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VICARIOUS LIABILITY

Report No 56

Queensland Law Reform Commission
December 2001

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VICARIOUS LIABILITY

Report No 56

Queensland Law Reform Commission
December 2001

To: The Honourable Rod Welford MP
Attorney-General and Minister for Justice

In accordance with section 15 of the *Law Reform Commission Act 1968* (Qld), the Commission is pleased to present its Report on Vicarious Liability.

The Honourable Mr Justice J D M Muir
Chairman

The Honourable Justice D A Mullins
Member

Assoc Prof P J MacFarlane
Member

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Previous Queensland Law Reform Commission publication in this reference:

Discussion Paper: Vicarious Liability (QLRC WP 48, July 1995)

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SUMMARY OF RECOMMENDATIONS

CHAPTER 3 - EMPLOYMENT

The Commission recommends that:

- 3.1 There should be no legislative change to the common law concerning the principle of vicarious liability as it currently applies to the employer/employee relationship.
- 3.2 There should be no legislative change to the common law concerning the determination of whether a worker is an employee or an independent contractor.
- 3.3 There should be no legislative change to the common law concerning the vicarious liability of a principal for the torts of an independent contractor.
- 3.4 Legislation should be introduced to provide that, where an employer, including the State, lends or lets on hire an employee's services to another person and the employee commits a tort while there continues to be a contract of service between the employer and the employee, the employer is vicariously liable for the tort to the same extent, if any, that the employer would have been vicariously liable if the employer had not lent or let the employee's services to the other person.¹
- 3.5 Legislation should be introduced to provide that, unless otherwise provided for by statute:
 - (a) an employer is vicariously liable for a tort committed by an employee in the performance or purported performance of an independent function to the same extent, if any, as if the tort had not been committed in the performance or purported performance of an independent function.²

¹ See cl 3 of the draft legislation (proposed s 11F of the *Law Reform Act 1995* (Qld)). The draft legislation is set out in Appendix 4 to this Report.

² See cl 3 of the draft legislation (proposed s 11D of the *Law Reform Act 1995* (Qld)).

- (b) the State is vicariously liable for a tort committed by a State employee³ in the course of, or arising out of, the State employee's employment, including a tort committed in the performance or purported performance of an independent function, to the same extent, if any, that an employer would be vicariously liable for the tort if:
- (i) the tort had been committed by an employee, other than a State employee; and
 - (ii) for a tort committed in the performance or purported performance of an independent function, the tort had not been committed in the performance or purported performance of an independent function.⁴
- (c) the State is vicariously liable for a tort committed by an individual in the service of the State in the performance or purported performance of a function conferred on the individual, including an independent function, to the same extent, if any, that an employer would be vicariously liable for the tort if:
- (i) the tort had been committed by an employee, other than a State employee; and
 - (ii) for a tort committed in the performance or purported performance of an independent function, the tort had not been committed in the performance or purported performance of an independent function.⁵
- 3.6 Section 10.5(1), (1A) and (2) of the *Police Service Administration Act 1990* (Qld) should be repealed.⁶

³ As to what is meant by a State employee in this context see p 42 of this Report and see cl 3 of the draft legislation (proposed s 11C of the *Law Reform Act 1995* (Qld)).

⁴ See cl 3 of the draft legislation (proposed s 11E of the *Law Reform Act 1995* (Qld)).

⁵ See cl 3 of the draft legislation (proposed s 11E of the *Law Reform Act 1995* (Qld)).

⁶ See Part 3 of the draft legislation. For a discussion of those provisions within s 10.5 of the *Police Service Administration Act 1990* (Qld) that relate to indemnity and contribution, see Chapter 5 of this Report.

CHAPTER 4 - VICARIOUS LIABILITY FOR THE TORTS OF CHILDREN

The Commission recommends that:

- 4.1 There should be no legislative change to the common law concerning the vicarious liability of parents for torts committed by their children.
- 4.2 There should be no legislative change to the common law concerning the vicarious liability of adult supervisors for torts committed by children in their care.
- 4.3 There should be no legislative change to the common law concerning the vicarious liability of teachers for torts committed by pupils in their care.

