Sawmilling Co Pty Ltd*¹²³ illustrate the difficulties involved in applying the test. Gray, a "snigger" (that is a bulldozer operator), and Stevens, a "trucker", were employed in logging by Brodribb Sawmilling. Sniggers and truckers used their own vehicles, worked their own hours, and were paid by volume of timber delivered. Tax was not deducted from their pay. Both parties were free to seek other work if bad weather or other circumstances prevented them from working for Brodribb Sawmilling. Stevens was injured when, due to Gray's negligence, a log rolled away from Gray's bulldozer and pinned Stevens between it and the bulldozer. Stevens sued Gray and Brodribb Sawmilling, alleging that Brodribb Sawmilling was vicariously liable as Gray's employer for Gray's negligence. Both Stevens and Gray were held by the trial judge and one member of the Full Court of the Victorian Supreme Court to be employees (thereby making the defendant Brodribb Sawmilling vicariously liable), and by the other two members of the Full Court to be independent contractors. On appeal, the High Court unanimously agreed that, in light of the features of the relationship, most of which were unlike typical employment relationships, Stevens and Gray were independent contractors.¹²⁴

Even then, the various indicia of an employment relationship are not always conclusive, as illustrated by the Canadian case of *Renault v Sheffield*.¹²⁵ There Renault, a parishioner, gave her Roman Catholic priest \$26 000 to look after. The money was stolen. Renault sued the priest as gratuitous **bailee**¹²⁶ of the money, along with the bishop of the diocese who was said to be vicariously liable for the priest's misfeasance. Houghton LJSC held that the bishop's "power over a priest is ecclesiastical, not civil", that he was not the priest's employer, and therefore was

¹²¹ (1986) 160 CLR 16.

¹²² *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16 per Mason J at 27-28 and per Wilson and Dawson JJ at 35-39.

¹²³ (1986) 160 CLR 16.

¹²⁴ The Court considered that Brodribb Sawmilling did owe a personal duty of care to Stevens, but that on the facts it had not breached that duty.

¹²⁵ (1988) 29 BCLR (2d) 171 (Houghton LJSC), noted by P J Downey "Benefit of Clergy?" [March 1989] *New Zealand Law Journal* 83. According to Downey, the case was also noted under the heading "God is priest's principal, bishop is not vicariously liable" in *The Lawyer's Weekly* 29 July 1988.

¹²⁶ See Appendix 6 for glossary of terms appearing in bold type.

not vicariously liable. The decision is consistent with two older English cases which were concerned with whether clergy were employees for the purposes of workers' compensation schemes.¹²⁷

A further problem may arise if an employer "lends" an employee to a third party (the "temporary employer") and the employee causes injury or damage while carrying out work for the temporary employer. Ordinarily the general employer will still be liable for the negligence of the employee unless the court is satisfied, in all the circumstances of the case, that effective control of the employee's work had passed to the temporary employer.¹²⁸ The onus of proving that such control has passed is a heavy one: the general or permanent employer must shift the prima facie responsibility for the negligence of the servant employed and paid by such employer so that the burden in a particular case may come to rest on the temporary employer who for the time being has the advantage of the service rendered.¹²⁹ The burden may only be discharged in exceptional circumstances,¹³⁰ such as by proving that entire and absolute control over the employee has passed to the temporary employer,¹³¹ as well as other factors such as who is paymaster, who can dismiss the employee, how long the alternative service lasts and what machinery is employed.¹³² It has been suggested that it may be easier to show a transference of employment of an unskilled worker than a skilled worker with valuable equipment.¹³³

An injured party, in order to avoid the difficulty of identifying the appropriate defendant, would be likely to sue both the general employer and the temporary employer. The litigation is likely to become complex and difficult to settle, even where the employee has clearly been negligent and the amount of compensation to which the injured party is entitled is not in issue. If there are subsequent appeal proceedings between the general employer and the temporary employer on the question of liability, it will still be necessary for the injured party, as the original

¹²⁷ *Rogers v Booth* [1937] 2 All ER 751; *In re National Insurance Act 1911* [1912] 2 Ch 563.

¹²⁸ See eg *Mersey Docks and Harbour Board v Coggins and Griffith (Liverpool) Ltd* [1947] AC 1; *McDonald v The Commonwealth* (1945) 46 SR(NSW) 129 at 132; *Savory v Holland & Hannen & Cubitts (Southern) Ltd* [1964] 1 WLR 1158 per Lord Denning MR at 1163, *Ready Mixed Concrete (East Midlands) Ltd v Yorkshire Traffic Area Licensing Authority* [1970] 2 QB 397 at 404.

¹²⁹ *Mersey Docks and Harbour Board v Coggins and Griffith (Liverpool) Ltd* [1947] AC 1 per Lord Simon at 10.

¹³⁰ See the discussion of Lord Salmon in *Bhoomidas v Port of Singapore Authority* [1978] 1 WLR 189 at 191-192.

¹³¹ *Mersey Docks and Harbour Board v Coggins & Griffith (Liverpool) Ltd* [1947] AC 1 per Lord Simonds at 18, citing Lord Esher MR in *Donovan v Laing, Wharton & Down Construction Syndicate Ltd* [1893] 1 QB 629 at 632.

¹³² *Mersey Docks and Harbour Board v Coggins & Griffith (Liverpool) Ltd* [1947] AC 1 per Lord Porter at 17.

¹³³ See the comments of Parker J in *Garrard v A E Southey & Co and Standard Telephones & Cables Ltd* [1952] 2 QB 174 at 179, and those of Lord Denning MR in *Denham v Midland Employers Mutual Assurance Ltd* [1955] 2 QB 437 at 444. See also Fleming at 376.

plaintiff, to be joined as a party to the appeal.¹³⁴ Such a situation illustrates the need for greater certainty in determining who is to be vicariously liable for the loss or injury suffered.

A problem also arises where there is difficulty in identifying the actual employee who caused the damage. Whether the loss or injury was caused by a "lent" employee or an employee of the hiring company obviously affects which employer is prima facie liable for the damage. Different considerations may apply where an employer hires out equipment and an employee to operate it, and that employee is then injured during the period of hire.¹³⁵

It is always open to the parties to determine between themselves who should be responsible for the payment of compensation in the event of any damage occurring, by including a specific term to this effect in a contract. Although such a term does not have the effect of divesting the general employer of his or her vicarious liability, it may entitle him or her to an indemnity from the temporary employer.¹³⁶ The question of determining whether such an indemnity is available will not avoid the necessity of having to join the original plaintiff to the proceedings,¹³⁷ although it will at least confine the issue to one between the general employer and the temporary employer.

There are a number of good reasons why vicarious liability should remain with the general employer, particularly where that employer is, for example, in the business of hiring out equipment with drivers or operators. The cost of the insurance against such accidents can often be absorbed in the hiring charges, and may be insured against more conveniently by the general employer than by the temporary employer because of the general employer's broader accident experience with the

¹³⁴ In *Mersey Docks and Harbour Board v Coggins and Griffith (Liverpool) Ltd* [1947] AC 1, the Board, which owned a number of mobile cranes, each driven by a skilled workman engaged and hired by the Board, hired out one of its cranes with a skilled crane driver to Coggins and Griffith Ltd, for the purpose of loading and unloading cargo at the Liverpool docks. The terms of the hire agreement provided that the hirer assume all risks in connection with lifting cargo and that the driver of the crane was the servant of the hirer. Coggins and Griffith Ltd were to direct the driver as to what work to do, but not how to do it. As a result of the crane driver's negligence the plaintiff (who was on the dock) was injured. The plaintiff sued both the Board and Coggins and Griffith Ltd. At trial and in the Court of Appeal the Board was held liable. On appeal by the Board to the House of Lords, the appeal could not proceed unless the plaintiff, although indifferent to which of the two original defendants was liable to compensate him, was joined as a party to the appeal, since the court was being asked to reverse a judgment which he had obtained.

¹³⁵ *Ferguson Construction Co Ltd v Hargreaves and Mayhead Brothers Ltd* [1973] 1 NZLR 634 at 642-643 and 653-4, where it was held that in such a case both employers may be liable, and see the reservation expressed by Parker J in *Garrard v AE Southey & Co* [1952] 2 QB 174 at 178, and the comments of Diplock LJ in *Savory v Holland & Hannen & Cubitts (Southern) Ltd* [1964] 1 WLR 1158 at 1164-1165, cf *Brogan v Smith* [1965] SLT 175 where the normal principles of vicarious liability were held to still apply.

¹³⁶ *Mersey Docks and Harbour Board v Coggins and Griffith (Liverpool) Ltd* [1947] AC 1; *Spalding v Tarmac Civil Engineering Ltd* [1967] 1 WLR 1508 at 1520.

¹³⁷ See footnote 134 above.

particular kind of risk, such as the operation of the equipment.¹³⁸ Certainty can be achieved by ensuring that the general employer remains vicariously liable for damage caused by an employee who has been "lent" to a temporary employer, thereby necessitating an action against one party only. It would also avoid the situation where the wrong party (such as the temporary employer) is sued, resulting in nothing being recovered for the loss or injury suffered.¹³⁹

4.2 COURSE OF EMPLOYMENT

Once the employment relationship has been established, a plaintiff must establish against a vicarious defendant that the employee's wrong was committed in the "course of employment".¹⁴⁰ If the employer expressly authorised or ratified the tort, the employer is personally, as well as vicariously, liable. If, at the other extreme, the employee acted in contravention of orders, the employer will usually not be liable. As will presently be seen, most difficulty arises in cases between those two extremes.

The preponderance of judicial and academic opinion looks at the mode of performance of the contract of service, so that vicarious liability arises where the employee uses an unauthorised mode in carrying out the authorised task. The rationale is that:

If a servant does negligently that which he was authorised to do carefully ... fraudulently that which he was authorised to do honestly, or ... mistakenly that which he was authorised to do correctly, [the] master will answer for that negligence, fraud or mistake.¹⁴¹

A number of the cases discussed later also illustrate the difficulties of applying the "course of employment" test in practice.¹⁴²

¹³⁸ Fleming at 375; note, "Borrowed Servants and the Theory of Enterprise Liability" (1967) 76 *Yale LJ* 807 especially at 816-817. Of course, if the hirer has more experience with the particular operation for which the equipment and personnel is required, so as to be a better predictor of accidents, this special knowledge may be reflected by an indemnification agreement between the general and temporary employer (817-818). Also, the general employer may not be liable if injury arises in the course of performing an operation which falls outside the scope of the hire contract, such as an "undisclosed extrahazardous use" (818).

¹³⁹ See eg *Savory v Holland & Hannen & Cubitts (Southern) Ltd* [1964] 1 WLR 1158.

¹⁴⁰ Some writers and judges have spoken of the "scope of authority" which imports considerations of agency: see FMB Reynolds *Bowstead on Agency* (Sweet & Maxwell 15th ed 1985) at 386-389.

¹⁴¹ RFV Heuston & RA Buckley *Salmond and Heuston on the Law of Torts* (Sweet & Maxwell 20th ed 1992) at 457 citing the judgment of the Court of Exchequer Chamber in *Barwick v English Joint Stock Bank* (1867) LR 2 Ex 259 at 266.

¹⁴² Eg *Rose v Plenty* [1976] 1 WLR 141 (see section 9.1(a) below); and *Harvey v RG O'Dell Ltd; Galway (3rd party)* [1958] 2 QB 78 (see section 10.4 below).

(a) Authority and ratification

If a person authorises or ratifies particular torts, the person is liable (although as pointed out above,¹⁴³ the liability will be personal rather than vicarious). Quite obviously, this applies to employers as much as to anyone else.¹⁴⁴

(b) Disobedience to orders

An employer may not be liable for acts which are expressly prohibited by the terms of the employment agreement. Thus employers are generally not liable for injury to hitchhikers given an unauthorised lift by an employee.¹⁴⁵

It appears that the quality of the order must be considered: if it limits the sphere of employment, the transgression places the employee in the position of stranger in relation to the employer. Disobedience to an order of lesser importance which affects only the mode of performance of the employment contract will not vitiate the employer's liability.¹⁴⁶

An example of the effect of disobedience to express orders arose in *Kooragang Investments Pty Ltd v Richardson & Wrench Ltd*.¹⁴⁷ In that case (which went on appeal from the Supreme Court of New South Wales to the Privy Council) Richardson & Wrench employed one Rathborne to conduct valuations for clients including the Giles Bourke group of companies. Richardson & Wrench later instructed Rathborne not to conduct any further valuations for the group. However Rathborne became a director of one of the Giles Bourke companies and, unknown to Richardson & Wrench, issued valuations on Richardson & Wrench's letterhead in respect of the group's assets. Kooragang, relying on the valuations, advanced money to the group and, owing to Rathborne's negligence in preparing the valuations, later suffered loss. The advice of the Privy Council, delivered by Lord Wilberforce, was that "a clearer case of departure from the course or scope of Rathborne's employment cannot be imagined",¹⁴⁸ and that Richardson & Wrench

¹⁴³ Ch 2.

¹⁴⁴ See the example given in section 2.3 above.

¹⁴⁵ *Twine v Bean's Express Ltd* [1946] 1 All ER 202 (KBD, Uthwatt J); 62 TLR 458 (CA) and *Conway v George Wimpey & Co Ltd* [1951] 2 KB 266. Although the same result would probably follow in both cases today, the "master's tort" theory espoused in them has been rejected: see notes 46, 47 above.

¹⁴⁶ Fleming at 378-380; *Bugge v Brown* (1919) 26 CLR 110; *Rose v Plenty* [1976] 1 WLR 141. *Rose v Plenty* is considered in section 9.1(a) below.

¹⁴⁷ [1982] AC 462, noted by JG Starke "Master and Servant: Extent of Vicarious Liability" (1982) 56 ALJ 42 and MA Pembroke "Vicarious Liability in Tort: When is a Document Genuine?" (1983) 27 Valuer 447.

¹⁴⁸ [1982] AC 462 at 475.

was therefore not liable.

Interestingly, the Privy Council's advice made it clear that it was not intended to create "a new principle equivalent to one of strict liability";¹⁴⁹ but that is exactly what vicarious liability is (in cases where the employee does act within the scope of employment).¹⁵⁰

(c) "Frolic and detour"

The question of when an employee is acting in the course of employment produced the case of *Joel v Morison*¹⁵¹ and Parke B's immortal phrase concerning the hypothetical employee on "a frolic of his own".¹⁵² The point of the case is that an employee who merely detours from carrying out the employer's business is still acting within the course of employment; the employee "on a frolic of his own" is not. The reader will note that the courts have thus reserved to themselves in all cases a wide discretion to decide whether a deviant employee is frolicking or merely detouring. The inconsistencies that have resulted have on occasion attracted trenchant criticism.¹⁵³

In *Joel v Morison* the defendant Morison's employee so negligently drove Morison's horse and cart that:¹⁵⁴

the cart and horse were driven against the plaintiff, and struck him, whereby he was thrown down and the bone of one of his legs was fractured, and he was ill in consequence, and prevented from transacting his business, and obliged to incur a great expense in and about the setting the said bone, &c, and a further great expense in retaining and employing divers persons to superintend and look after his business for six calendar months.

¹⁴⁹ Ibid.

¹⁵⁰ The Privy Council specifically denied that the case was one of ostensible authority, holding rather that the issue was one of actual authority or total absence of authority: Ibid at 474.

¹⁵¹ (1834) 172 ER 1338.

¹⁵² As GM Kelly ("Prospective Liabilities of Sport Supervisors" (1989) 63 ALJ 669 at 681 n 79) says, "The expression scarcely deserves its extreme longevity, but remains a favourite among sanctified legal formulas."

¹⁵³ YB Smith "Frolic and Detour" (1923) 23 *Colum L Rev* 444 & 716, and writers and judges cited there (especially at 449-452). The test as expounded by Parke B in *Joel v Morrison* (1834) 172 ER 1338 has been described as being "devoid of guidance": BS Markesinis & SF Deakin *Tort Law* (Clarendon Press 3rd ed 1994) at 513. Comyn J in *Harrison v Michelin Tyre Co Ltd* [1985] 1 All ER 918 at 919-920 briefly surveyed the case law which developed from *Joel v Morrison*, and found that the case law was largely inconsistent, often with an immediately preceding case; the cases were hard to reconcile in a number of instances. Comyn J reformulated Parke B's test in *Joel v Morrison* as follows: was the incident part and parcel of the employment in the sense of being incidental to it although and albeit unauthorised or prohibited, or was it so divergent from the employment as to be plainly alien to and wholly distinguishable from the employment? Other tests have been expounded, such as that put forward by RFV Heuston & RA Buckley in *Salmond and Heuston on the Law of Torts* (Sweet & Maxwell 20th ed 1992) at 457, although the authors add that the principle is easy to state but difficult to apply.

¹⁵⁴ 172 ER 1338.

Morison called evidence to show that "for weeks before and after" the event the cart was "only in the habit of being driven between Burton Crescent Mews and Finchley, and did not go into the City at all." Parke B, in summing up, said:¹⁵⁵

If the servants, being on their master's business, took a detour to call upon a friend, the master will be responsible. If you think the servants lent the cart to a person who was driving without the defendant's knowledge, he will not be responsible. Or, if you think that the young man who was driving took the cart surreptitiously, and was not at the time employed on his master's business, the defendant will not be liable. The master is only liable where the servant is acting in the course of his employment. If he was going out of his way, against his master's implied commands, when driving on his master's business, he will make his master liable; but if he was going on a frolic of his own, without being at all on his master's business, the master will not be liable.

The jury returned a verdict for Joel for £30.

Thus, where the employee is merely on a *detour* from the employer's business, liability attaches to the employer; but where the jaunt becomes a *frolic* of the employee's own, there is no vicarious liability. It can be seen then that this is simply a quaint verbal formulation of the course of employment test: if the detour is an unauthorised mode of doing what the employee was employed to do, the employer is liable, but not if it goes entirely beyond the scope of employment.¹⁵⁶

4.3 INTENTIONAL TORTS

Difficulties also arise where the employee commits an **intentional tort**. Should an employer be responsible, for example, for an assault on a customer? Some of the older cases suggest that liability should not attach to the employer in these cases. However, as Fleming argues, there are really no high minded legal principles underlying vicarious liability; it is simply a policy device for fixing liability on a financially responsible defendant.¹⁵⁷

¹⁵⁵ *Id* at 1338-1339.

¹⁵⁶ The test as expounded by RFV Heuston & RA Buckley in *Salmond and Heuston on the Law of Torts* (Sweet & Maxwell 20th ed 1992) at 457 is as follows:

...a master is responsible not merely for what he authorises his servant to do, but also for the way in which he does it. If a servant does negligently that which he was authorised to do carefully, or if he does fraudulently that which he was authorised to do honestly, or if he does mistakenly that which he was authorised to do correctly, his master will answer for that negligence, fraud or mistake. On the other hand, if the unauthorised and wrongful act of the servant is not so connected with the authorised act as to be a mode of doing it, but is an independent act, the master is not responsible: for in such a case the servant is not acting in the course of his employment, but has gone outside it.

This test, which is often cited, has been referred to as "the test...which has found most favour" per Stephenson LJ in *Armagas Ltd v Mundogas SA* [1986] AC 717 at 763.

¹⁵⁷ Fleming at 367. See also section 2.5 above.

Swanton argues that the former weight of authority that an employer should not be liable for the intentional torts of employees has become diluted, so that the test has been assimilated to that applied in cases of negligence. Although the incongruity of intentional torts being committed "in the course of employment" is acknowledged, the alternative is a situation in which plaintiffs can sue an economically responsible defendant whose employee is merely negligent, but cannot sue where the damage is done intentionally.

[T]he argument against imposing liability on the master for wilful or even selfish wilful torts, based on unfairness to the master, loses force when it is remembered that *all* vicarious liability is strict in any event; that few employers bear the cost of accident losses personally ... and that, though the master may be morally innocent, so too is the plaintiff, and thus the contest is between two equally innocent parties. [original emphasis]¹⁵⁸

Fleming disagrees, however, saying that there is still a "decided preference" for the "real or ostensible authority" test in respect of intentional torts.¹⁵⁹ Of course, if there is an order, say, prohibiting violence, the principal may avoid liability on the reasoning set out earlier.¹⁶⁰ On the other hand, if an employer orders an employee to assault customers, the employer will be vicariously, and (on the principles set out above¹⁶¹) personally, liable.

4.4 INDEPENDENT DISCRETIONARY FUNCTION

There is a line of authority relating to persons, whether or not employees, upon whom the law casts an independent discretionary function. The effect is to place such persons in a position analogous to that of independent contractors,¹⁶² so that the person alone (and not the employer if there is one) is liable for his or her torts committed in the execution of that duty. As might be expected, this rule has not been free from criticism. But before considering the criticism, the rule itself should be expounded.

¹⁵⁸ J Swanton "Master's Liability for the Wilful Tortious Conduct of His Servant" (1985) 16 *UWALR* 1 at 29.

¹⁵⁹ Fleming at 382. At common law, a principal is bound by the acts of his or her agent, if the acts were within the scope of the agent's *actual or ostensible* authority.

¹⁶⁰ Section 4.2(b).

¹⁶¹ Section 2.3.

¹⁶² See Ch 5 below.

(a) Common law

According to Kneebone,¹⁶³ the "two main authorities which are usually cited" in support of the independent discretionary function principle are *Stanbury v Exeter Corporation*¹⁶⁴ and *Enever v R*.¹⁶⁵ In the former case, a local authority was held not liable for the acts of an inspector appointed by the authority under the *Diseases of Animals Act 1894* (UK) on the basis that his powers and functions were conferred on him by the Act and not by the authority. Lord Alverstone CJ said:¹⁶⁶

the inspector was not acting in performance of duties imposed by statute upon the [corporation], or, in other words, was not performing as their agent duties imposed upon them and delegated by them to him, but was acting in discharge of duties imposed on him as inspector...

In *Enever v R*¹⁶⁷ the plaintiff sued the Crown in right of Tasmania under section 4 of the *Crown Redress Act 1891* (Tas) which provided for actions by subjects "in respect of any act ... or default of any officer, agent or servant of the Government of Tasmania". The plaintiff was wrongfully arrested by a police officer following a disturbance on the streets of Hobart. The officer's personal liability was not in question. The Government argued that it was not liable because the officer was not its "officer, agent or servant". The members of the High Court discussed the history of the office of constable at length, noting that although the mode of appointment and the particular powers of constables had varied over time, the essential nature of the office had not. In particular, it had never been thought that (for instance) a local authority with power to appoint should be liable for a constable's wrongs. Griffith CJ drew the analogy of a ship's captain who, although appointed by the ship's owners, exercises "an original and personal, and not a delegated, authority."¹⁶⁸ Accordingly, it was held that no action lay against the Government for the wrongful arrest of the plaintiff by the constable. The position in *Enever* was reiterated in Queensland in *Irvin v Whitrod (No 2)*.¹⁶⁹

¹⁶³ S Kneebone "The Independent Discretionary Function Principle and Public Officers" (1990) 16 *Monash ULR* 184 at 191.

¹⁶⁴ [1905] 2 KB 838.

¹⁶⁵ (1906) 3 CLR 969; discussed in section 9.4 below.

¹⁶⁶ [1905] 2 KB 838 at 841-842 (Wills & Darling JJ agreeing).

¹⁶⁷ (1906) 3 CLR 969.

¹⁶⁸ *Id* at 977. This view of the relationship between Crown and constable was confirmed in *Attorney-General (NSW) v Perpetual Trustee Co Ltd* [1955] AC 457.

¹⁶⁹ [1978] QdR 271.

Enever and Irvin v Whitrod (No 2) were both referred to in *Oceanic Crest Shipping Co v Pilbara Harbour Services Pty Ltd*.¹⁷⁰ There Oceanic Crest's ship collided, due to the negligence of the pilot, with a wharf. Pilotage was, pursuant to statute, compulsory for vessels entering or leaving the port. The wharf owner sued the ship's owner (Oceanic Crest) and the pilot's employer (Pilbara), and Oceanic Crest and Pilbara exchanged contribution notices, each claiming that the other was vicariously liable. Pilbara claimed that it was not vicariously liable for the damage because the pilot was exercising an independent discretionary function.

The judgments differ in some details, for example as to the scope of the principle of independent discretionary function, and as to whether it applies to employees of the Crown, statutory corporations and private companies.¹⁷¹ Nevertheless, the majority¹⁷² held that Pilbara was not vicariously liable because of the independent discretionary function principle.¹⁷³ In the minority, Brennan J accepted the general principle, but considered that it only applied to the exercise of statutory (not common law) powers and only by persons employed by the Crown or a public authority.¹⁷⁴ Only Deane J attacked the principle, arguing that the general principles of vicarious liability should govern all cases, whether or not an independent discretionary function is involved.¹⁷⁵

(b) Legislation

In *Oceanic Crest Shipping Co v Pilbara Harbour Services Pty Ltd* Deane J said:¹⁷⁶

[T]he proposition that a general employer, be it public instrumentality or private company, is not vicariously liable for the negligence of the licensed pilots in its employ in carrying out the piloting duties which it employs and pays them to perform and for which the employer charges fees to the shipping owner is one which lies ill indeed with the ordinary principles governing vicarious liability in tort

¹⁷⁰ (1986) 160 CLR 626.

¹⁷¹ The judgments are closely analysed by S Kneebone "The Independent Discretionary Function Principle and Public Officers" (1990) 16 *Monash ULR* 184 at 186-191.

¹⁷² Gibbs CJ, Wilson and Dawson JJ.

¹⁷³ *Oceanic Crest* was followed in *Esso Petroleum Co Ltd v Hall Russell & Co Ltd* [1989] AC 643.

¹⁷⁴ (1986) 160 CLR 626 at 662.

¹⁷⁵ See section 4.4(b) below.

¹⁷⁶ (1986) 160 CLR 626 at 676.

which, however uncertain they may have been in 1916 when *Fowles*¹⁷⁷ was decided in the Privy Council, are now incontrovertible.¹⁷⁸ In particular, the importance which Isaacs J in this Court¹⁷⁹ placed upon "the principle that the alleged servant must be completely under the control and at the disposition of the alleged master before the latter can as such be held liable for the negligence of the former" and the emphasis which the Privy Council placed¹⁸⁰ upon the status of a pilot as "an independent professional man ... discharging his skilled duties" plainly indicate insistence upon a degree of control as a prerequisite of an employer's vicarious liability in tort which is simply inconsistent with contemporary law. The specialist employee - be he engineer, architect, lawyer, computer operator, airline pilot, ferry master or taxicab driver - has become almost as much the rule as the exception. He frequently performs his duties as an employee under the authority of a personal statutory licence. His specialist knowledge will commonly be such that it will be impracticable for his employer to do more than satisfy himself about, and rely upon, the qualifications, experience and reputed competence of the employee as a trained and licensed expert in the particular field. Nonetheless, the law is now clear that such a general employer will ordinarily be vicariously liable for such an employee's negligence in the course of the ordinary discharge of the duties of his employment.

For these reasons, many Australian jurisdictions have abrogated the independent discretionary function principle to varying degrees. In relation to police officers, *Irvin v Whitrod (No 2)*¹⁸¹ and Australian Law Reform Commission reviews prompted statutory reforms.¹⁸² The principle has also been modified by Crown proceedings legislation in some jurisdictions,¹⁸³ and in New South Wales by the *Law Reform (Vicarious Liability) Act 1983*.¹⁸⁴ The New South Wales Act provides that:

¹⁷⁷ *Fowles v Eastern and Australian Steamship Co Ltd* [1916] 2 AC 556.

¹⁷⁸ Note that S Kneebone ("The Independent Discretionary Function Principle and Public Officers" (1990) 16 *Monash ULR* 184 at 189) misquotes this passage as "not incontrovertible".

¹⁷⁹ *Fowles v Eastern and Australian Steamship Co Ltd* (1913) 17 CLR 149 at 181.

¹⁸⁰ [1916] 2 AC 556 at 562.

¹⁸¹ [1978] QdR 271.

¹⁸² These matters and the resulting legislation are described in section 9.4.

¹⁸³ *Crown Proceedings Act 1972* (SA) s10(2); *Crown Proceedings Act 1947* (UK) s2(3); *Crown Proceedings Act 1950* (NZ) s6(3). These are discussed by S Kneebone "The Independent Discretionary Function Principle and Public Officers" (1990) 16 *Monash ULR* 184 at 199-203. The South Australian Act has now been replaced by the *Crown Proceedings Act 1992* (SA) which does not contain an equivalent provision to s10(2).

¹⁸⁴ The relevant provisions are reproduced in Appendix 3. See also New South Wales Law Reform Commission *Proceedings by and against the Crown* (Report No 24 1976) at 40. S Kneebone ("The Independent Discretionary Function Principle and Public Officers" (1990) 16 *Monash ULR* 184 at 204-206), after reviewing the relevant legislation in Australian and other common law jurisdictions, considered that the New South Wales Act was the best model.

- an employer (including the Crown) is vicariously liable for his, her or its employee's tort committed in the performance of a function:
 - (a) conferred or imposed by statute or common law independently of the employer's will; and
 - (b) performed in the course of employment or directed to or incidental to the employer's business, enterprise, undertaking or activity;
- the Crown is vicariously liable for the tort committed by a "person in the service of the Crown" (including a police officer) committed in the performance of a function:
 - (a) whether or not conferred or imposed by statute or common law independently of the Crown's will; and
 - (b) performed in the course of employment or directed to or incidental to the Crown's business, enterprise, undertaking or activity.

The Commission considers that the abrogation of the independent discretionary function principle in relation to police officers is justifiable and desirable in light of modern views of state responsibility and the role of public officers, and that the reforms should be extended to officers of all descriptions. This could be accomplished by means of the enactment of legislation like the *Law Reform (Vicarious Liability) Act 1983* (NSW) which is not specific to police officers.

4.5 ISSUES

- (a) Is the liability of employers for the torts of employees under existing law adequate? If not, what changes should be made to the law?
- (b) Should the liability of principals for independent contractors be assimilated to that of employers for employees?
- (c) In any event, should the basis of an employer's liability be:
 - (i) the financial responsibility of the employer; or
 - (ii) the employer's control over (or ability to hire; or fire; or direct; or pay) the employee; or
 - (iii) the fact of the employee's membership of the employer's organisation (irrespective of the measure of control); or
 - (iv) some other matter?
- (d) Should an employer always remain vicariously liable for the negligence of an employee who has been "lent" to a third party?
- (e) Is the liability under existing law of employers for the torts of employees exercising an independent discretionary function adequate?
- (f) If not, what changes should be made to the law? Should liability for the torts of persons exercising an independent discretionary function be assimilated to that of employers for employees generally?
- (g) If so, is legislation like the *Law Reform (Vicarious Liability) Act 1983* (NSW) adequate to achieve this purpose? If not, what alternative model should be used?

CHAPTER 5

INDEPENDENT CONTRACTORS

5.1 WHAT IS AN INDEPENDENT CONTRACTOR?

An independent contractor is a person, other than an employee, who performs work for another (the principal). Generally, a principal is not answerable for the wrongs of his or her independent contractor.

Despite this general rule, the courts have fixed liability on principals for the acts or omissions of independent contractors in certain "exceptional" situations¹⁸⁵ by means of the so-called "non-delegable duty". The origins and development of the "non-delegable duty" have already been considered.¹⁸⁶

5.2 A GENERAL PRINCIPLE FOR CONTRACTORS' LIABILITY?

The rationale for the general rule of non-liability is that the principal should not have to bear responsibility for a person who is not an employee. Here policy considerations are important. If the defendant's financial responsibility is the reason for vicarious liability, perhaps the principle should be extended to cover contractors.¹⁸⁷ On the other hand, if the defendant's control over the tortfeasor is the governing consideration, liability should not attach to the principal.

Although the non-delegable duty¹⁸⁸ is frequently relied upon by the courts to establish liability on the part of a principal against whom no personal fault can be proved, theoretical examination of the rule has been scant.

Sixty years ago Chapman attempted to discover a unifying principle in cases of liability for independent contractors.¹⁸⁹ After reviewing the authorities since

¹⁸⁵ The "extra-hazardous activities doctrine" is one such exception in England and elsewhere (Fleming at 391), but is not part of the law of Australia: *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16 where Mason J at 30 suggests that in circumstances of special danger the common law, rather than imposing strict liability, would insist on a higher standard of care in the performance of an existing duty.

¹⁸⁶ Section 3.2 above.

¹⁸⁷ Although, as Fleming points out (at 389), the independent contractor's financial responsibility will exceed the principal's more often than the employee's will the employer's.

¹⁸⁸ See section 3.2 above.

¹⁸⁹ S Chapman "Liability for the Negligence of Independent Contractors" (1934) 50 *LQR* 71 at 75.

Dalton v Henry Angus & Co,¹⁹⁰ he concluded that they establish a series not of exceptions¹⁹¹ but of general propositions. One is that a principal is not liable for the wrongs of independent contractors where the person wronged is owed a duty by the contractor but not the principal. A second is that a principal is liable to a person who is owed a duty by the principal; this liability is not affected by the employment of an independent contractor. This mere application of general principles of torts yields the same result as the subsequent authorities in England and Australia.

McKendrick's review of the authorities in England¹⁹² is the first thorough theoretical treatment liability for the negligence of independent contractors has received since the controversies of the 1950s.¹⁹³ In light of the "rapid increase in new, flexible forms and patterns of work which depart radically from the standard employment relationship", McKendrick considers that the definition of "employee" should be expanded for the purposes of vicarious liability to include certain independent contractors. He points out that definitions of employee already vary in relation to taxation, social security and workers' compensation (often to include contractors). With increasing numbers moving into "atypical employment", the law, rather than expanding the exceptions in a haphazard manner, should determine general criteria for imposing on principals liability for torts committed by contractors.¹⁹⁴

As seen earlier,¹⁹⁵ the High Court has in fact moved Australian law some distance in the direction urged by Chapman and McKendrick by way of the general principle enunciated by Mason J (with whom Deane and Dawson JJ agreed) in *Kondis v State Transport Authority (Vic)*.¹⁹⁶

The application of these principles to independent contractors has, as Wilson and

¹⁹⁰ (1881) 6 App Cas 740. The case is considered in section 3.2 above.

¹⁹¹ Although the Privy Council is still clearly in favour of a general rule of no liability: "it is trite law that the employer of an independent contractor is, in general, not liable for the ... torts committed by the contractor in the course of the execution of the work" (*D & F Estates Ltd v Church Commissioners for England* [1989] AC 177 per Lord Bridge of Harwich at 208).

¹⁹² E McKendrick "Vicarious Liability and Independent Contractors - A Re-examination" (1990) 53 *MLR* 770.

¹⁹³ These are considered in section 3.2 above.

¹⁹⁴ E McKendrick "Vicarious Liability and Independent Contractors - A Re-examination" (1991) 53 *MLR* 770 at 782 suggests but then rejects the idea that agency could be used to accommodate a general rule of liability in relation to independent contractors.

¹⁹⁵ Section 3.2 above.

¹⁹⁶ (1984) 154 CLR 672 at 687.