CHAPTER 5 - INDEMNITY AND CONTRIBUTION

The Commission recommends that:

- 5.1 Legislation should be introduced to abrogate the rule in *Lister v Romford Ice and Cold Storage Co Ltd* [1957] AC 555 so that an employee, including a State employee, who commits a tort in the course of, or arising out of, the employment relationship is not liable to indemnify the employer, including the State, in relation to liability incurred by the employer for the tort of the employee, unless the conduct of the employee amounted to serious and wilful misconduct.⁷
- 5.2 Legislation should be introduced to provide that an employee, including a State employee, who commits a tort in the course of, or arising out of, the employment relationship is not liable to pay contribution to the employer, including the State, in relation to liability incurred by the employer for the tort of the employee, unless the conduct of the employee amounted to serious and wilful misconduct.⁸
- 5.3 The legislative provisions giving effect to Recommendations 5.1 and 5.2 should apply to an individual in the service of the State as if that individual were a State employee and the individual's service with the State were that of employment.⁹

⁷ See cl 3 of the draft legislation (proposed ss 11G and 11I of the *Law Reform Act 1995* (Qld)).

⁸ See cl 3 of the draft legislation (proposed ss 11G and 11I of the *Law Reform Act 1995* (Qld)).

⁹ See cl 3 of the draft legislation (proposed ss 11G, 11H and 11I of the *Law Reform Act 1995* (Qld)).

- 5.4** Legislation should be introduced to provide that an employer, including the State, is liable to indemnify an employee, including a State employee, in relation to liability incurred for any tort committed by the employee during the course of, or arising out of, the employment relationship, unless the conduct of the employee amounted to serious and wilful misconduct, or the employee is otherwise entitled to an indemnity in relation to the liability.¹⁰
- 5.5** The legislative provision giving effect to Recommendation 5.4 should apply to an individual in the service of the State as if that individual were a State employee and the individual's service with the State were that of employment.¹¹
- 5.6** Section 10.5(3) of the *Police Service Administration Act 1990* (Qld) should be amended by omitting the words "by the Crown" after the words "may be relied on" and inserting the words "by the Crown" after the words "as constituting contributory negligence".¹²
- 5.7** Section 10.6(1)(a) of the *Police Service Administration Act 1990* (Qld) should be amended by omitting the words ", other than damages in the nature of punitive damages,".¹³
- 5.8** Section 10.6(3) of the *Police Service Administration Act 1990* (Qld) should be amended by omitting the words "Except as provided by section 10.5(5), if the Crown has paid moneys" and replacing them with the words "If the Crown has paid moneys under subsection (1)".¹⁴
- 5.9** Section 10.6 of the *Police Service Administration Act 1990* (Qld) should be amended to provide that the section does not limit or affect the provisions implementing Recommendations 5.1, 5.2 and 5.4.¹⁵

¹⁰ See cl 3 of the draft legislation (proposed ss 11G and 11J of the *Law Reform Act 1995* (Qld)).

¹¹ See cl 3 of the draft legislation (proposed ss 11G, 11H and 11J of the *Law Reform Act 1995* (Qld)).

¹² See cl 5(2), (3) of the draft legislation.

¹³ See cl 6(1) of the draft legislation.

¹⁴ See cl 6(2) of the draft legislation.

¹⁵ See cl 6(3) of the draft legislation.

- 5.10** Legislation should be introduced to provide that, if an employee, including a State employee, commits a tort in the course of, or arising out of, the employment relationship, and the employee is entitled under an insurance policy or contract of indemnity to be indemnified in relation to that liability, the employer, including the State, is subrogated to the employee's rights under that policy or contract in relation to liability incurred by the employer arising from the commission of the tort.¹⁶
- 5.11** The legislative provision giving effect to Recommendation 5.10 should apply to an individual in the service of the State as if that individual were a State employee and the individual's service with the State were that of employment.¹⁷
- 5.12** Legislation should be introduced to provide that an employee, including a State employee, is not liable in tort to his or her employer, including the State, only because the employee has deprived the employer of the services of any other employee.¹⁸

¹⁶ See cl 3 of the draft legislation (proposed ss 11K and 11M of the *Law Reform Act 1995* (Qld)).