Dawson JJ said in *Stevens v Brodribb Sawmilling*,¹⁹⁷ impacted most on workplaces, hospitals and schools. These are considered in more detail below.¹⁹⁸

5.3 ISSUES

- (a) Is the liability of principals for the torts of independent contractors under existing law adequate? If not, what changes should be made to the law?
- (b) Should the liability of principals for independent contractors be assimilated to that of employers for employees?
- (c) In any event, should the basis of a principal's liability be:
 - (i) the financial responsibility of the principal; or
 - (ii) the principal's control over (or ability to hire; or fire; or direct; or pay) the contractor; or
 - (iii) the fact of the contractor's role within the principal's organisation (irrespective of the measure of control); or
 - (iv) some other matter?

¹⁹⁷ (1986) 160 CLR 16 at 44.

¹⁹⁸ Sections 9.2 and 9.3.

CHAPTER 6

PARENTS AND CHILDREN

Under the present law, parents are not vicariously liable for the wrongs of their children. They may, however, have duties of care to their children or to strangers in respect of their children's wrongs.¹⁹⁹ These duties are personal not vicarious.²⁰⁰

The Commission has considered two possible approaches to the argument that parents should be vicariously liable for the wrongs of their children.

The first is to say that strict vicarious liability, like that of an employer, should be imputed to parents. However, none of the possible rationales advanced earlier²⁰¹ in relation to existing forms of vicarious liability, except perhaps that of control,²⁰² are generally applicable to parent/child relationships. It is also unlikely that any public support such a measure might attract would outweigh the entailed disadvantages and unfairness (although of course that is a matter on which submissions will be welcomed).

The second is to say that vicarious liability should not be extended to parents, but that the existing law (principally of negligence) which may make parents personally liable to third parties in respect of the misfeasance of their children should be reviewed. It is this approach which is given more detailed consideration in this Chapter.

6.1 COMMON LAW

The common law has never imposed any general liability, vicarious or otherwise, on parents for the wrongs of their children.²⁰³ Nevertheless, the general duty of parents to strangers under the law of negligence will often extend to a duty to control the actions of children. Thus a duty analogous to that found in *Carmarthenshire County Council v Lewis*²⁰⁴ lies on parents as much as on

¹⁹⁹ See Fleming's distinction at 151 n 110; as to duty to strangers: at 682-683; as to parents' disciplinary privilege: at 98-99.

²⁰⁰ See section 2.3 above.

²⁰¹ Section 2.5 above.

²⁰² See section 7.1 below.

²⁰³ Fleming at 681.

²⁰⁴ [1955] AC 549. The facts are recounted in section 7.2 below.

school authorities. The reported cases involving parents' liability to strangers are not as frequent, however.

One case that did reach the High Court was *Smith v Leurs*.²⁰⁵ There Leurs, a 13 year old, fired a stone from his slingshot and injured his friend Smith. Smith sued Leurs' parents alleging negligent failure to control their son and to confiscate the slingshot. The court²⁰⁶ held that the parents were not liable. Starke J said:²⁰⁷

Young boys, despite their mischievous tendencies, cannot be classed as wild animals, nor can 'shanghais' be classed as dangerous articles which require 'consummate care' in their use. But, in the control of their children, parents must not omit to do that which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or do anything which a prudent and reasonable man would not do.

This duty of care is not general, but arises only on specific occasions when the parent is present, such as leading a child across a road.²⁰⁸ The courts have been conscious not to impose a duty so strict as to stifle the growth of a child's sense of personal responsibility.²⁰⁹

6.2 STATUTORY MODIFICATION

A novel statutory provision in Northern Territory law affecting parents' civil liability should be noted. The *Law Reform (Miscellaneous Provisions) Act 1956 (NT)*²¹⁰ fixes liability (up to a limit) on the parents of children²¹¹ who intentionally cause damage to property. Liability attaches irrespective of the parent's state of mind or conduct in relation to supervising the child, although the child must be ordinarily resident with that parent, and not in full-time employment, for the parent to be liable under the section. As the liability is strict in the sense that the parent need not be at fault, it is therefore close to the common law concept of vicarious liability.

²⁰⁵ (1945) 70 CLR 256.

²⁰⁶ Latham CJ, Starke, Dixon & McTiernan JJ.

²⁰⁷ (1945) 70 CLR 256 at 260-261. See also per Latham CJ at 259-260, Dixon J at 262 and McTiernan J at 265.

²⁰⁸ *McCallion v Dodd* [1966] NZLR 710, cited by Fleming at 682.

²⁰⁹ Fleming at 683; compare (in the context of schools) *Kretschmar v Queensland* [1989] Aust Torts Reports 68, 888.

²¹⁰ s29A. The provision is reproduced in Appendix 5.

²¹¹ "Child" is defined to mean a person who has not attained the age of 17 years: s29A(1).

A similar provision was proposed in South Australia,²¹² but has not been enacted to date.

Provisions in the *Juvenile Justice Act 1992* (Qld) Part 5 Division 11²¹³ do not impose civil liability as such but, in the sense that they make a parent liable to compensate other persons for damage not caused by the parent, they are worthy of comparison. Section 197(1) provides that where a court finds a child guilty of an offence, and it appears beyond reasonable doubt that the parent's wilful failure to exercise proper care or supervision over the child was likely to have substantially contributed to the offence being committed, the court may call on the parent to show cause why he or she should not compensate any person for loss of property or injury. If cause is not shown, any compensation order made must have regard to the parent's capacity to pay.²¹⁴

Officers of the Queensland Police Service and the Department of Family Services and Aboriginal and Islander Affairs (Division of Juvenile Justice and Protective Services) have informally advised the Commission that they are unaware of any applications having been made, and that certainly no orders have ever been made, either under the *Juvenile Justice Act 1992* (Qld) provisions or their predecessors in the *Children's Services Act 1965* (Qld). According to one prosecutor, that is explained by the high standard of proof stipulated in the section - that is, the criminal standard of proof beyond reasonable doubt; by the need to prove a subjective matter contrary to the interests of the only person capable of giving evidence of that matter (the parent); and by the difficulty facing investigating officers in many cases of even locating the parents.

²¹² *The Wrongs (Parents Liability) Amendment Bill 1992* (SA), referred to in Fleming at 683 n 298.

²¹³ The provisions are reproduced in Appendix 1. Division 11 replaced the less detailed provisions to similar effect in the *Children's Services Act 1965* (Qld) s 62(1)(c) & (2).

²¹⁴ Compare with s9 *Children (Parental Responsibility) Act 1994* (NSW) which makes a parent guilty of an offence if that parent has, by wilful default or by neglecting to exercise proper care and guardianship of the child, contributed to the commission of an offence of which the child has been found guilty. However, there is no equivalent liability to pay compensation for damage caused by the child.

6.3 ISSUES

- (a) Is the liability of parents under the general law of negligence and under the *Juvenile Justice Act 1992* (Qld) Part 5 Division 11 adequate?
- (b) If not, should parents be liable for the torts of their children:
 - (i) if the tort is also a crime; or
 - (ii) if the tort occurred because of wilful failure of the parent to supervise the child; or
 - (iii) if the tort occurred because of negligent failure of the parent to supervise the child; or
 - (iv) in all circumstances?
- (c) Should the basis of a parent's liability be:
 - (i) the financial responsibility of the parent; or
 - (ii) the parent's control over the child; or
 - (iii) the fact of the child's membership of the parent's family or household (irrespective of the measure of control); or
 - (iv) some other matter?
- (d) Should a parent's liability be subject to a monetary limit and, if so, what should the limit be?
- (e) Should the definition of "parent" be sufficiently wide to include a person or body acting *in loco parentis*?

CHAPTER 7

TEACHERS AND PUPILS

This chapter is concerned with the liability of teachers for or in relation to the wrongful conduct of their students. The liability of school authorities for the torts of teachers is covered elsewhere in this Discussion Paper.²¹⁵

Like parents,²¹⁶ teachers are not vicariously liable for the wrongs of their charges. Like parents, they may have duties of care to their students, or to strangers in respect of their students' misfeasances. These duties however are personal not vicarious.

As with parents and children, the Commission could approach these matters either on the basis that, although vicarious liability does not exist at present, it should be imposed on teachers, or that vicarious liability should be left alone, and only issues arising from the general law of negligence should be reviewed. Again, the Commission believes that the latter approach would be more acceptable to the community.

7.1 THE TEACHER/STUDENT RELATIONSHIP

According to Lowe, the assumption by teachers and schools of responsibility for the safety of a student is concomitant with the creation of the teacher/student relationship and depends not on the parties' intentions but on the objective facts.²¹⁷ Once the relationship is established, the duty is cast upon the teacher and the school.²¹⁸

Teachers and schools therefore owe a duty of care to students in relation to risks posed by fellow students. They also owe a duty to persons other than students in relation to risks posed by their students.²¹⁹ The question is whether the personal duty of teachers to their students and to other persons in relation to the conduct of their students is adequate, or whether liability should be imposed on teachers for the wrongful conduct of their students, even where the teachers are not at fault. A

²¹⁵ Ch 4 above (in general) and section 9.2 below (in particular).

²¹⁶ See Ch 6.

²¹⁷ G Lowe "The Liability of Teachers and School Authorities for Injuries Suffered by Students" (1983) 13 *UQLJ* 28 at 28.

²¹⁸ *Kretschmar v Queensland* [1989] Aust Torts Reports 68,888 per Thomas J at 68,891 (with whom Ambrose J agreed).

²¹⁹ Risks posed by other persons or things are well beyond the scope of the Commission's terms of reference.

review of some of the cases may illuminate these questions.

7.2 SOME CASES

In the United Kingdom case of *Carmarthenshire County Council v Lewis*²²⁰ the Council as an education authority was held liable in respect of an unsafe system which allowed a four year old boy to escape from an infants' school onto a road causing the death of the plaintiff's husband who steered his lorry to avoid the infant and collided with a telegraph pole. Devlin J at the Carmarthen Assizes and the Court of Appeal²²¹ found that the Council was vicariously liable for the negligence of the teacher. On appeal, the House of Lords held that the teacher was not negligent. Since the teacher had not committed a tort the school authority could not be vicariously liable. However, because of the unexplained fact that the child was able to wander through an open gate onto a road, the Court held that the Council had been negligent. There was a duty on the Council as occupiers of premises adjoining the highway not to allow young children negligently to escape onto it so as to endanger other persons using it.²²² The case therefore concerned the school authority's duty towards members of the public.

In *Richards v Victoria*²²³ the Full Court of the Supreme Court of Victoria held that a teacher's past failure to maintain discipline in a classroom could not in law be treated as a cause of a fight in which the plaintiff was seriously injured resulting in spastic paralysis.

In *Geyer v Downs*²²⁴ the school gates were opened at around 8:00 am. The plaintiff, an 8 year old child, arrived at school at 8:45 am, and was injured while playing a game in the schoolyard at 8:50 am. Supervision began at 9:00 am. The head teacher was held by the High Court of Australia to be in breach of his personal duty to ensure supervision of the schoolyard at a time when he knew there to be a large number of children in attendance, albeit before the beginning of the formal routine. Although the report of the case discloses no wrongdoing by a student, the same duty of the head teacher to ensure supervision of the schoolyard would apply in such a case, provided the wrongdoing was (or would be, if supervision were not in place) reasonably foreseeable.

²²⁰ [1955] AC 549 (HL(E)).

²²¹ *Lewis v Carmarthenshire County Council* [1953] 1 WLR 1439 (CA).

²²² Lord Oaksey was alone in thinking that, because personal negligence on the part of the Council had not been argued in the courts below, it could not be relied upon on appeal.

²²³ [1969] VR 136.

²²⁴ (1977) 138 CLR 91.

*Bills v South Australia*²²⁵ concerned a trampolining accident. The plaintiff Bills, at the end of a trampolining lesson and after being told to pack up, in fact kept using the trampoline. The teacher left the scene. Two of Bills' friends "kipped" him, with the result that he bounced higher than usual, lost control and fell off the trampoline and was injured. Bills sued the State (the school authority), but not his friends or the teacher. At trial, Millhouse J held that there was:

a risk of injury of some kind to someone as a result of disobedient horseplay or foolhardiness in the absence of supervision ... and [the teacher] should have been aware of it ... She should have remained so that she could supervise continuously until the trampolines were back in the shed ... Her breach of duty and therefore the vicarious liability of the defendant to the plaintiff is established.²²⁶

On appeal, a majority of the Full Court of the Supreme Court of South Australia²²⁷ reversed this finding, holding that the teacher had not, on the facts, been negligent. Judgment was entered for the State.

*Shaw v Commonwealth*²²⁸ was another trampolining case. The school authority was held vicariously liable for the teacher's failure to maintain reasonable supervision of the children, and personally for breach of its non-delegable duty to ensure adequate supervision. For another case where a school authority was held personally liable for damage arising from students' schoolyard horseplay, see *Commonwealth v Introvigne*.²²⁹

One union representative has pointed out to the Commission that, to the extent that the law of negligence requires fault to be proven, grievous injustice may result. In *Kretschmar v Queensland*,²³⁰ for example, a group of children was playing a game called "Rob the Nest" which involved lunging around a classroom. The teacher was held not to have been negligent in supervising the game. Derrington J said:²³¹

In games of this description which are not overtly violent or dangerous, it would be impossible to expect that a supervising teacher should essay to anticipate every

²²⁵ (1982) 32 SASR 312 (Millhouse J); (1985) 38 SASR 80 (FC).

²²⁶ (1982) 32 SASR 312 at 319.

²²⁷ King CJ and Bollen J; Matheson J (dissenting) thought that Bills should have been found contributorily negligent to the extent of 40%.

²²⁸ (1992) 110 FLR 379.

²²⁹ (1982) 150 CLR 258. The case is discussed in section 3.2 above and section 9.2 below.

²³⁰ [1989] Aust Torts Reports 68,888.

²³¹ *Id* at 68,894.

possible deviation which might constitute a risk and take precautions against them all. The catalogue of admonitions would probably be so long as to leave little time for the game. In those circumstances it is reasonable to give any warnings which might be consistent with ordinary precautions and then to exercise supervision to ensure that there is no manifestation of any unexpected risk ... applying the proper standard of care, there was no departure by the supervising teacher from that standard.

Because there had been no fault on the part of the teacher, the plaintiff was unable to obtain compensation.

7.3 POSSIBLE REFORM

If the law is to make compensation in cases like *Kretschmar*, any arbitrary no-fault liability should be fixed not on the individual teacher but on the employer. The imposition of an intermediate liability on a teacher can serve no useful purpose.

The Commission has conducted informal discussions with teachers' unions and is provisionally satisfied that vicarious liability should not be imposed on teachers. As with parents, it does not believe that any of the possible policy objectives of vicarious liability outweigh the unfairness which such liability would represent to individual teachers.

In *Commonwealth v Introvigne*²³² Murphy J made this proposal for reform which has not since been taken up:²³³

In this area the common law should follow the developments in the protection of employees (See *Wilson & Clyde Coal Co Ltd v English*)²³⁴ and those of other social organizations such as hospitals ... Parents and pupils have in practice no choice of classmates or other students. Injury occasionally occurs through foolish or sometimes malicious acts of other students. The school has the right to control what occurs at school, just as an employer has the right to control what happens in its undertaking. Where a student is injured by the negligence of another student (and perhaps by act or omission which if it were a person of full capacity would be negligent) without breach of personal duty by those conducting the school, and without act or omission by those for whom otherwise it is vicariously liable, it may be that the loss is best spread by treating the body conducting the school as vicariously liable just as an employer would be for its employee's acts or omissions; but it is unnecessary to decide this.

²³² (1982) 150 CLR 258.

²³³ *Id* at 275.

²³⁴ [1938] AC 57.

7.4 ISSUES²³⁵

- (a) Is the liability of teachers under the general law of negligence adequate?
- (b) If not, should teachers be liable for the torts of their students:
 - (i) if the tort is also a crime; or
 - (ii) if the tort occurred because of wilful failure of the teacher to supervise the student; or
 - (iii) if the tort occurred because of negligent failure of the teacher to supervise the student; or
 - (iv) in all circumstances?
- (c) Should the basis of a teacher's liability be:
 - (i) the financial responsibility of the teacher, or his or her employer, union or insurer; or
 - (ii) the teacher's control over the student; or
 - (iii) the fact of the student's membership of the teacher's class (irrespective of the measure of control); or
 - (iv) some other matter?
- (d) Should a teacher's liability be subject to a monetary limit and, if so, what should the limit be?
- (e) Should the suggestions of Murphy J in *Commonwealth v Introvigne* (1982) 150 CLR 258 at 275 be taken up?

²³⁵ Submissions on these issues should have regard to the issues raised in section 9.5(d) below.

CHAPTER 8

ADULT SUPERVISORS AND CHILDREN

The Commission takes the term "adult supervisors" in paragraph (d) of the terms of reference²³⁶ to include such persons as sports coaches, community group volunteers (for example, scout masters) and child minders. Under the present law, supervisors are not vicariously liable for the torts of their charges. Like parents and teachers, they may be subject to duties of care to the child, or to strangers in respect of the wrongs of the child. These duties however are personal, not vicarious.

Following its approach in relation to parents and teachers,²³⁷ the Commission does not consider that the possibility of imposing strict vicarious liability merits further deliberation. Like parents and teachers, but unlike employers, supervisors do not expect and are not expected to meet liability for the misdeeds of their charges unless the supervisors themselves have been at fault. They may not be insured for such liability; nor may they or those dealing with them have ordered their affairs on the basis of any such liability.

Again, for similar reasons to those expressed in relation to teachers, the Commission does not believe that the common law of negligence (or of other torts) is in need of reform. To the extent that children may suffer grievous harm while under a supervisor's care in relation to which no fault can be found, it may be that the Government should devise a compensation scheme (which of course is beyond the Commission's present terms of reference), rather than for the supervisor to be made unjustifiably liable.