¹⁷ See cl 3 of the draft legislation (proposed ss 11K, 11L and 11M of the *Law Reform Act 1995* (Qld)).

¹⁸ See cl 3 of the draft legislation (proposed s 11N of the *Law Reform Act 1995* (Qld)).

CHAPTER 1

INTRODUCTION

1. TERMS OF REFERENCE

The terms of this reference were to:

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

- (i) parent/child relationships;
- (ii) teacher/pupil relationships;
- (iii) employer/employee relationships;
- (iv) adult supervisor/child relationships.

The term “vicarious liability”¹⁹ is used to indicate that the law holds one person responsible for the misconduct of another, although the first person is free from any personal blameworthiness or fault.²⁰ In the context of this reference, the principle of vicarious liability is considered in relation to civil proceedings. Vicarious liability for criminal acts was considered by the Commission to be outside its terms of reference.²¹

2. THE DISCUSSION PAPER

In July 1995, the Commission published a Discussion Paper on *Vicarious Liability*.²² The purpose of that paper was to provide information to interested people on the issues that the Commission envisaged would need to be addressed in the course of the review, and to assist people in making submissions. A notice was then placed in

19 The terms “vicarious liability” and “vicariously liable”, being the more common and conventional terms, will be used throughout this Report.

20 Fleming JG, *The Law of Torts* (9th ed, 1998) at 409.

21 The reluctance of the law to impose vicarious liability for the criminal wrongs of another was noted in Gillies P, *Criminal Law* (4th ed, 1997) at 111:

Broadly speaking, vicarious liability in the criminal law may be described as the imposition of criminal liability upon a person in the capacity of a principal offender by virtue of the commission of an offence or (at least) an element in an offence by another person.

... The common law has, with a couple of insignificant exceptions, refused to allow that the citizen can be punished, in the capacity of principal (that is, independently of the doctrine of accessory liability) for another's misdeeds. It follows that vicarious liability may only arise in consequence of legislative initiative. [notes omitted]

22 Queensland Law Reform Commission, Discussion Paper, *Vicarious Liability* (WP 48, July 1995).

The Courier-Mail setting out the terms of reference, advising of the availability of the Discussion Paper and seeking submissions on the issues canvassed in it.

3. SUBMISSIONS

Fourteen written submissions were received in response to the Discussion Paper.²³

In January 2000 the Commission agreed that an outline reflecting developments in the law since preparation of the Discussion Paper should be distributed to those who had made submissions, with an invitation for them to make further comment. Four submissions were received following distribution of the outline.

The submissions received by the Commission have been of great assistance to it in the preparation of this Report. The Commission appreciates the contribution made by all the respondents.

4. THE STRUCTURE OF THIS REPORT

The Commission has conducted a general examination of the principle of vicarious liability as it currently relates to the law of torts. In making its recommendations, the Commission has considered policy issues underlying the principle of vicarious liability.

In this Report, the Commission has adopted the approach that the imposition of vicarious liability on one person for the torts of another must be referable to clearly defined principles consistent with fairness and justice and, further, that any extension of the situations in which the principle of vicarious liability may be applied must fall within those principles. Chapter 2 of this Report considers these policy issues and the difference between vicarious and personal liability.

Chapter 3 examines vicarious liability in the workplace and, in particular, the relationship between an employer and an employee.

The Commission has also considered a number of workplace situations where vicarious liability is not presently imposed, in order to determine whether and, if so, to what extent, the principle of vicarious liability should be extended to them. In this context, the Commission has considered:

- the relationship between a principal and an independent contractor; and

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A list of these respondents is set out in Appendix 1. Two respondents requested that their submissions remain confidential. Since the receipt of submissions, the Department of Family and Community Services has changed its name to Families, Youth and Community Care Queensland.

- the situation of an individual who exercises an independent discretionary function,²⁴ whether as an employee of the State²⁵ or of another employer or as a person in the service of the State.

Chapter 3 also considers the vicarious liability of a general employer for the torts of an employee who has been lent to a third party.