²³⁶ See section 1.1.

²³⁷ Chs 6 and 7.

8.1 ISSUES

- (a) Is the liability of adult supervisors under the general law of negligence adequate?
- (b) If not, should adult supervisors be liable for the torts of their charges:
 - (i) if the tort is also a crime; or
 - (ii) if the tort occurred because of wilful failure of the supervisor to supervise the child; or
 - (iii) if the tort occurred because of negligent failure of the supervisor to supervise the child; or
 - (iv) in all circumstances?
- (c) Should the basis of an adult supervisor's liability be:
 - (i) the financial responsibility of the supervisor, or his or her employer, union or insurer; or
 - (ii) the supervisor's control over the child; or
 - (iii) the fact of the child's membership of the supervisor's organisation (irrespective of the measure of control); or
 - (iv) some other matter?
- (d) Should an adult supervisor's liability be subject to a monetary limit and, if so, what should the limit be?
- (e) If adult supervisors are to be subject to any such liability, how should "adult supervisor" be defined?

CHAPTER 9

PARTICULAR SITUATIONS

This Chapter considers some situations in which the application of the principles of vicarious (and contractors') liability has occasioned special difficulties.

9.1 MOTOR VEHICLES

The concern of the courts in seeing that victims of road accidents are properly compensated has led to much judicial inventiveness where the negligent driver of a vehicle is not the vehicle's owner or an employee of the owner. Clearly the object is to find a defendant who has **insurance**.²³⁸ Although this imperative has been attenuated under systems of compulsory third party personal injury insurance,²³⁹ it is still of importance in relation to cases not covered by those systems.²⁴⁰

(a) Common law

The concern of courts that deserving plaintiffs should not go uncompensated has resulted in strained interpretations of the law. If the driver is not the owner's employee, classical notions of vicarious liability cannot assist a plaintiff. The law therefore used the notion of "agency" to make persons using vehicles the "agent" of the owner in some circumstances, so as to make the driver an indemnified person under compulsory or other insurance schemes or otherwise to furnish a financially responsible defendant.

A leading authority on agency law considers that there is at least *prima facie* reason for excluding considerations of agency from the law of torts altogether, but that the historical interrelationship between agency and vicarious liability prevents such a separation. Indeed it is implied that the traditional dichotomy between contract and tort may need to be re-examined.²⁴¹ Nevertheless, the need for a basis for liability in respect of motor vehicles appears to have ensured the retention of "agents" as a category of persons for whom liability will arise. Whether that liability is properly to be characterised as vicarious or personal is a matter for

²³⁸ See Appendix 6 for glossary of terms appearing in bold type.

²³⁹ See section 9.1(b) below.

²⁴⁰ See generally Fleming at 385-387.

²⁴¹ FMB Reynolds *Bowstead on Agency* (Sweet & Maxwell 15th ed 1985) at 386-388.

debate.²⁴²

Even so, the test for agency has its limits. The rule is stated in *Hewitt v Bonvin*, where MacKinnon LJ said:²⁴³

If A suffers damage by the wrongful act of B, and seeks to say that C is liable for that damage [A] must establish that in doing the act B acted as the agent or servant of C. If [A] says that [B] was C's agent [A] must further show that C authorised the act. If [A] can establish that B was the servant of C the question of authority need not arise.²⁴⁴

In the same case du Parcq LJ said:²⁴⁵

The driver of a car may not be the owner's servant, and the owner will be nevertheless liable for [the driver's] negligent driving if it be proved that at the material time [the driver] had authority, express or implied, to drive on the owner's behalf. Such liability depends not on ownership, but on the delegation of a task or duty.

The leading case in English law is *Morgans v Launchbury*.²⁴⁶ The facts in that case were set out by Lord Cross of Chelsea in his speech in the House of Lords:²⁴⁷

Mr and Mrs Morgans lived at Brynamman. Mr Morgans worked in a bank at Ammanford some seven miles away. They had a Jaguar car which was registered in the name of Mrs Morgans but each made use of it freely ... [Mr Morgans] had originally intended to come home to supper on the evening of August 4, 1964, but he rang up his wife to say that he had decided to spend the evening out ... Mr Morgans, alone and driving the car, was at a public house at Glanamman about 7 pm. Some 20 minutes later he was at a public house at a place popularly known as "GCG". He was then somewhat under the influence of drink and conscious that he ought not to drive the car himself any longer. At this public house he met a Mr Cawfield - whom Mrs Morgans said she hardly knew - and asked him to act as his chauffeur for the rest of the evening. They proceeded to visit several public houses together, the last of which was at Cwmgors. There they

²⁴² As will appear, it is probably closer to the liability in commercial law of principals for the acts of their agents done within the scope of their authority: this is personal liability. To put it another way, motor vehicle liability is personal in that damage to a plaintiff by a driver constitutes a breach of the owner's *personal* duty to the plaintiff (even if it also constitutes a breach of the driver's personal duty to the plaintiff); see section 2.3 above.

²⁴³ [1940] 1 KB 188 at 191.

²⁴⁴ An intriguing observation because, in an employer/employee situation, the analogous question of "course of employment" (section 4.2 above) will arise.

²⁴⁵ [1940] 1 KB 188 at 194-195.

²⁴⁶ [1973] AC 127.

²⁴⁷ *Id* at 143-144.

met the respondents [the plaintiffs in the action, Mr and Mrs Launchbury and Mr Phillips], who were friends of Cawfield. They stayed drinking until closing time when the respondents realised that they had missed their last bus home. Cawfield said that he would give them a lift and the whole party got into the car. Mr Morgans, who was by that time very much the worse for drink, got into one of the rear seats and fell asleep. Cawfield - despite the protests of the respondents, who wanted to be taken straight home - decided that it would be a good thing for them all to have a meal in Swansea and drove off in that direction [opposite to the direction of the homes of Morgans and the respondents] at high speed.²⁴⁸ Shortly afterwards the car crashed into a bus.

Mr and Mrs Launchbury and Mr Phillips recovered judgment against Mrs Morgans as being vicariously liable, as owner of the car, for Cawfield's negligence.

The trial judge and the majority of the Court of Appeal²⁴⁹ took the view that an earlier conversation between Mr and Mrs Morgans, which included a "promise" by Mr Morgans not to drive if he was affected by drink, together with Mr Morgans' arrangement with Cawfield on the night in question, had contributed to establishing Cawfield as Mrs Morgans' agent.

In the House of Lords, the authorities (including *Hewitt v Bonvin*²⁵⁰ and *Ormrod v Crosville Motor Services Ltd*²⁵¹) were canvassed. Their Lordships unanimously allowed Mrs Morgans' appeal, holding that for the owner of a motor vehicle to be "vicariously" liable on facts such as these, it must be shown that the driver was using it for the owner's purposes under a delegation of the owner's duty. Four of the five members of the House made a point of holding that, in English law, mere permission by the owner to another to use a chattel is not sufficient to fix vicarious liability on the owner for the user's torts.²⁵² The judgments of the Court of Appeal in *Hewitt v Bonvin*²⁵³ were approved. Applying them to the present case, Cawfield was certainly not the employee of Mrs Morgans. Their Lordships unanimously held that neither, on any construction of the facts, could he be an agent of Mrs Morgans. Facts relied on by their Lordships included the fact that she hardly knew Cawfield; that Mr Morgans' promise to his wife not to drive was a domestic promise which could not give rise to the relationship of principal and agent between her and Cawfield; that (even if bringing Mr Morgans home was an

²⁴⁸ 90 miles (or about 145 km) per hour: [1973] AC 127 per Lord Wilberforce at 134.

²⁴⁹ *Launchbury v Morgans* [1971] 2 QB 245 criticised by MN Howard "The Permitted Driver: Lord Denning Takes a Trip" (1971) 34 *MLR* 568.

²⁵⁰ [1940] 1 KB 188, considered above.

²⁵¹ *Ormrod v Crosville Motor Services Ltd; Murphie (3rd party)* [1953] 1 WLR 409; (Devlin J); [1953] 1 WLR 1120 (CA); criticised by BJ Brooke-Smith "Liability for the Negligence of Another: Servant or Agent?" (1954) 70 *LQR* 253.

²⁵² [1973] AC 127 per Lord Wilberforce at 135; Viscount Dilhorne at 138; Lord Cross of Chelsea at 144; and Lord Salmon at 148.

²⁵³ [1940] 1 KB 188.

authorised purpose of Mrs Morgans which was doubted) Cawfield drove in the opposite direction.²⁴⁵ Their Lordships also put a certain end to Lord Denning MR's attempt in the Court of Appeal to introduce the American doctrine of "family car" liability to the law of England.²⁴⁶

*Morgans v Launchbury*²⁴⁷ was, however, distinguished in the South Australian case of *Preston v Dowell*²⁴⁸ on the basis that the owner of the vehicle was a passenger in the vehicle at the relevant time and could withdraw the driver's "authority to drive" at any time. Von Doussa J added by way of *obiter dictum*²⁴⁹ that the owner-passenger would therefore have been vicariously liable for any damage or injury caused by the plaintiff driver. This appears to go further than warranted by the English cases cited in support of the proposition, which would require a plaintiff to show that the vehicle was being used for a purpose of the defendant owner or that the owner retained some element of control over the driver. While that conclusion would probably follow in most cases from the mere presence of the owner in the vehicle, von Doussa J's formulation is, with respect, somewhat imprecise, although it should be noted that unlike the situation in *Morgans v Launchbury*,²⁵⁰ the driver was driving at the request and direction of the owner-passenger, in circumstances where the owner-passenger knew the driver was inexperienced and would need assistance and supervision if she drove. Moreover, von Doussa J expressly acknowledged the ability of the owner-passenger to assert his power of control,²⁵¹ a factor that was also held to be of significance in *Samson v Aitchison*.²⁵²

²⁴⁵ On what might be called a frolic of his own: [1973] AC 127 per Lord Wilberforce at 136.

²⁴⁶ [1973] AC 127 per Lord Wilberforce at 136-137; Viscount Dilhorne at 138; Lord Pearson at 141-143; Lord Cross of Chelsea at 144-146 (who said "I cannot help thinking that those who have held Mrs Morgans personally liable ... have been unconsciously influenced by the belief ... that her liability would be covered by insurance"); and Lord Salmon at 148 & 151.

²⁴⁷ [1973] AC 127 (HL(E)).

²⁴⁸ (1987) 45 SASR 111.

²⁴⁹ (1987) 45 SASR 111 at 120, citing *Ormrod v Crosville Motor Services Ltd*; *Murphie* (3rd party) [1953] 1 WLR 1120 (CA) and *Samson v Aitchison* [1912] AC 844.

²⁵⁰ [1973] AC 127 (HL(E)).

²⁵¹ (1987) 45 SASR 111 at 119.

²⁵² [1912] AC 844 at 850.

*Rose v Plenty*²⁵³ furnishes an example of genuine vicarious liability in relation to motor vehicles. The plaintiff, aged 13, was employed by a milk vendor on his milk round, contrary to the vendor's employer's express prohibition on the employment of children. The trial judge found the vendor liable for injuries sustained by the plaintiff in consequence of the vendor's negligent driving, but held the employer not liable on the ground that the disobedience to the prohibition took the vendor outside the scope of his employment. The Court of Appeal²⁵⁴ held that the prohibition affected only the mode of conduct of the milk run, and did not limit or define the scope of employment. The employer was therefore liable.²⁵⁵

Scarman LJ said this about the basis of the employer's liability:²⁵⁶

...the principle of vicarious liability is one of public policy. It is not a principle which derives from a critical or refined consideration of other concepts in the common law, for example, the concept of trespass or indeed the concept of agency. No doubt in particular cases it may be relevant to consider whether a particular plaintiff was or was not a trespasser. Similarly, when ... it is important that one should determine the course of employment of the servant, the law of agency may have some marginal relevance. But basically, as I understand it, the employer is made vicariously liable for the tort of his employee not because the plaintiff is an invitee, nor because of the authority possessed by the servant, but because it is a case in which the employer, having put matters into motion, should be liable if the motion that he has originated leads to damage to another.

On the basis of this analysis, the majority had no difficulty in distinguishing *Twine v Bean's Express Ltd*²⁵⁷ and *Conway v George Wimpey & Co Ltd*²⁵⁸ (the unauthorised lift cases²⁵⁹). However, Lawton LJ was unable to draw the distinction. He followed both decisions and held that the employment of the child plaintiff in the present case took the employee outside the scope of employment.

(b) Legislation

By the *Insurance Contracts Act 1984* (Cth) section 65, an insurer does not have the right to be **subrogated** to the rights of an insured if the insured might reasonably

²⁵³ [1976] 1 WLR 141.

²⁵⁴ Lord Denning MR and Scarman LJ, Lawton LJ dissenting.

²⁵⁵ The judgment is criticised by J Finch "Express Prohibitions and Scope of Employment" (1976) 39 *MLR* 575.

²⁵⁶ [1976] 1 WLR 141 at 147.

²⁵⁷ [1946] 1 All ER 202 (KBD, Uthwatt J); 62 TLR (CA).

²⁵⁸ [1951] 2 KB 266.

²⁵⁹ See section 4.2(b) above. Although the same result would probably follow in both cases today, the "master's tort" theory espoused in them has been rejected: see note 47 above.

be expected not to have exercised those rights against a person to whose use of the insured's vehicle the insured consented.²⁶⁰

In Queensland, the former *Motor Vehicles Insurance Act 1936* (Qld) section 3(2) created a statutory agency as between the owner and any driver for the time being with a view to spreading the insurance coverage to all cases.²⁶¹ Similarly, the driver of an uninsured Commonwealth vehicle is deemed to be the agent of the Commonwealth in relation to claims for death or personal injury arising out of the use of the vehicle.²⁶²

The *Motor Vehicles Insurance Act 1936* (Qld) has been replaced by the *Motor Accident Insurance Act 1994* (Qld) which does away with deemed agency. Instead, the terms of the insurance policy required to be entered into by the Act²⁶³ cover "the owner, driver, passenger or other person whose wrongful act or omission causes injury to someone else" as well as "any person who is vicariously liable for the wrongful act or omission."

The new Act does not alter the net effect of the compulsory insurance scheme, except that the fiction of the agency need not now be relied on by a plaintiff wishing to take advantage of the scheme; the plaintiff could now sue the driver direct.²⁶⁴

These provisions have rendered *Morgans v Launchbury*²⁶⁵ obsolete in Queensland as to actions for damages for personal injuries and death (that is, those covered by the *Motor Accident Insurance Act 1994* (Qld)), but the principles expressed in the case may be of persuasive authority in relation to other motor vehicle tort claims (for example, property damage claims).

9.2 SCHOOLS

This section is concerned with school authorities' liability for the torts of its

²⁶⁰ See further as to subrogation sections 10.3 and 10.6(b) below.

²⁶¹ The provision, which is reproduced in Appendix 1, was noted with interest by Lord Wilberforce in *Morgans v Launchbury* [1973] AC 127 at 136.

²⁶² *Commonwealth Motor Vehicles (Liability) Act 1959* (Cth) s5, which is reproduced in Appendix 2.

²⁶³ s23(1); Sch cl 2. Both provisions are reproduced in Appendix 1.

²⁶⁴ Pt 4 Div 7 allows the insurer to recover certain amounts from the insured person if the vehicle was being used unlawfully, if the insured person intended to injure a person, or if the insured person's blood alcohol content as a driver exceeded 0.05%.

²⁶⁵ [1973] AC 127 (HL(E)).

employees (that is, teachers). The general rules of vicarious liability (and in appropriate cases, the non-delegable duty) apply.²⁶⁶

As to vicarious liability, an early Australian authority²⁶⁷ based on the nature of the relationship between school authorities and parents held that schools were not liable for their employees' torts. But that was overruled in *Ramsay v Larsen*.²⁶⁸ There a pupil at the Peakhurst State School in Sydney threw a set of keys belonging to another pupil into a tree in the schoolyard where they stuck fast out of reach from the ground. The plaintiff and others climbed the tree in disobedience to a teacher's orders. The teacher, having administered a reprimand, asked whether the plaintiff, being in the tree already, could pass a rope over the branch on which the keys were stuck with a view to their retrieval. This the plaintiff did. Having completed the manoeuvre, however, he slipped and fell. The High Court overruled previous authority on a school's liability for its employees' torts, and found that the Education Department could be held vicariously liable for a teacher's negligence.

The facts of *Carmarthenshire County Council v Lewis*²⁶⁹ have already been recounted.²⁷⁰ There the liability of a school authority for the escape of a four year old boy into a road causing the death of a passing motorist was considered. The House of Lords held that the teacher was not negligent,²⁷¹ but that (because of the unexplained fact that the child was able to wander through an open gate onto a road) the Council had breached its [non-delegable] duty to provide reasonable precautions to prevent a young child leaving the school yard.

Finally, in *Commonwealth v Introvigne*²⁷² the High Court applied the concept of the non-delegable duty to Australian school authorities. In that case, a group of schoolchildren at the Woden Valley High School in Canberra was swinging on the halyard of a flagpole when a fitting at the top fell and injured one of the group. There was only one teacher on duty at the time when, but for an emergency staff meeting (to announce the principal's death), more would have been rostered. It was not at all clear whether the Commonwealth was the employer of the teachers, because the school was operated for the Commonwealth by the Education

²⁶⁶ See generally G Lowe 'The Liability of Teachers and School Authorities for Injuries Suffered by Students' (1983) 13 *UQLJ* 28 at 42.

²⁶⁷ *Hole v Williams* (1910) 10 SR(NSW) 638.

²⁶⁸ (1964) 111 CLR 16.

²⁶⁹ [1955] AC 549 (HL(E)).