An important issue raised by the terms of this reference is whether the principle of vicarious liability should be extended to apply to certain adults in respect of torts committed by children under their care or supervision. Chapter 4 considers the application of the principle of vicarious liability to the relationships of parent/child, adult supervisor/child and teacher/pupil. The chapter also considers the liability of a school authority for torts committed by pupils.

In the area of employer/employee relationships, a finding that an employer is vicariously liable for the tort of an employee raises particular issues, such as the right of the employer to claim an indemnity²⁶ or contribution²⁷ from the employee who committed the tort. These matters are considered by the Commission in Chapter 5.

A draft bill to give effect to the Commission's recommendations is set out in Appendix 4 to this Report. The Commission thanks the Office of the Queensland Parliamentary Counsel for its assistance in the preparation of the draft bill.

²⁴ See pp 43-52 of this Report.

²⁵ In this Report, State refers to the Queensland State government or the Crown in right of Queensland.

²⁶ Indemnity is discussed at pp 84-102 of this Report.

²⁷ Contribution is discussed at pp 102-106 of this Report.

CHAPTER 2

THE PRINCIPLE OF VICARIOUS LIABILITY

1. INTRODUCTION

Vicarious liability may be imposed on a person for loss or injury resulting from the wrongdoing of another person, even though the person who is vicariously liable may not have been personally at fault. Vicarious liability in tort arises by virtue of the relationship between the wrongdoer and the person who is vicariously liable. For example, an employer is vicariously liable for the torts of an employee committed during the course of his or her employment.²⁸

The principle of vicarious liability was developed at common law.²⁹ However, it is possible for legislation to extend or narrow the application of the principle. An example is the *Partnership Act 1891* (Qld), which makes the partners of a firm jointly and severally liable for loss or injury caused to any person by the wrongful act or omission of a partner.³⁰

2. THE DISTINCTION BETWEEN VICARIOUS AND PERSONAL LIABILITY

Vicarious liability does not involve any element of personal blame. It is a form of liability imposed for a wrong committed by another person. The person on whom vicarious liability is imposed is liable.³¹

... not for a breach of duty resting on him and broken by him but for a breach of duty resting on another and broken by another.

The absence of personal fault distinguishes vicarious liability from personal liability, which involves a breach of one's own duty:³²

There is generally an obvious difference between holding a person liable for his own torts and holding him liable for the torts of a servant, agent or independent contractor, and the difference is emphasised by the fact that in the modern law of torts liability is still generally based on some notion of "fault".

28 *Darling Island Stevedoring Lighterage Co Ltd v Long* (1957) 97 CLR 36 per Kitto J at 63.

29 A reference to common law in this context means that body of law developed by the courts based on precedent and found in the cases.

30 *Partnership Act 1891* (Qld) ss 13-15.

31 *Darling Island Stevedoring Lighterage Co Ltd v Long* (1957) 97 CLR 36 per Fullagar J at 57.

32 Atiyah PS, *Vicarious Liability in the Law of Torts* (1967) at 3.

The distinction between vicarious liability and personal or direct liability is important. Vicarious liability is not the only form of liability that may result from another person's tort. In some circumstances, a person may incur liability for a tort committed by another person, even though the principle of vicarious liability does not apply. For example, while the relationship of principal and agent sometimes results in the imposition of vicarious liability on a principal for the wrongs of his or her agent,³³ a principal may, in certain circumstances, be personally liable for the torts of an agent.³⁴ In other cases, a person may incur personal liability because a tort committed by a wrongdoer amounts to a breach of a personal or a non-delegable duty³⁵ owed by that person to a person who is injured as a result of the tort.

(a) Agency

The rules relating to the imposition of liability on a principal for the acts of an agent were developed in the context of contract law. Their application to liability for a tort committed by an agent raises issues which are complex and beyond the scope of this reference.³⁶ In particular, it is not always clear whether the liability of a principal for an agent's tort is vicarious or personal.³⁷

It has been suggested that the liability of a principal will be personal rather than vicarious in the following situations:³⁸

- where the wrongful act was specifically instigated, authorised³⁹ or ratified⁴⁰ by the principal;
- where the wrongful act amounts to a breach by the principal of a personal duty, liability for non-performance or non-observance of which cannot be avoided by delegation to another.⁴¹

33 For example, where the agent is the employee of the principal.

34 See pp 5-6 of this Report.

35 For a discussion of a non-delegable duty see pp 7-9 of this Report.

36 See for example *Scott v Davis*(2000) 175 ALR 217.

37 See for example the comments of Lindgren J in *NMFM Property Pty Ltd v Citibank Ltd (No 10)* (2000) 107 FCR 270 at 383-384.

38 Reynolds FMB, *Bowstead and Reynolds on Agency*(16th ed, 1996) at 502, 505.

39 But see also the comments of Lindgren J in *National Mutual Property Services (Australia) Pty Ltd v Citibank Savings Ltd (No1)* (1995) 132 ALR 514 at 534, where the liability of a principal for the wrongful act of an agent, which has been authorised by the principal, is described as vicarious.

40 *NMFM Property Pty Ltd v Citibank Ltd (No 10)* (2000) 107 FCR 270 per Lindgren J at 541.

41 For a discussion of a non-delegable duty see pp 7-9 of this Report.

The need to rely on agency as a basis for establishing liability in cases of personal injury arising from motor vehicle accidents has long since been overtaken by specific legislative schemes:⁴²

... legislation providing for compulsory third party insurance and schemes of no-fault liability have long since overtaken the common law in relation to such personal injury claims ...

Nevertheless, in *Soblusky v Egan*,⁴³ the principle of agency was used to impose liability on the bailee of a motor vehicle for injuries caused to a passenger by the negligence of the driver of the vehicle.⁴⁴ The High Court considered a line of cases in which either the owner or the hirer of a carriage had been held liable for injury caused by the driver⁴⁵ and concluded:⁴⁶

It means that the owner or bailee being in possession of the vehicle and with full legal authority to direct what is done with it appoints another to do the manual work of managing it and to do this on his behalf in circumstances where he can always assert his power of control. Thus it means in point of law that he is driving by his agent. ... The principle ... is simply that the management of the vehicle is done by the hands of another and is in fact and law subject to direction and control.⁴⁷ [note added]

⁴² *Scott v Davis* (2000) 175 ALR 217 per Hayne J at 298. In Australia, compensation for personal injury caused by the negligent use of a motor vehicle is funded by statutory schemes under which the owner of a motor vehicle must, as a prerequisite of registration, take out a policy of insurance. Under the Queensland scheme, the statutory policy of insurance covers "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": *Motor Accident Insurance Act 1994* (Qld) s 23(1), Schedule (s 2 Insured person).

⁴³ (1960) 103 CLR 215.

⁴⁴ In that case, Soblusky had purchased his interest in the vehicle from a third person, Behrendorff, who was the purchaser of the vehicle under a hire purchase agreement. Behrendorff failed to notify the Commissioner of Main Roads of the transfer of the vehicle, with the result that he remained registered as the owner of the vehicle. Behrendorff's policy of insurance under the *Motor Vehicles Insurance Act 1936* (Qld) also remained on foot. Although Soblusky notified the motor agents that he had taken possession of the vehicle from Behrendorff and continued to pay the instalments for the vehicle, he did not enter into a new hire purchase agreement naming him as the hirer. The High Court held that Soblusky "was at best a bailee", although it observed that "he treated the car as his and drove it about as his own": *Soblusky v Egan* (1960) 103 CLR 215 per Dixon CJ, Kitto and Windeyer JJ at 225.

⁴⁵ *Id* at 229-231.

⁴⁶ *Id* at 231. It was argued on behalf of Soblusky that, because the effect of s 3(2) of the *Motor Vehicles Insurance Act 1936* (Qld) was that the driver of the vehicle was deemed to be the "authorized agent" of Behrendorff, the driver could not also be regarded as driving as the authorized agent of Soblusky. That argument was rejected by the Court, which held (at 231-232) that the purpose of s 3(2) of the Act was "to impose liability, not to relieve from liability":

The statutory relationship of principal and agent which it creates is introduced for the purpose of making certain that the negligence of the person in charge of a motor vehicle exposes the insured owner and through him the insurer to liability. Moreover, s. 6 provides that nothing in the Act shall affect any civil liability of the owner at common law or affect the right of any person to sue for and recover damages at common law.