²⁷⁰ Section 7.2 above.

²⁷¹ As the teacher had not committed a tort, the authority could not be vicariously liable for it.

²⁷² (1982) 150 CLR 258.

Department of the New South Wales Government.²⁷³ The High Court, however, decided the matter on the basis of the Commonwealth's non-delegable duty to ensure that care was taken for the safety of the children attending the school.

For a case where the school authority was held liable both personally and vicariously, see *Shaw v Commonwealth*.²⁷⁴

9.3 HOSPITALS²⁷⁵

The problem posed in hospital cases has been the relationship between hospitals and their medical staff. When the relationship is that of employer/employee, the hospital will be vicariously liable for its staff's torts on the usual principles. When it is not, the hospital will not be liable unless it is in breach of some personal duty. This section considers first strict vicarious liability, then personal liability in hospital cases.

(a) Vicarious liability

In the early part of the twentieth century, Kennedy LJ in the English case of *Hillyer v Governors of St Bartholomew's Hospital*²⁷⁶ expressed the view that the vicarious liability of hospitals for the torts of their staff should only apply when those staff were discharging their administrative, but not professional functions. In *Gold v Essex County Council*,²⁷⁷ however, the Court of Appeal appeared to accept that the professional-administrative dichotomy should be done away with, so that (as in all other cases of vicarious liability) the only questions are whether the tortfeasor was an employee, and if so whether he or she was acting in the course of employment when the tort was committed. It is clear that these principles apply in Australia.²⁷⁸

²⁷³ (1982) 150 CLR 258 per Mason J at 271-273.

²⁷⁴ (1992) 110 FLR 379. The case is discussed in section 7.2 above.

²⁷⁵ See generally WP Whippy "A Hospital's Personal and Non-delegable Duty to Care for its Patients - Novel Doctrine or Vicarious Liability Disguised?" (1989) 63 ALJ 182.

²⁷⁶ [1909] 2 KB 820. See also *Strangways-Lesmere v Clayton* [1936] 2 KB 11.

²⁷⁷ [1942] 2 KB 293.

²⁷⁸ *Albrighton v Royal Prince Alfred Hospital* [1980] 2 NSWLR 542; *Ellis v Wallsend District Hospital* (1989) 17 NSWLR 553.

(b) Personal liability

Although the decision in *Gold v Essex County Council*²⁷⁹ is couched in the language of vicarious liability,²⁸⁰ Lord Greene MR considered the basis of a local authority's liability for the negligence of a radiographer employed on a full-time basis by a hospital operated by the authority. He expressed it in terms of the extent of the obligation assumed towards an injured party by the person sought to be made liable, who could not escape liability for a breach of that obligation by employing someone else to fulfil it. The debate as to whether liability for breach of such an obligation is personal, or vicarious liability in disguise has been addressed above.²⁸¹

In *Cassidy v Ministry of Health*²⁸² the English Court of Appeal found the hospital authority answerable for the health care providers' negligence. Denning LJ considered that the basis for the liability was not the control which the employer may or may not exert in the way the job was done, but in "the ultimate sanction for good conduct, the power of dismissal".²⁸³ Since the authority had that power, it was liable:

I think it depends on this: who employs the doctor or surgeon - is it the patient or the hospital authorities? If the patient himself selects and employs the doctor or surgeon ... the hospital authorities are of course not liable for his negligence ... But where the doctor or surgeon, be he a consultant or not, is employed and paid, not by the patient but by the hospital authorities, I am of opinion that the hospital authorities are liable for his negligence in treating the patient.²⁸⁴

Denning LJ concluded that a person who owes a duty of care cannot escape the duty by delegating it to another, whether the other is a servant or an independent contractor.²⁸⁵ Somervell and Singleton LJJ, on the other hand, found that the

²⁷⁹ [1942] 2 KB 293.

²⁸⁰ See per Lord Greene at page 302 - "Once the extent of the obligation is determined the ordinary principles of liability for the acts of servants or agents must be applied"; per Goddard LJ at page 312 - "If (the alleged superior) does that which he promises or professes by a servant or agent, he is liable for their acts on the doctrine of *respondeat superior*"; and per MacKinnon LJ at 304,305 - "(1) One who employs a servant is liable to another person if the servant does an act within the scope of his employment so negligently as to injure that other. This is the rule of *respondeat superior*. (2) That principle applies even though the work which the servant is employed to do is of a skilful or technical character as to the method of performing which the employer is himself ignorant".

²⁸¹ Section 3.2.

²⁸² [1951] 2 KB 343.

²⁸³ *Id* at 360.

²⁸⁴ *Id* at 362.

²⁸⁵ Later in *Roe v Minister of Health* [1954] 2 QB 66 Denning LJ rationalised this liability (in the case of non-employees) on the basis that independent contractors are hospitals' agents for the purpose of administering treatment.

health care providers, (including two doctors) were employed under contracts of service, and vicarious liability was therefore sufficient to hold the hospital liable.

*Samios v Repatriation Commission (WA)*²⁸⁶ adopted the English cases on the subject in holding that where, in the absence of its employed radiologist, a hospital authority engaged independent contractors to interpret a patient's X-rays and the contractors were negligent in doing so, the hospital was liable for that negligence. Jackson SPJ said:²⁸⁷

The Commission is ... vicariously responsible for the negligence of Dr Fraser as a member of the clinic which was ... the agent of the hospital for the purpose of interpreting the X-ray films of the plaintiff. The evidence shows that the Commission undertook to provide for the plaintiff full hospital and medical treatment including examination by X-rays. For that purpose the hospital supplied a medical and nursing staff and in the normal course of events the hospital's own employee ... would have pronounced upon the X-rays. In his absence the hospital employed the clinic and its partners to do so and ... as a matter of law that makes no difference at all so far as the plaintiff is concerned. On this subject I would adopt, with respect, what was said by Lord Greene MR in *Gold v Essex County Council*.²⁸⁸

Although Jackson SPJ uses the words "vicariously liable", it is arguable that the liability described is personal, in that it refers to the hospital's undertaking to provide services.²⁸⁹

After noting the apparent adoption in New South Wales of the same line of authority in *Albrighton v Royal Prince Alfred Hospital*,²⁹⁰ Whippy predicted that, "until the High Court itself decides a hospital case, courts below will continue to enjoy considerable latitude in this area of the law".²⁹¹

At least one court has taken up that latitude, and soon after Whippy's article was published, the doctrine of non-delegable duty in hospitals suffered a setback. In

²⁸⁶ [1960] WAR 219.

²⁸⁷ *Id* at 227-228.

²⁸⁸ [1942] 2 KB 293.

²⁸⁹ WP Whippy "A Hospital's Personal and Non-delegable Duty to Care for Its Patients - Novel Doctrine or Vicarious Liability Disguised?" (1989) 63 *ALJ* 182 at 192-193.

²⁹⁰ [1980] 2 NSWLR 542.

²⁹¹ WP Whippy "A Hospital's Personal and Non-delegable Duty to Care for Its Patients - Novel Doctrine or Vicarious Liability Disguised?" (1989) 63 *ALJ* 182 at 193-198. The High Court has considered other situations involving the non-delegable duty: see section 3.2 above.

*Ellis v Wallsend District Hospital*²⁹² the New South Wales Court of Appeal held that a hospital was not vicariously liable for a doctor's negligence. The point of distinction was ultimately that the doctor had been consulted before the patient's admission to the hospital, although the judgment of Samuels JA contains some criticism of the English cases. Since *Ellis* remains the most authoritative decision on the point in Australia, the English cases should be approached with some caution.

9.4 POLICE

As indicated earlier, the common law developed the so-called independent discretionary function principle, which holds that a person's employer (the Crown or another person) is not vicariously liable for torts committed by the person in the exercise of a function cast on the person by law.²⁹³ A major application of the principle in practice has involved police officers.

In *Enever v R*²⁹⁴ the High Court considered the history and nature of the office of constable and held that, in exercising the duty to keep the peace, a constable is exercising an original and not delegated authority. No vicarious liability attaches to the Crown for wrongs committed in the exercise of that authority. The position in *Enever* was reiterated in Queensland in *Invin v Whitrod (No 2)*.²⁹⁵

The Australian Law Reform Commission recommended that the Commonwealth legislate to assume vicarious liability for the torts of police officers.²⁹⁶ That Commission's recommendations and possibly *Invin* precipitated a then-novel provision in Australia, section 69B of the *Police Act 1937* which created vicarious liability in the Crown for the torts of police officers.²⁹⁷ This section has been repealed and replaced by section 10.5 of the *Police Service Administration Act 1990* (Qld) which is to a similar effect. The Crown is liable (jointly with the officer) for a police officer's tort committed in the execution of duty as if the Crown were an employer and the officer an employee. It also requires the Crown to indemnify the

²⁹² (1989) 17 NSWLR 553, Samuels and Meagher JJA, Kirby P dissenting.

²⁹³ See section 4.4.

²⁹⁴ (1906) 3 CLR 969. The facts are recited in section 4.4(a) above.

²⁹⁵ [1978] QdR 271.

²⁹⁶ Australian Law Reform Commission *Complaints against Police* (ALRC 1 1975) at 65; *Complaints against Police: Supplementary Report* (ALRC 9 1978) at 81. The recommendations were implemented in 1981; see the *Australian Federal Police Act 1979* (Cth) s64B.

²⁹⁷ Inserted by the *Police Act Amendment Act 1978* (Qld), now repealed. Compare the *Law Reform (Vicarious Liability) Act 1983* (NSW) s8 (which is considered in section 4.4(b) above). See also the comment in (1981) 22 *Reform* 51.

officer in respect of wrongs committed in the course of rendering emergency assistance in good faith and without gross negligence to a person suffering illness or injury. Section 10.6 enables the Crown to pay damages (other than punitive damages²⁹⁸) and costs awarded against an officer for a tort and to recover that money as contribution from the officer.²⁹⁹

9.5 ISSUES

- (a) Is the liability of motor vehicle owners under the general law of negligence adequate?
- (b) If not, should a motor vehicle owner be liable for the torts of the driver of his or her vehicle and, if so, in what circumstances?
- (c) Should the basis of a motor vehicle owner's liability be:
 - (i) the financial responsibility of the owner, or his or her employer, union or insurer; or
 - (ii) the owner's control over the driver; or
 - (iii) the fact of the driver's membership of the owner's organisation (irrespective of the measure of control); or
 - (iv) some other matter?
- (d) Should the general principles, either of existing law or of any recommendations which might be made, be altered in any way in their application to employees in schools, hospitals or the police service?

²⁹⁸ The effect of the now repealed provision under the *Police Act 1937* (Qld) (s69B(3)) was considered by Williams J (now the Chairperson of this Commission) in *Henry v Thompson* [1989] 2 QdR 412 at 416-417.

²⁹⁹ See also *Police Act 1952* (SA) s51a; *Police Regulation Act 1898* (Tas) s52.

CHAPTER 10

INDEMNITY AND SUBROGATION

10.1 *LISTER V ROMFORD ICE: THE FACTS*

This Chapter considers the consequences of the decision of the House of Lords in *Lister v Romford Ice and Cold Storage Co Ltd*³⁰⁰ which gives an employer who is vicariously liable for a tort of an employee the right to be indemnified by the employee. The facts were as follows.³⁰¹

The appellant [Lister junior] was, in January 1949, in the employment of the respondent company [Romford Ice and Cold Storage Co Ltd] as a lorry driver. He was then some 27 years of age and had, apart from an interval during the war, been in that employment since he was 17. He had previously for a short time been employed by them as a general labourer. On January 28, 1949, accompanied as mate by his father, he drove his lorry into a slaughterhouse yard off the Old Church Road, Romford, to collect some waste. In the yard he backed his lorry and, in doing so, knocked down and injured Lister senior, who had previously alighted from it.

In June, 1951, Lister senior issued a writ against [Romford Ice] claiming damages for the personal injuries suffered by him, alleging that they were due to the negligent driving of [Lister junior] and that [Romford Ice] as his employers were vicariously liable. [That] action was tried by McNair J on January 29, 1953, and he held that [Lister junior] had negligently driven the lorry in reverse without looking where he was going but that Lister senior was also at fault in failing to take proper care for his own safety, the relative responsibility being two-thirds for [Lister junior] and one-third for Lister senior. The responsibility of [Romford Ice] was purely vicarious. The damage was assessed at £2,400 and judgment was entered for Lister senior for £1,600, two-thirds of that amount, and costs.

On January 26, 1953, three days before the trial of Lister senior's action, [Romford Ice] issued the writ in the action, in which this appeal is brought, claiming against [Lister junior] "damages or in the alternative ... payment by way of indemnity or contribution in respect of such damages as may be adjudged or agreed to be paid" to Lister senior in the first action and [Romford Ice's] costs of that action.

The proceedings were in fact brought in the name of [Romford Ice], by an insurance company which ultimately paid the third party [Lister senior], under alleged rights of subrogation.

³⁰⁰ [1957] AC 555.

³⁰¹ [1957] AC 555 per Viscount Simonds at 557.

10.2 IMPLIED TERMS

In *Lister v Romford Ice*,³⁰² both Lister junior and Romford Ice argued that there were certain **implied terms**³⁰³ in the employment contract which might affect the employer's indemnity. These are considered in turn.

(a) Employee's obligation to take care

Romford Ice (or its insurer at any rate) argued that certain employees are under obligations to the employer not only in tort, but also by way of terms implied into the employment contract, to take care in the performance of the contract. The House of Lords unanimously agreed.³⁰⁴ For example, two of their Lordships quoted the following statement of the law from *Harmer v Cornelius* with approval:³⁰⁵

When a skilled labourer, artizan, or artist is employed, there is on his part an implied warranty that he is of skill reasonably competent to the task he undertakes ... Thus, if an apothecary, a watch-maker, or an attorney be employed for reward, they each impliedly undertake to possess and exercise reasonable skill in their several arts.

(b) Employer's obligation not to require unlawful acts

Lister junior argued that there was an implied term in the employment contract that the employer would not require the employee to do anything unlawful, and that in the event the employer had breached that term by requiring Lister junior to drive while there was not in force a policy of insurance as required by the *Road Traffic Act 1930* (UK). This was not an issue, however, because the compulsory insurance had been taken out and, in any event, the accident did not take place on a road³⁰⁶ and the employer had taken out extra non-compulsory insurance which covered the risk of the accident.

³⁰² [1957] AC 555.

³⁰³ See Appendix 6 for glossary of terms appearing in bold type.

³⁰⁴ [1957] AC 555 per Viscount Simonds at 573, Lord Morton of Henryton at 580, Lord Radcliffe at 586, Lord Tucker at 592 and Lord Somervell of Harrow at 598.

³⁰⁵ (1858) 141 ER 94 per Willes J (who delivered the judgment of the Court) at 98; cited [1957] AC 555 per Viscount Simonds at 572 and per Lord Somervell of Harrow at 597.

³⁰⁶ The *Road Traffic Act 1930* (UK) required insurance to be carried only in relation to vehicles used on roads.

In *Kelly v Alford*,³⁰⁷ the Full Court of the Supreme Court of Queensland was in no doubt from their Lordships' speeches in *Lister v Romford Ice* "that there is to be implied in the contract of service a term that the employer will not require the employee to do anything which is unlawful".³⁰⁸ In *Kelly v Alford* the employer was held to be in breach of the implied contractual obligation to maintain compulsory insurance, and therefore not entitled to an indemnity³⁰⁹ against the negligent driver.

(c) Employment indemnity

"An indemnity was (and is) allowed, generally speaking, whenever anyone, himself blameless, is held liable for someone else's tort."³¹⁰ The application of this principle to vicarious liability is obvious: an employer who is held (vicariously) liable for an employee's tort will be allowed an indemnity against the employee.³¹¹ An indemnity of this sort was claimed by Romford Ice against Lister junior in *Lister v Romford Ice*.³¹² It was held that, where the employee breached the obligation to use reasonable care and caused damage to another, the employer (being vicariously liable to the other) was entitled as against the employee:

- (a) to damages for breach of that obligation; and
- (b) to contribution under the tortfeasors contribution legislation.³¹³

On the other hand, Lister junior claimed a reverse indemnity from Romford Ice against his liability (pursuant to the employer's indemnity) to Romford Ice. It was held by a majority³¹⁴ that there was no implied term that the employer would indemnify the employee against such liability.

³⁰⁷ [1988] 1 QdR 404.

³⁰⁸ *Id per Connolly J (with whom Carter and de Jersey JJ agreed)* at 410. Statements to this effect can be found in *Lister v Romford Ice* [1957] AC 555 per Viscount Simonds at 570 and 576, Lord Morton of Henryton at 582, Lord Radcliffe at 588 and Lord Tucker at 595.

³⁰⁹ See section 10.2(c) below.

³¹⁰ Fleming at 265.

³¹¹ The High Court in *McGrath v Fairfield Municipal Council* (1985) 156 CLR 672 settled that "indemnity" in this sense, used in a statute designed to reverse *Lister*, includes contribution under the tortfeasors contribution legislation (eg *Law Reform (Tortfeasors Contribution, Contributory Negligence, and Division of Chattels) Act 1952* (Qld) Pt 2).

³¹² [1957] AC 555.

³¹³ In that case, the *Law Reform (Married Women and Tortfeasors) Act 1935* (UK); the Queensland equivalent is the *Law Reform (Tortfeasors Contribution, Contributory Negligence, and Division of Chattels) Act 1952* (Qld) Pt 2.

³¹⁴ Viscount Simonds, Lord Morton of Henryton and Lord Tucker; Lord Radcliffe and Lord Somervell of Harrow dissenting.