⁴⁷ In *Scott v Davis* (2000) 175 ALR 217 the High Court considered the extent to which the owners of an aeroplane should be liable for loss or damage arising out of its use by another person. The owners, at a party held at their property, had asked the pilot to take some guests for a ride in the plane. The plane crashed, killing the pilot and injuring the passengers. The appellants (plaintiffs) had argued that the pilot was the owner's agent and that the owners were vicariously liable as principals for the personal injuries caused by the pilot's negligence. The majority (Gleeson CJ, Gummow, Hayne and Callinan JJ, McHugh J dissenting) dismissed the appeal. Gleeson CJ (at 216) and Gummow J (at 285) held that the pilot was not the owners' agent. It was also held (per Gleeson CJ at 220, per Gummow J at 283, per Hayne J at 299 and per Callinan J at 314) that the owners were not in a position to exercise any control over the pilot while the plane was in flight. A majority (Gummow J at 282-283, Hayne J at 299 and Callinan J at 314) held further that *Soblusky* should not be extended beyond cases involving motor vehicles; that is,

(b) Non-delegable duty

A non-delegable duty is a duty imposed by the common law upon a person who has undertaken responsibility for the person or property of another who is in a position of special vulnerability:⁴⁸

[T]he 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.

For example, it has been held that an employer has a non-delegable duty to provide a safe system of work for employees.⁴⁹ Hospitals have been held to owe non-delegable duties of care to their patients,⁵⁰ and school authorities have been held to owe non-delegable duties to their pupils.⁵¹ A person in control of land or premises who authorises the dangerous use of the land or premises in circumstances that impose a foreseeable danger on another person, also owes that other person a non-delegable duty of care.⁵²

that owners should not generally be liable for loss or damage arising out of the use of a chattel by another person. However, Gleeson CJ (at 219) considered that the principle that, in certain situations, liability can be imposed on the owner of a chattel for the negligent use of the chattel by another person is not restricted to motor vehicles. McHugh J held (at 245) that the principle of vicarious liability should also apply in respect of planes and boats.

48 *Kondis v State Transport Authority* (1984) 154 CLR 672 per Mason J (with whom Deane and Dawson JJ agreed) at 687. See also *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520 per Mason CJ, Deane, Dawson, Toohey and Gaudron JJ at 550-551. In *Northern Sandblasting Pty Ltd v Harris* (1997) 188 CLR 313 Gaudron J (at 361) noted:

It is now recognised that relationships which give rise to a special non-delegable duty to ensure that care is taken are marked by the central features of control, on the one hand, and vulnerability, on the other. [note omitted]

49 *Kondis v State Transport Authority* (1984) 154 CLR 672.

50 *Albrighton v Royal Prince Alfred Hospital* [1980] 2 NSWLR 542 per Reynolds JA (with whom Hope and Hutley JJA agreed) at 561-562.

51 *Commonwealth v Introvigne* (1982) 150 CLR 258 per Mason J (with whom Gibbs CJ agreed) at 269-271, per Murphy J at 274-276 and per Brennan J at 279-280. The non-delegable duty owed by a school authority to its pupils has recently been considered in *Lepore v State of New South Wales* (2001) Aust Torts Reports ¶81-609 and *Rich v State of Queensland* [2001] QCA 295 (27 July 2001).

In *Lepore v State of New South Wales* (2001) Aust Torts Reports ¶81-609, Mason P (at 67,016) held (Davies AJA agreeing, Heydon JA dissenting) that a school authority's non-delegable duty to pupils extended to "ensuring that they are not injured physically at the hands of an employed teacher (whether acting negligently or intentionally)".

In *Rich v State of Queensland* [2001] QCA 295 (27 July 2001), the Queensland Court of Appeal declined to follow the decision in *Lepore v State of New South Wales*: per McPherson JA at [18], per Thomas JA at [29] and per Williams JA at [48]. The Court held that the non-delegable duty of a school authority was not an absolute duty to protect pupils from any harm. McPherson JA commented at [13]:

It is not to be equated with a warranty, promise or undertaking to indemnify or hold them harmless against injury. It goes no further than a duty ... to take reasonable steps to prevent them from being harmed.