10.3 SUBROGATION

The general principle in insurance is that an insured should be indemnified under the policy for loss actually suffered: no more and no less. Consequently, an insured should not be allowed to profit from the insurance. This leads to the equitable principle of subrogation which has been defined as "[t]he term ... used to refer to the insurer's exercise, in the insured's name, of such rights as the insured has against a third party in respect of the subject matter of insurance".³¹⁵

In *Lister v Romford Ice*³¹⁶ the employer's rights were in fact being exercised in the employer's name by the employer's insurer pursuant to the insurer's rights of subrogation.

10.4 CONSEQUENCES

A difficult policy area has been the application of the subrogation rule to the employment relationship in the light of *Lister v Romford Ice*.³¹⁷ The result of the decision was that an insurer which indemnified an employer in relation to damage done by an employee became subrogated to the *Lister v Romford Ice* right of the employer to indemnity from the employee. In other words, the employee would become personally liable to the insurer. The problems created by this situation were recognised by an inter-departmental committee which considered the implications of the case and by the British Insurance Association.³¹⁸ Members of the latter agreed not to exercise their *Lister v Romford Ice* rights in respect of injury to one employee by another unless there was evidence of collusion, or of wilful misconduct by the employee.

In *Harvey v R G O'Dell Ltd; Galway (3rd party)*³¹⁹ decided only just over one year after *Lister*, the case was distinguished from *Lister* by a judge of Queen's Bench at first instance. There R G O'Dell, a firm of builders and repairers at

³¹⁵ Australian Law Reform Commission *Insurance Contracts* (ALRC 20 1982) at 184. See also *Simpson & Co v Thomson* (1877) 3 App Cas 279 per Lord Cairns at 284.

³¹⁶ [1957] AC 555.

³¹⁷ *Ibid.*

³¹⁸ G Gardiner "*Lister v The Romford Ice and Cold Storage Company Ltd* (Report of the Inter-Departmental Committee)" (1959) 22 MLR 652 at 653-654; *Morris v Ford Motor Co Ltd* [1973] QB 792 per Lord Denning MR at 798-799 and per James LJ at 813-814.

³¹⁹ [1958] 2 QB 78; criticised by JA Jolowicz "The Master's Indemnity - Variations on a Theme" (1959) 22 MLR 71 & 189.

Battersea, employed Harvey as a repairman and Galway (whose widow was the third party) as a storekeeper. The second defendant (R G O'Dell's manager) instructed Harvey and Galway to go to Hurley to do a job. At lunch time Harvey and Galway travelled in Galway's motorcycle and sidecar some five miles to Maidenhead. On the way back to Hurley they collided with a car. Galway was killed and Harvey injured. Harvey sued R G O'Dell and its manager. Much of the report on this aspect of proceedings concerns whether Galway was acting in the course of employment (so as to make the defendant vicariously liable); McNair J held that he was.³²⁰

R G O'Dell joined Galway's widow as third party claiming tortfeasor's contribution, and in the alternative, damages for breach of a *Lister* implied term. On this point His Lordship distinguished *Lister* saying:³²¹

It is, in my judgment, indisputable on the basis of [*Lister*] that if Galway had been engaged and employed by [R G O'Dell] as a driver of a motor vehicle, [R G O'Dell] would have been entitled to recover from Galway, if alive, the amount of the judgment ... as damages for breach of the implied term in his contract of employment that he would use reasonable skill and care in driving ... [His Lordship analysed the speeches in *Lister* at length and continued:] Galway was engaged and employed ... as a storekeeper; as a concession to [R G O'Dell] he from time to time used his own motor-cycle on their business and was so using it at the time of the accident. I find it difficult to see on what grounds of justice and reason I should hold that by making his motor-cycle combination available for his employers' business on a particular occasion he should be held in law to have impliedly agreed to indemnify them if he committed a casual act of negligence.

O'Dell's claim for tortfeasors contribution was, however, successful.

A particularly difficult case arose in *Morris v Ford Motor Co.*³²² There Cameron Industrial Services was the defendant Ford's cleaning contractor. By the contract Cameron Industrial Services agreed to indemnify Ford for the negligence of the employees or agents of either party. Morris (an employee of Cameron Industrial Services) was injured while working at Ford's factory because of the negligence of Roberts, a Ford employee.

Morris sued Ford. Ford, for reasons of industrial pragmatism, did not wish to sue Roberts, but joined Cameron Industrial Services claiming indemnity under the contract. Cameron Industrial Services brought in Roberts, claiming that, having indemnified Ford, Cameron Industrial Services was entitled to be subrogated to Ford's *Lister v Romford Ice*³²³ rights against Roberts and thus to be indemnified

³²⁰ [1958] 2 QB 78 at 102.

³²¹ *Id* at 104 & 106.

³²² *Morris v Ford Motor Co Ltd; Cameron Industrial Services Ltd (3rd party); Roberts (4th party)* [1973] QB 792.

³²³ [1957] AC 555.

entirely in respect of the plaintiff's claim.

Morris' claim against Ford was settled. The trial judge upheld the claim by Cameron Industrial Services. Roberts appealed. The majority in the Court of Appeal³²⁴ (before which Morris and Ford did not appear) held that Cameron Industrial Services was not entitled to an indemnity against Roberts. Lord Denning MR held this to be so on the alternative bases:

- that it was not just and equitable for the defendant to lend its name to the third party to be used to sue its employee;³²⁵ or
- that there was no implied term that the third party was entitled to subrogation to the defendant's rights.³²⁶

His Lordship said:³²⁷

Lister v Romford Ice and Cold Storage Co Ltd was an unfortunate decision. Its ill effects have been avoided only by an agreement between insurers not to enforce it. It should not be extended to this case. I would apply this simple principle: where the risk of a servant's negligence is covered by insurance, [the] employer should not seek to make that servant liable for it. At any rate, the courts should not compel [the employer] to allow [its] name to be used to do it.

James LJ's basis for allowing the appeal was broadly that, in the circumstances, there was an implied term that any right to subrogation was excluded. His Lordship said:³²⁸

The court cannot shut its eyes to the reality of the situation. In 1969 the implications of the law as confirmed and decided in *Lister's* case were well known among employers (the defendants included). Employers' liability insurance ... was commonly if not universally used as a means of satisfying the liability of the servant; the industrial repercussions referred to in [the] evidence would, as a matter of common knowledge, be of general application and not confined to the defendants ... the defendants had adopted a policy renouncing their entitlement to sue their servants for negligence.

³²⁴ Lord Denning MR and James LJ; Stamp LJ dissenting.

³²⁵ [1973] 1 QB 792 at 800-801.

³²⁶ *Id* at 801-802.

³²⁷ *Id* at 801.

³²⁸ *Id* at 814-815.

Stamp LJ's dissenting judgment is of a more traditional flavour; his Lordship relied on a long line of authority³²⁹ to hold, like the trial judge, that the right of subrogation arises from the contract of indemnity itself and not from an implied agreement that it should be applicable. He agreed with the Master of the Rolls that the right could be exercised only if it was just and equitable to do so but, because the point had not been taken by the fourth party at trial or on appeal, expressed no opinion on it. On the authority of *Reigate v Union Manufacturing Co (Ramsbottom) Ltd*³³⁰ his Lordship refused to imply a term of the sort implied by James LJ.

*Morris v Ford Motor Co*³³¹ has been the subject of criticism in its turn.³³² The case itself is, however, effectively a rejection of the *Lister* principle. *Morris* itself was not appealed and has not been overruled. Some of the criticisms of *Lister* to which *Morris* points need to be addressed in detail.

10.5 CRITICISMS

*Lister v Romford Ice*³³³ has been the subject of criticism,³³⁴ although it has never been critically examined by the High Court of Australia.³³⁵ The principal criticisms are summarised in this section.

³²⁹ Including *Simpson & Co v Thomson* (1877) 3 App Cas 279, *Burnand v Rodocanachi Sons & Co* (1882) 7 App Cas 333 and *Castellain v Preston* (1883) 11 QBD 380 (although those cases have themselves been the subject of criticism: PS James, "The Fallacies of *Simpson v Thomson*" (1971) 34 *MLR* 149 at 150-155).

³³⁰ [1918] 1 KB 592.

³³¹ [1973] QB 792.

³³² DG Powles "Subrogation: Equity, Implied Terms and Exclusion" (1974) 90 *LQR* 34.

³³³ [1957] AC 555.

³³⁴ R Parsons "Individual Responsibility versus Enterprise Liability" (1956) 29 *ALJ* 714; GL Williams "Vicarious Liability and the Master's Indemnity" (1957) 20 *MLR* 220 & 437; G Gardiner "Lister v The Romford Ice and Cold Storage Company Ltd (Report of the Inter-Departmental Committee)" (1959) 22 *MLR* 652; P Jeffery "An Anomalous Indemnity" (1970) 44 *ALJ* 3; and DG Powles "Subrogation: Equity, Implied Terms and Exclusion" (1974) 90 *LQR* 34. That there has been some support for the majority view should not be ignored, however: JA Jolowicz "Master and Servant - Vicarious Liability" [1957] *CLJ* 21.

³³⁵ The case was considered in *Commercial and General Insurance Co Ltd v Government Insurance Office (NSW)* (1973) 129 CLR 374 per Menzies, Walsh and Mason JJ at 380-381 and in *McGrath v Fairfield Municipal Council* (1985) 156 CLR 672 per Mason, Brennan, Wilson, Deane & Dawson JJ at 675. In *Kelly v Alford* [1988] 1 QdR 404 Connolly J (with whom Carter and de Jersey JJ agreed) at 412 refused to construe the High Court's comments in *McGrath* (as to which see section 10.6(a)(iii) below) as meaning that the High Court was in some way casting doubt on the correctness of *Lister*.

(a) The implied undertaking to use care is a fiction

Denning LJ, who dissented in the Court of Appeal, said:³³⁶

The employer was at one time given the defence of common employment on the supposition of a contract, but that fiction has now been abolished. It bedevilled the law long enough and should serve as a warning not to imply promises contrary to the fact.

The argument has often been repeated that no employee, if asked, would say that he or she will never make a mistake.³³⁷ An employee driver does not belong with the artisan, artist, apothecary and attorney of *Harmer v Cornelius*,³³⁸ the latter are usually contractors.³³⁹

(b) Expectation that the employer will indemnify the employee

According to Denning LJ, it never occurred to either employer or employee that the driver would be personally responsible. The understanding of both parties in such cases is that "the insurance company will pay." It is on this basis that premiums are fixed, not on the basis that the insurer may later gain a windfall indemnity from the insured's employee.³⁴⁰

Lord Radcliffe, who dissented in the House of Lords, held that the implied term could be discovered in this hypothetical reply to the insurer's (or the employer's) indemnity suit.³⁴¹

I and my employer recognized that a fund of money had to be secured by insurance to take care of any third party liability that my driving might involve us in, and we arranged that he should pay for and provide the insurance policy that would produce the money. It follows from that that he cannot now look to me to find all or part of that money.

³³⁶ *Romford Ice and Cold Storage Co Ltd v Lister* [1956] 2 QB 180 at 188.

³³⁷ R Parsons "Individual Responsibility versus Enterprise Liability" (1956) 29 *ALJ* 714 at 716.

³³⁸ (1858) 141 ER 94; see note 305 above.

³³⁹ R Parsons "Individual Responsibility versus Enterprise Liability" (1956) 29 *ALJ* 714 at 716 n 17.

³⁴⁰ *Romford Ice and Cold Storage Co Ltd v Lister* [1956] 2 QB 180 at 185 & 192.

³⁴¹ *Lister v Romford Ice and Cold Storage Co Ltd* [1957] AC 555 at 589.

This is the distribution of loss argument.³⁴² His Lordship pointed out that if such a term were not implied, the anomaly arises that if the injured third party sues the driver direct, the employer's insurance will usually cover the employee,³⁴³ and there the matter will rest; but if the third party sues the employer alone or jointly, the insurer (being subrogated) can sue the driver (who is then not covered). The outcome depends entirely on the course adopted by the third party, a matter which neither insurer, employer nor employee can control.³⁴⁴

Another anomaly was pointed out by Lord Somervell of Harrow who also dissented:³⁴⁵

I [instance] the case of an owner [of a vehicle] who drives himself at times and at other times employs a chauffeur. 'Unreasonable' would be too mild an epithet if the owner had protected his own resources if he was negligent but had failed to ensure the protection of his driver or, of course, made it clear to him that he must insure himself. If the present claim succeeds that would be the position.

The approaches of the members in the Court of Appeal to implied terms were not consistent.³⁴⁶ Denning LJ, who dissented, considered both the employee's undertaking to use care and the employer's indemnity in terms of what the reasonable person would have said if asked. On the other hand, the majority used a fictional implication based on *Harmer v Cornelius*³⁴⁷ in relation to the first matter; and Lord Denning's approach in relation to the second.³⁴⁸ A similar criticism can be made of the majority in the House of Lords.

The interrelationship between the principles of *Jones v Staveley Iron & Chemical Co Ltd*³⁴⁹ and *Lister v Romford Ice* also presents possible difficulties. In *Jones v Staveley Iron & Chemical Co Ltd*, the standard of care of an employer in a "pure" vicarious liability case was held to be higher than that of the injured employee who was contributorily negligent. A negligent employee who is, under the *Lister* principle, required to indemnify an employer against that higher standard of care, is under a potential liability which is "far beyond the demands of any policy of

³⁴² See section 2.5 above.

³⁴³ See *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd* (1988) 165 CLR 107.

³⁴⁴ *Lister v Romford Ice and Cold Storage Co Ltd* [1957] AC 555 at 590 per Lord Radcliffe.

³⁴⁵ *Id* at 599.

³⁴⁶ R Parsons "Individual Responsibility versus Enterprise Liability" (1956) 29 *ALJ* 714 at 718-719.

³⁴⁷ (1858) 141 ER 94.

³⁴⁸ R Parsons "Individual Responsibility versus Enterprise Liability" (1956) 29 *ALJ* 714 at 716.

³⁴⁹ [1955] 1 QB 474 (CA) (affirmed *Staveley Iron & Chemical Co Ltd v Jones* [1956] AC 627 (HL(E))).

individual responsibility".³⁵⁰

The practical consequence of the *Lister* indemnity might have been limited where low paid workers were the only possible indemnifiers but, in an age of increasingly well paid professionals, middle managers and technicians, the consequences are (potentially) more widespread.³⁵¹

Fox J put the matter this way nearly twenty five years ago:

[T]he law ... is in an unsatisfactory state. The result at which the course of judicial decision has arrived is, I fear, at variance with the understanding and reasonable expectations of employers and employees alike ... The expectation of the employee and of the employer in such cases is that the insurance company will pay any damages awarded. It is not, I believe, in the contemplation of the parties to the employment contract that the insurer will, in the name of the employer, claim, for its own benefit, an indemnity or even a contribution from the employee ... in general, it is no longer the case that persons guilty of negligence expect or are expected to bear personally a resultant liability to pay damages.³⁵²

(c) Industrial disharmony

Since the best justification for vicarious liability in general is economic distribution of risk, it makes no sense to visit the entire loss on one pair of shoulders in *Lister* situations.³⁵³ It is to the benefit of the employee that employers should "stand behind" their tortfeasor employees.

Moreover, vicarious liability with no indemnity against the employee is likely to make employers improve work systems. On the other hand, the existence of the indemnity means that in practice friendly employment relations can be disrupted by an insurer, a stranger to the workplace.³⁵⁴ And, as Gardiner pointed out, it leaves the way open for insurers to industrially blackmail unions in these hypothetical terms:³⁵⁵

³⁵⁰ R Parsons "Individual Responsibility versus Enterprise Liability" (1956) 29 *ALJ* 714 at 718-719.

³⁵¹ GL Williams made the same observation 38 years ago: "Vicarious Liability and the Master's Indemnity" (1957) 20 *MLR* 220 & 437 at 220.

³⁵² *Marrapodi v Smith-Roberts* (Unreported, Supreme Court of ACT, noted (1970) 44 *ALJ* 3 at 4).

³⁵³ GL Williams "Vicarious Liability and the Master's Indemnity" (1957) 20 *MLR* 220 & 437 at 440-443.

³⁵⁴ *Id* at 221 & 444-445.

³⁵⁵ G Gardiner "*Lister v The Romford Ice and Cold Storage Company Ltd* (Report of the Inter-Departmental Committee)" (1959) 22 *MLR* 652 at 654.

If you go on with this action on behalf of your injured member, and we choose with the consent of the assured to claim over against the foreman whose negligence is alleged to have caused the injury, the foreman, who is also one of your members, may have to sell up his home.

The rule may also discriminate against employees of industrially irresponsible employers. If a small firm does not insure, co-workers may become the target of litigation.

(d) Shortcomings of the "Gentlemen's Agreement"

It is doubtful whether law reform by way of gentlemen's agreements is to be encouraged.³⁵⁶ In any event, the gentlemen's agreement also discriminates against employees of irresponsible employers: it does not cover uninsured employers.³⁵⁷ It only covers injury to fellow employees; if the indemnity is so important (and based on terms supposedly implied in every contract of employment) why, it might be asked, has the British Insurers' Association agreed to forgo it in all but exceptional cases?

Further, there is no "standstill" agreement in Australia as in England and New Zealand.³⁵⁸

(e) *Lister* may deter deserving claimants

Some critics have argued that the indemnity has the net result of deterring an employee from suing the financially responsible defendant (the employer) where the injury is caused by a fellow employee. As the editor of the *Australian Law Journal* observed:³⁵⁹

The doctrine of common employment will have moved from the situation where there could be no recovery if the negligence was that of a fellow servant to a situation in which there will be recovery but the fellow servant may ultimately have to pay.

Of course the net effect may be the same for the plaintiff, but it will be very different for the negligent fellow employee particularly where, as indicated earlier,³⁶⁰ that

³⁵⁶ *Id* at 656.

³⁵⁷ *Id* at 654. See also the comments of the editor of the *Australian Law Journal* "An Anomalous Indemnity" (1970) 44 *ALJ* 3 at 4.

³⁵⁸ "An Anomalous Indemnity" (1970) 44 *ALJ* 3 at 4.

³⁵⁹ *Ibid*. See also R Parsons "Individual Responsibility versus Enterprise Liability" (1956) 29 *ALJ* 714 at 716 n 18.

³⁶⁰ See note 351 above.

employee is of some means.

(f) Fairness

As indicated earlier, it is often not worth visiting the liability on the likely impecunious employee.³⁶¹ Neither, it is argued, is it fair to do so; the undertaking as a whole should bear the loss, not the unfortunate employee who happened to be wielding the machine at the time. Tort damages in general, and the *Lister* rule in particular, impose liability far in excess of proper punishment for the wrongdoer.³⁶²

Another way in which the rule could work unfairly is that juries might not act evenhandedly. If the defendant employer has a right of indemnity against the tortfeasor employee and, out of "vicarious sympathy" for the latter, the jury³⁶³ is unduly lenient towards the defendant, the result may be unfair to the plaintiff.³⁶⁴ This leads to a double standard of care: lenient for the employee, harsh for the employer.

Lastly, if Denning LJ and Fox J are correct about what the average employer and employee (mistakenly) believe their respective rights and liabilities to be, the supposed deterrent effect of the rule is illusory. A person will not be deterred by a prospective liability which the person does not think exists.

10.6 LEGISLATION

Not surprisingly, there have been efforts to reverse the effect of *Lister v Romford Ice* by legislation. Some of these are considered in this section.

(a) Employees' indemnity

A number of jurisdictions have enacted legislation to exclude any indemnity liability

³⁶¹ See note 353 above, and R Parsons "Individual Responsibility versus Enterprise Liability" (1956) 29 *ALJ* 714 at 718.

³⁶² R Parsons "Individual Responsibility versus Enterprise Liability" (1956) 29 *ALJ* 714 at 718-719; GL Williams "Vicarious Liability and the Master's Indemnity" (1957) 20 *MLR* 220 & 437 at 445; "An Anomalous Indemnity" (1970) 44 *ALJ* 3 at 4.

³⁶³ Juries are now a rarity in civil litigation, and likely to become rarer especially in the most common tort actions, namely those for damages for personal injuries: *Motor Accident Insurance Act 1994* (Qld) s56 provides that a claim under that Act must be determined by a court sitting without a jury; the draft *Personal Injuries Proceedings Bill 1994* (Qld) cl 26 is to similar effect.

³⁶⁴ R Parsons "Individual Responsibility versus Enterprise Liability" (1956) 29 *ALJ* 714 at 720.

of the employee (and in some cases to require an indemnity from the employer). The legislation excludes cases where the employee's conduct amounts to serious or wilful misconduct.

(i) South Australia

The *Wrongs Act 1936* (SA) section 27C provides that where an employee commits a tort for which the employer is vicariously liable, the employee is not liable to indemnify the employer and (if the employee is not entitled to another indemnity) the employer is liable to indemnify the employee. If the employee is insured or otherwise indemnified the employer is subrogated to the employee's rights under the insurance or indemnity. Section 27C does not apply to an employee whose serious and wilful misconduct constitutes the tort in question. The provision is reproduced in Appendix 4.

(ii) Northern Territory

The *Law Reform (Miscellaneous Provisions) Act 1956* (NT) section 22A is in substantially the same terms as the South Australian legislation. It is reproduced in Appendix 5.

(iii) New South Wales

Until its repeal in 1991, section 2 of the *Employee's Liability (Indemnification of Employer) Act 1982* (NSW) provided that where:

- a person suffered damage by the fault (that is, negligence or other act or omission other than serious and wilful misconduct) of an employee, and
- as a result the employer was liable (as employer and not otherwise) in damages in tort, and
- but for the Act the employee would be liable to indemnify the employer,

the employee was not so liable. The Act was the subject of some judicial explanation in *Fairfield Municipal Council v McGrath*³⁶⁵ and *Sinclair v Graham*.³⁶⁶ In these cases, the majority in the New South Wales Court of Appeal³⁶⁷ held that the use of the word "indemnity" in the Act did not

³⁶⁵ [1984] 2 NSWLR 247 at first instance and on appeal: *McGrath v Fairfield Municipal Council* (1985) 156 CLR 672.

³⁶⁶ [1984] 2 NSWLR 253.

³⁶⁷ Hutley and Glass JJA; Mahoney JA dissenting.

affect an employer's right to contribution (even up to 100%) under the tortfeasors contribution legislation. The dissent of Mahoney JA was vindicated when the High Court unanimously reversed the decision of the Court of Appeal (in the *McGrath* case at least). There the Court said this:³⁶⁸

It is scarcely to be supposed that the legislature intended to exclude the employer's right to recover in contract but to leave on foot [the employer's] right to recover contribution from [the] employee as a concurrent tortfeasor. Indeed, it would seem improbable that the legislature even concerned itself with the nice distinction between recovery in contract and recovery between concurrent tortfeasors, more especially when we recall that in *Lister v Romford Ice* it was an implied term of the contract of employment ... that grounded the employer's right to indemnity ... The 1982 [Act] sprang from a deeply rooted and general concern with the substance of the problem as it was thought to exist under the law as expounded in *Lister v Romford Ice*, namely, the perceived injustice in the employer's entitlement to recoupment whether under [the tortfeasors contribution legislation] or under the contract from an employee whose fault resulted in the employer becoming liable to a plaintiff ... Plainly enough this was the mischief which the Act sought to remedy ... The criticism from the point of view of policy ... was equally applicable regardless of whether the decision was based on an employer's entitlement to contribution ... as a concurrent tortfeasor or on an ... indemnity under a contractual term.

The Act has now been replaced by the *Employees Liability Act 1991* (NSW) which provides among other things that:

- if an employee commits a tort for which his or her employer is also liable, then (unless the tort is "serious and wilful misconduct" or conduct not connected with the employment):
 - (a) the employee is not liable to indemnify the employer; and
 - (b) the employer is liable to indemnify the employee;
- the action against an employee for the loss of services of a fellow employee (*per quod servitium amisit*) is abolished;
- the employer is subrogated to the rights of the employee in respect of any insurance.

Both Acts are reproduced in Appendix 3.

³⁶⁸ (1985) 156 CLR 672 per Mason, Wilson, Brennan, Deane and Dawson JJ at 676-677.

(iv) Queensland

There has been very limited legislation in relation to employees' indemnity in Queensland. The *Health Services Act 1991* (Qld) section 3.35 requires an indemnity to be given by regional health authorities to employees and agents in relation to acts done, or omitted to be done, by the person without negligence under the Act or to acts done, or omitted to be done, by the person in good faith and without negligence for the purposes of the Act.³⁶⁹ The provision is reproduced in Appendix 1. However, the *Health Services Amendment Act 1995* (Qld), assented to on 14 June 1995, repeals section 3.35.³⁷⁰

(b) Exclusion of subrogation rights

The Commonwealth has, in the insurance context, enacted section 66 of the *Insurance Contracts Act 1984* (Cth), based on recommendations of the Australian Law Reform Commission.³⁷¹ Section 66 rules out subrogation in the employment relationship.³⁷² The provision is set out in Appendix 2.

It will be noted that, like the indemnity legislation, the *Insurance Contracts Act* (Cth) excludes certain cases; but importantly, it excludes cases where the employee's conduct amounts to serious or wilful misconduct.

Section 66 received detailed judicial attention in *Boral Resources (Qld) Ltd v Pyke*.³⁷³ The facts were these. In 1986 Pyke had been employed as a truck driver by Boral for 13 years. He had an excellent work record; was an experienced sprayer-driver; and an accustomed beer drinker. Boral employees were liable to instant dismissal for driving under the influence of liquor.

On 7 April 1986 Pyke informed Boral's contract manager that he had been suffering headaches and tiredness, that a doctor had advised him to take time off work, and that he was on prescribed medication for the headaches. The manager asked him nevertheless to do the "Isis job" near Childers and said that he could have time off thereafter. Pyke worked more than seven hours on that day, and 17 hours the next. He then went to the Cordalba Hotel to meet a Boral engineer.

³⁶⁹ For a discussion of this section, see L Smith "Vicarious Liability and s3.35 of the Health Services Act 1991 (Qld)" (1992) 22 *QLSJ* 553 and the criticism of that article in BD Bartley "Section 3.35 Revisited" (1993) 23 *QLSJ* 78.

³⁷⁰ The *Health Services Amendment Act 1995* (Qld) will commence on a date still to be fixed by proclamation.

³⁷¹ *Insurance Contracts* (ALRC 20 1982).

³⁷² In certain circumstances s65 rules out subrogation in the context of family members and motor vehicles: see section 9.1(b) above.

³⁷³ [1992] 2 *QdR* 25.

Between 6.15 pm and 8.30 pm Pyke consumed between 11½ and 13½ seven ounce pots of beer, and two pies.

At 8.30 he left the hotel, feeling tired but capable of driving the heavy Boral vehicle (a partly laden Mercedes Benz tanker with a dog trailer and a passenger) to the motel where he was staying, about 5 kilometres (or 15 minutes) away. The passenger fell asleep and witnessed nothing more. Pyke fell asleep suddenly and without warning as he approached a bend in Churchill Street. He regained control of the vehicle as it reached the bend, but the dog trailer rolled over dragging the lead vehicle off the road causing damage to the extent of \$17,000. Pyke checked for gas leaks, and called police "with due alacrity". In accordance with a practice which Boral knew of and connived in, he falsified his logbooks to give the impression that he had driven so as not to exceed the hours prescribed by section 62 of the *State Transport Act 1960* (Qld).

Boral's insurer, having indemnified Boral, was subrogated to Boral's rights under *Lister v Romford Ice* and brought an action against Pyke. The trial judge seemed to assume that section 66 calls for a finding of causation between the misconduct and the loss in question. As the conduct did not give rise to the loss suffered the action failed.

The Full Court allowed the appeal by a majority.³⁷⁴ Thomas J pointed out that "the conduct ... that gave rise to the loss" in section 66(b) is the same conduct by which the employee is liable for the loss in section 66(a). Accordingly, once the matter in section 66(a) is established, there is no further question of causation. Either the employee's conduct constituted a tort sounding in the employer's rights against the employee or not. Section 66(b) simply creates an exception if that conduct fits a certain description. On this point the majority overturned the trial judge.

The *Insurance Contracts Act 1984* (Cth) section 66 still leaves employees liable to indemnify employers in respect of "deductibles" or "excesses" on claims paid by employers. It also does not affect the position of the employer who is not insured. Arguably Queensland should legislate to cover the field. The question then arises as to which of the several available models should be chosen for any Queensland legislation. The New South Wales model is the only one to have resulted from a court challenge; perhaps this makes it preferable.

³⁷⁴ Thomas and Ambrose JJ; Derrington J dissenting.

10.7 ISSUES

- (a) Should the principle that an employer has a right to indemnity or contribution from an employee for whose tort the employer is vicariously liable be abolished?
- (b) If so:
 - (i) is legislation like the *Employees Liability Act 1991* (NSW) adequate to achieve this purpose? If not, what alternative model should be used; and
 - (ii) should the abolition extend to other relationships in relation to which vicarious liability might be applied?

APPENDIX 1: QUEENSLAND LEGISLATION

Health Services Act 1991

Indemnity

3.35. Each [Regional Health] Authority is to indemnify every member, employee and agent of that Authority against all actions, proceedings and claims in relation to:

- (a) acts done, or omitted to be done, by the person without negligence under this Act;
- (b) acts done, or omitted to be done, by the person in good faith and without negligence for the purposes of this Act.

Juvenile Justice Act 1992

PART 5 - SENTENCING

Division 8 - Restitution and compensation

Restitution and compensation

192.(1) In this section:

"offence affected property" includes:

- (a) property in relation to which the offence was committed; or
- (b) property affected in the course of, or in connection with, the commission of the offence, for example, property of a victim of an offence committed against the victim's person.

(2) If a child is found guilty before a court of an offence relating to property or against the person of another, the court may in addition to making a sentence order against the child, make 1 or more of the following orders:

- (a) an order that the child make restitution of offence affected property;
- (b) an order that the child pay compensation (not more than an amount equal to 20 penalty units) for loss caused to offence affected property;
- (c) an order that the child pay compensation for injury suffered by another person (whether the victim against whose person the offence was committed or another) because of the commission of the offence.

(3) An order made under subsection (1) [sic] requiring a child to pay an amount by way of compensation or making restitution must direct:

- (a) that the amount must be paid by a time specified in the order or by instalments specified in the order; and
- (b) that the amount must be paid in the first instance to the proper officer of the court.

(4) An order under this section may include a direction the court considers necessary or convenient for the order, for example the way in which restitution of property is to be carried out.

(5) A court may make an order requiring a child to pay an amount under this section only if the court is satisfied that the child has the capacity to pay the amount.

Division 10 - Application of Chapter 65A of the Criminal Code - Compensation for injury

Civil compensation orders

195. Chapter 65A of the Criminal Code applies in relation to an offence committed by a child and, for this purpose, a reference in the Chapter to a conviction of an offence includes a reference to a finding of guilt.

Division 11 - Orders against parent

Interpretation

196. In this Division:

"parent" means a guardian of the child, other than the chief executive;

"show cause hearing" means the hearing and determination of the issue of whether a parent should be ordered to pay compensation under section 198(5)(Show cause hearing).

Notice to parent of child offender

197.(1) If it appears to a court that finds a child guilty of an offence relating to property or against the person of another, on evidence admitted or submissions made in the case against the child:

- (a) that wilful failure on the part of a parent of the child to exercise proper care of, or supervision over, the child was likely to have substantially contributed to the commission of the offence; and
- (b) that compensation should be paid to any person for:
 - (i) loss caused to the person's property whether the loss was an element of the offence charged or happened in the course of the commission of the offence; or
 - (ii) injury suffered by the person, whether as the victim of the offence or otherwise, because of the commission of the offence;

the court, of its own initiative or on application by the prosecution, may decide to call on the parent to show cause, as directed by the court, why the parent should not pay the compensation.

...

Show cause hearing

198. ...

(5) If on consideration of evidence and submissions ... a court is satisfied beyond reasonable doubt of the matters mentioned in section 197(1)(a) and (b) ..., the court may make an order requiring the parent to pay compensation.

- (6) The order must direct that:
- (a) the amount must be paid by a time specified in the order or by instalments specified in the order; and
 - (b) the amount must be paid in the first instance to the proper officer of the court.
- (7) In determining the amount to be paid by a parent by way of compensation, the court must have regard to the parent's capacity to pay the amount, which must include an assessment of the effect any order would have on the parent's capacity to provide for dependants.

...

Recovery of unpaid compensations [sic] amount

199.(1) An order of a court under section 198 (Show cause hearing) for payment of compensation by a parent is enforceable as if it were an order for payment of money made by justices under the *Justices Act 1886*.

(2) In addition to the way of enforcement mentioned in subsection (1), the amount of compensation ordered to be paid (including an amount for costs) constitutes a debt owing by the parent to the person in whose favour the order is made.

(3) The order may be filed in the registry of a Magistrates Court under the *Magistrates Courts Act 1921*.

(4) If the order is filed in the registry of a Magistrates Court, the order is taken to be an order made by the court and may be enforced as an order of the court.

Motor Accident Insurance Act 1994

Statutory policy of insurance

23.(1) When transport administration registers or renews the registration of a motor vehicle:

- (a) a policy of insurance in terms of the Schedule comes into force for the motor vehicle when the registration or renewal of registration takes effect; and
- (b) the licensed insurer selected under this Part in or in relation to the relevant application is the insurer under the policy.

...

SCHEDULE

Insured person

2. The person insured by this policy is the owner, driver, passenger or other person whose wrongful act or omission causes the injury to someone else and any person who is vicariously liable for the wrongful act or omission.

Motor Vehicles Insurance Act 1936 (repealed)

3.(2) For the purposes of [a] contract of [compulsory third party personal injury] insurance and of every claim for accidental injury ... caused ... in connection with a motor vehicle insured thereunder, every person ... who at any time is in charge of such motor vehicle, whether or not with the owner's authority, shall be deemed to be the authorised agent of the owner, and to be acting in relation thereto within the scope of [the agent's] authority as such agent ...

Partnership Act 1891**Liability of the firm for wrongs**

13. Where, by any wrongful act or omission of any partner acting in the ordinary course of the business of the firm, or with the authority of his or her copartners, loss or injury is caused to any person not being a partner in the firm, or any penalty is incurred, the firm is liable therefor to the same extent as the partner so acting or omitting to act.

Misapplication of money or property received for or in custody of the firm

14. In the following cases, namely:

- (a) where one partner acting within the scope of the partner's apparent authority receives the money or property of a third person and misapplies it;
- (b) where a firm in the course of its business receives money or property of a third person, and the money or property so received is misapplied by 1 or more of the partners while it is in the custody of the firm;

the firm is liable to make good the loss.

Liability for wrongs joint and several

15. Every partner is liable jointly with the partner's copartners and also severally for everything for which the firm while he or she is a partner therein becomes liable under either section 13 or 14.

APPENDIX 2: COMMONWEALTH LEGISLATION

Commonwealth Motor Vehicles (Liability) Act 1959

Interpretation

3.(1) In this Act ...

"third-party policy" means a policy of insurance effected for the purposes of ... a law of a State or Territory relating to the compulsory insurance of owners and drivers of ... motor vehicles ... against liability in respect of the death of, or bodily injury to, persons;

"uninsured motor vehicle" means a motor vehicle in respect of which a third-party policy is not in force.

...

Conclusive presumption of agency in respect of driving of Commonwealth vehicles

5.(1) In proceedings in which:

- (a) a claim is made against the Commonwealth or a Commonwealth authority for damages in respect of the death of, or personal injury to, a person caused by, or arising out of the use of, an uninsured motor vehicle owned by the Commonwealth or the Commonwealth authority; or
- (b) a claim is made by or against the Commonwealth or a Commonwealth authority for contribution in relation to liability of the Commonwealth or the Commonwealth authority for such damages;

the driver of the vehicle shall, for the purposes of that claim, be conclusively presumed to have been at all relevant times, with respect to the driving of the vehicle, the agent of the Commonwealth or the Commonwealth authority, as the case may be, acting within the scope of his authority.

(2) Nothing in this section shall be taken to imply ratification by the Commonwealth or the Commonwealth authority of the acts of the driver of a vehicle.

...

Insurance Contracts Act 1984

Subrogation to rights against family etc.

65.(1) Subject to sub-section (2), this section applies where:

- (a) an insurer is liable under a contract of general insurance in respect of a loss;
- (b) but for this section, the insurer would be entitled to be subrogated to the rights of the insured against some other person (in this section called the **"third party"**); and

- (c) the insured has not exercised those rights and might reasonably be expected not to exercise those rights by reason of:
 - (i) a family or other personal relationship between the insured and the third party; or
 - (ii) the insured having expressly or impliedly consented to the use, by the third party, of a road motor vehicle that is the subject-matter of the contract.
- (2) This section does not apply where the conduct of the third party that gave rise to the loss:
 - (a) occurred in the course of or arose out of his employment by the insured; or
 - (b) was serious or wilful misconduct.
- (3) Where the third party is not insured in respect of his liability to the insured, the insurer does not have the right to be subrogated to the rights of the insured against the third party in respect of the loss.
- (4) Where the third party is so insured, the insurer may not, in the exercise of his rights of subrogation, recover from the third party an amount that exceeds the amount that the third party may recover under his contract of insurance in respect of the loss.
- ...
- (7) In sub-section (1), "road motor vehicle" means a motor vehicle that is so constructed as to be capable of carrying by road at least one person other than the driver.

Subrogation to rights against employees

66. Where:

- (a) the rights of an insured under a contract of general insurance in respect of a loss are exercisable against a person who is [the insured's] employee; and
- (b) the conduct of the employee that gave rise to the loss occurred in the course of or arose out of the employment and was not serious or wilful misconduct,

the insurer does not have the right to be subrogated to the rights of the insured against the employee.

APPENDIX 3: NEW SOUTH WALES LEGISLATION

Employees Liability Act 1991

Employee not liable where employer also liable

- 3.(1) If an employee commits a tort for which his or her employer is also liable:
- (a) the employee is not liable to indemnify, or to pay any contribution to, the employer in respect of the liability incurred by the employer; and
 - (b) the employer is liable to indemnify the employee in respect of liability incurred by the employee for the tort (unless the employee is otherwise entitled to an indemnity in respect of that liability).
- (2) Contribution under this section includes contribution as joint tortfeasor or otherwise.

Abolition of action against employee for loss of services of fellow employee (per quod servitium amisit)

4. An employee is not liable in tort to his or her employer merely because the employee has deprived the employer of the services of any other employee of the employer.

Act not to apply to serious misconduct of employee or to conduct not related to employment

5. This Act does not apply to a tort committed by an employee if the conduct constituting the tort:
- (a) was serious and wilful misconduct; or
 - (b) did not occur in the course of, and did not arise out of, the employment of the employee.

Employer subrogated to rights of employee under insurance policy

- 6.(1) If:
- (a) an employer is proceeded against for the tort of his or her employee; and
 - (b) the employee is entitled under a policy of insurance to be indemnified in respect of liability that the employee may incur in respect of that tort,

the employer is subrogated to the rights of the employee under that policy in respect of the liability incurred by the employer arising from the commission of the tort.

- (2) In this section, "insurance" includes indemnity.

Employee's Liability (Indemnification of Employer) Act 1982 (repealed)**Partial abrogation of right to indemnity**

2.(1) In this section:

"damage" includes loss of life and personal injury;

"fault", in relation to an employee, means negligence, or other act or omission, of the employee (not being negligence, or other act or omission, that is serious and wilful misconduct) as a result of which his employer is, as employer and not otherwise, liable in damages in tort.

(2) This section has effect notwithstanding any other Act, any law or the provisions of any express or implied contract or agreement entered into before or after the commencement of this Act.

(3) Where:

(a) a person suffers damage as a result of the fault of an employee; and

(b) but for this Act, the employee would be liable to indemnify the employer against whom proceedings for damages may be taken as a result of the fault against any liability of the employer arising out of those proceedings,

the employee is not so liable, whether the cause of action against the employer arose before, or arises after, the commencement of this Act.

Law Reform (Vicarious Liability) Act 1983**Definitions**

5.(1) In this Act, except in so far as the context or subject-matter otherwise indicates or requires:

"Crown" means the Crown in right of New South Wales;

"Independent function", in relation to a servant or a person in the service of the Crown, means a function conferred or imposed upon the servant or person, whether or not as the holder of an office, by the common law or statute independently of the will of his master or the Crown, as the case may require;

"office" includes the office of special constable within the meaning of Part 4 of the *Police Offences Act 1901*;

"person in the service of the Crown" does not include a servant of the Crown.

(2) In this Act, a reference to:

(a) a function includes a reference to a power, authority and duty; and

(b) the performance of a function includes a reference to the exercise of the function and the failure to perform or exercise the function.

Police officer

6. For the purposes of this Act, a police officer shall be deemed to be a person in the service of the Crown and not a servant of the Crown.

Vicarious liability of masters

7. Notwithstanding any law to the contrary, a master is vicariously liable in respect of a tort committed by his servant in the performance or purported performance by the servant of an independent function where the performance or purported performance of the function:

- (a) is in the course of his service for his master or is an incident of his service (whether or not it was a term of his contract of service that he perform the function); or
- (b) is directed to or is incidental to the carrying on of any business, enterprise, undertaking or activity of his master.

Further vicarious liability of the Crown

8.(1) Notwithstanding any law to the contrary, the Crown is vicariously liable in respect of the tort committed by a person in the service of the Crown in the performance or purported performance by the person of a function (including an independent function) where the performance or purported performance of the function:

- (a) is in the course of his service with the Crown or is an incident of his service (whether or not it was a term of his appointment to the service of the Crown that he perform the function); or
- (b) is directed to or is incidental to the carrying on of any business, enterprise, undertaking or activity of the Crown.

(2) Subsection (1) does not apply to or in respect of a tort committed by a person in the conduct of any business, enterprise, undertaking or activity which is:

- (a) carried on by him on his own account; or
- (b) carried on by any partnership, of which he is a member, on account of the partnership.

Contributory negligence

9. Section 2(1) of the *Statutory Duties (Contributory Negligence) Act 1945* and section 7 of the *Law Reform (Miscellaneous Provisions) Act 1965* apply with respect to an action under section 7 or 8 as if the references in those sections of those Acts to a statutory duty imposed on a defendant include a reference to an action for breach of a statutory duty imposed upon:

- (a) a servant in respect of whom the defendant is vicariously liable under section 7; or
- (b) a person in the service of the Crown in respect of whom the defendant is vicariously liable under section 8.

Effect of statutory exemptions

10.(1) In this section:

"person" includes the Crown;

"statutory exemption" means a provision made by or under an Act which excludes or limits the liability of a person.

(2) For the purposes of determining whether or not a person is vicariously liable in respect of a tort committed by another person, any statutory exemption conferred on that other person is to be disregarded.

(3) Except as provided by this section, nothing in this Act affects a statutory exemption conferred on a person.

APPENDIX 4: SOUTH AUSTRALIAN LEGISLATION

Wrongs Act 1936

Rights as between employer and employee in cases of vicarious liability

27C.(1) Notwithstanding any Act or law, or the provisions express or implied of any contract or agreement, where an employee commits a tort for which his employer is vicariously liable:

(a) the employee shall not be liable to indemnify the employer in respect of the vicarious liability incurred by the employer; and

(b) unless the employee is otherwise entitled to indemnity in respect of his liability, the employer shall be liable to indemnify the employee in respect of liability incurred by the employee in respect of the tort.

(2) Where an employer is proceeded against for the tort of his employee, and the employee is entitled pursuant to a policy of insurance or contract of indemnity to be indemnified in respect of liability that he may incur in respect of the tort, the employer shall be subrogated to the rights of the employee under that policy or contract in respect of the liability incurred by him (the employer), arising from the commission of the tort.

(3) Where a person commits serious and wilful misconduct in the course of his employment and that misconduct constitutes a tort, the provisions of this section shall not apply in respect of that tort.

APPENDIX 5: NORTHERN TERRITORY LEGISLATION

Law Reform (Miscellaneous Provisions) Act 1956

Rights in cases of vicarious liability

22A.(1) Notwithstanding any other law in force in the Territory, or the provisions, express or implied, of a contract or agreement, where an employee commits a tort for which his employer is vicariously liable:

- (a) the employee shall not be liable to indemnify the employer in relation to the vicarious liability incurred by the employer; and
- (b) unless the employee is otherwise entitled to indemnity in relation to his liability, the employer shall be liable to indemnify the employee in relation to the liability incurred by the employee,

arising from the commission of the tort.

(2) Where an employer is proceeded against for the tort of his employee, and the employee is entitled in pursuance of a policy of insurance or contract of indemnity to be indemnified in relation to a liability that he may incur in relation to the tort, the employer shall be subrogated to the rights of the employee under the policy or contract in relation to the liability incurred by the employer, arising from the commission of the tort.

(3) Where a person commits serious and wilful, or gross, misconduct in the course of his employment and the misconduct constitutes a tort, subsection (1) shall not apply in relation to the tort.

Liability for damage to property caused by children

29A.(1) In this section, "child" means a person who has not attained the age of 17 years.

(2) Where, after the commencement of this section, a child intentionally causes damage to property, a parent of the child is, subject to this section, jointly and severally liable with the child for the damage caused to the property where, at the time the damage was caused, the child was:

- (a) ordinarily resident with that parent; and
- (b) not in full employment.

(3) Where, after the commencement of this section, a detainee, within the meaning of the *Juvenile Justice Act*, intentionally causes damage to property, the Territory is, subject to this section, jointly and severally liable with the detainee for the damage caused to the property.

(4) The maximum amount that may be recovered from any parent or parents under subsection (2) (whether sued individually or jointly) or the Territory under subsection (3) is \$5000 in respect of damage caused by a child or detainee referred to in those subsections, as the case may be.

(5) Nothing in this section shall be construed as:

- (a) affecting or limiting a cause of action which may otherwise lie in or in relation to damage caused to property by a child or detainee; or
- (b) imposing liability on a parent under subsection (2) in respect of damage caused by a detainee referred to in subsection (3).

APPENDIX 6: GLOSSARY³⁷⁵

agent	a person employed to act on behalf of another (the principal), whose act, if done within the scope of the agent's authority, binds the principal.
bailment, -or, -ee	transfer of possession of goods for a specific purpose without transfer of ownership, on condition that the goods be returned or delivered to a third party as soon as the purpose has been fulfilled.
breach	the invasion of a right, or the violation of or omission to perform a legal duty. In negligence "breach of duty" is "...the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do." (<i>Blyth v Birmingham Waterworks Co.</i> (1856) 11 Exch. 781 per Alderson B at 784.) See section 2.1.
common law	judge made law; law settled in the course of judicial decisions rather than by Parliament.
contractor	party who has agreed to perform stipulated work (eg, for building to specified plans) for another party and who is not an employee of that other party. See Chapter 5.
conversion	a tort: the dealing by the tortfeasor with property belonging to another person in a manner inconsistent with the rights of the true owner.
damages	compensation for loss or injury suffered as a result of a tort (among other things) the object of which is to put the person injured as nearly as possible in the position he or she would have been in if the tort had not been committed.
defendant	a person against whom an action or other civil proceeding is brought. See section 2.1.
duty	tort law imposes on persons certain duties to other persons. See section 2.1.
duty of care	duty imposed by law to "take reasonable care to avoid acts or omissions which [I] can reasonably foresee would be likely to injure...persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question." per Lord Atkin in <i>Donoghue v Stevenson</i> [1932] AC 562 at 580. See section 3.1.
employ ee, -er, -ment	the relationship of employer and employee exists where a worker is employed under a contract of employment (ie, a contract of service). See section 4.1

³⁷⁵ See generally L Rutherford & S Bone (eds) *Osborn's Concise Law Dictionary* (Sweet & Maxwell 8th ed 1993) upon which this Appendix mainly draws.

Implied term	a term of a contract which has not been expressly included within the contract, but which the courts assume the parties to the contract must have intended to be part of the contract or which the courts are required to imply by statute.
Indemnity	the making good by one person of loss or damage suffered by a second person as a result of the act or omission of a third person; -fy to make good loss or damage suffered by a second person as a result of the act or omission of a third person.
Independent contractor	see contractor .
Injunction	an order by which a party to an action is required to do, or refrain from doing, a particular thing.
Insurance, -er	a contract under which the insurer agrees to indemnify the assured in respect of loss sustained on the happening of specified events.
Intentional tort	a tort the proof of which includes the intention on the part of the defendant to cause the resulting damage (examples are trespass, conversion and assault; negligence, however, is not an intentional tort because its essence is carelessness).
master	see employer .
Master of the Rolls	president of the Civil Division of the Court of Appeal (Eng).
master's tort theory	the employer (or "master") is liable for breach by the employee of the employer's duty. See section 2.4.
minor	a person under 18 years of age who, by virtue of his or her age, lacks full legal capacity.
negligence	a tort: the breach by the tortfeasor of a duty of care resulting in damage to the plaintiff in circumstances in which a reasonable person in the tortfeasor's position would have foreseen the possibility of damage to the plaintiff if reasonable care was not taken.
non-delegable duty	a person's duty the breach of which is the person's responsibility, even if the person delegates the performance of the duty to another. It has its origin in the remark of Lord Blackburn in <i>Dalton v Henry Angus & Co</i> ³⁷⁶ that "a person causing something to be done, the doing of which casts on him a duty, cannot escape from the responsibility attaching on him of seeing that duty performed by delegating it to a contractor".
obiter dictum	"A saying by the way." An observation by a judge on a legal question suggested by a case before him or her, but not arising in such a manner as to require decision and therefore not binding as precedent.

³⁷⁶ (1881) 6 App Cas 740 at 829. See also the peremptory remarks of Lord Watson at 831-832. The other members of the House (Lord Selborne LC, Lord Coleridge and Lord Penzance) did not consider the liability of principals for contractors.

partner	person carrying on business with one or more others in common with a view to profit, the rights of partners between themselves being governed by the partnership agreement.
partnership	business carried on by more than one person (partner) with a view to profit.
per	by (a judge in giving reasons for judgment).
personal liability	liability for damage caused to others by the breach of one's own duty. See section 2.3.
plaintiff	someone who brings an action at law. See section 2.1.
principal	someone who authorises another to act on his/her behalf. See Chapter 5.
servant, -ice	see employee, employment .
servant's tort theory	an employer is liable for the breach by an employee of the employee's duty. See section 2.4.
subrogation	the substitution of one person or thing for another, so that the same rights and duties which attached to the original person or thing attach to the substituted one, for example, an insurer is subrogated to the rights of the insured on paying his or her claim. See section 10.3.
tort	an act or omission by the tortfeasor which causes harm to the plaintiff due to the breach of duty owed by the tortfeasor to the plaintiff, for which the plaintiff may be compensated. See section 2.1.
tortfeasor	someone who commits a tort. See section 2.1.
vicarious liability	according to Fleming: We speak of vicarious liability when the law holds one person responsible for the misconduct of another, although [the first person] is ... free from personal blameworthiness or fault. It is therefore an instance of strict (no-fault) liability. ³⁷⁷ See further section 2.2.

³⁷⁷ Fleming p 366.

APPENDIX 7: REFERENCES

- PS Atiyah *Vicarious Liability in the Law of Torts* (Butterworths 1967)
- Australian Law Reform Commission *Complaints against Police* (ALRC 1 1975)
- _____ *Complaints against Police: Supplementary Report* (ALRC 9 1978)
- _____ *Insurance Contracts* (ALRC 20 1982)
- Australian Torts Reporter* (CCH looseleaf)
- RW Baker "Independent Contractors and the Liability of Their Principals" (1954) 27 *ALJ* 546
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APPENDIX 10: ABBREVIATIONS³⁷⁸

ALJ	<i>Australian Law Journal</i>
ALRC	Australian Law Reform Commission
CA	Court of Appeal
CJ	Chief Justice
cl	clause (of a Bill or a Schedule to an Act)
CLB	<i>Commonwealth Law Bulletin</i>
CLJ	<i>Cambridge Law Journal</i>
Colum L Rev	<i>Columbia Law Review</i>
Crim LJ	<i>Criminal Law Journal</i>
Cth	Commonwealth of Australia
Eng	England and Wales (of courts)
HCA	High Court of Australia
HL(E)	House of Lords (as an appellate court for England, Wales and Northern Ireland)
HLR	<i>Harvard Law Review</i>
J (pl JJ)	when used after a name, indicates a superior court judge (e g "Smith J" denotes Justice Smith)
JA (pl JJA)	when used after a name, indicates a Justice of Appeal
LJ (pl LJJ)	when used after a name, indicates a Lord Justice of Appeal (Eng)
LJSC	when used after a name, indicates a Local Judge of the Supreme Court (British Columbia)
LQR	<i>Law Quarterly Review</i>
MLR	<i>Modern Law Review</i>