Applications have been filed in the High Court for special leave to appeal against the decisions in *Lepore v State of New South Wales*: S104/2001; and *Rich v State of Queensland*: B70/2001.

52 *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520 per Mason CJ, Deane, Dawson Toohey and Gaudron JJ at 551-552.

The effect of a non-delegable duty is to impose on the person who owes the duty liability for the conduct of another person, in circumstances in which the first person may not be vicariously liable for the consequences of the other person's conduct. Consequently, although a principal is not vicariously liable for loss or injury caused by an independent contractor,⁵³ he or she may be personally liable if the conduct of the independent contractor constitutes a breach of a non-delegable duty owed by the principal to the injured person.

The duty is said to be non-delegable because it cannot be met by simply delegating the task to a competent person.⁵⁴ The person who owes the duty:⁵⁵

... cannot acquit himself by exercising reasonable care in entrusting the work to a reputable contractor but must actually assure that it is done - and done carefully.

It is a personal duty that will be breached if the task in question is performed negligently by another person:⁵⁶

... if the defendant is under a personal duty of care owed to the plaintiff and engages an independent contractor to discharge it, a negligent failure by the independent contractor to discharge the duty leaves the defendant liable for its breach. The defendant's liability is not a vicarious liability for the independent contractor's negligence but liability for the defendant's failure to discharge his own duty.

Because the existence of a non-delegable duty depends on the nature of the relationship between the plaintiff and the defendant, it is not possible to define exhaustively the circumstances in which it may occur. As a result, courts have been able to impose a non-delegable duty in new situations which have arisen.

However, the concept of a non-delegable duty of care has been said to have developed "in a not entirely satisfactory and principled way",⁵⁷ resulting in some

53 *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16.

54 This does not mean that the defendant cannot get another person to perform the task. The duty is said to be non-delegable in the sense that the defendant cannot escape liability if the task has been delegated and then not properly performed: *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520 per Mason CJ, Deane, Dawson Toohey and Gaudron JJ at 550; *McDermid v Nash Dredging Ltd* [1987] AC 906 per Lord Hailsham of St Marylebone at 910.

55 Fleming JG, *The Law of Torts* (9th ed, 1998) at 434.

56 *Northern Sandblasting Pty Ltd v Harris* (1997) 188 CLR 313 per Brennan CJ at 330. In *Rich v State of Queensland* [2001] QCA 295 (27 July 2001) McPherson JA at [7] noted:

The master is liable, not because the servant has committed a wrong for which the master is responsible in law as the wrongdoer's superior, but because the master has himself failed to fulfil his duty to take care for the safety of the person injured. The liability is original and not derivative or vicarious.

57 *Jones v Bartlett* (2000) 176 ALR 137 per Callinan J at 201.

uncertainty about the circumstances that will give rise to the duty:⁵⁸

Academic writers have been critical of the failure of courts to explain more clearly the precise characteristics of relationships said to justify the imposition of the exceptional non-delegable duty of care. Judges and commentators have admitted that it is not always easy to identify the boundaries of the categories of non-delegable duty. Various criteria are nominated, ranging from the superior capacity of the defendant to bear the risk of mishap; its greater power to see that care is taken so as to avoid mishap; the special obligations which it is proper to attach to extra-hazardous activities; and the special dependence or vulnerability of the person to whom the duty is owed if it is not discharged. Each of these considerations may be relevant in the case of particular categories accepted as falling within this class. Whilst they help to describe the idea which lies behind the imposition of a “special” duty of care, they do not define with precision the circumstances where the special duty will be imposed by law. [notes omitted]

A judge of the High Court recently expressed the view that “courts should be very cautious about extending the range of non-delegable duties”.⁵⁹

3. THE POLICY BASIS OF VICARIOUS LIABILITY

Vicarious liability is a policy device for extending liability arising from the commission of a tort.⁶⁰

... 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.

The imposition of vicarious liability is thought to have been introduced into the English common law in the late seventeenth century.⁶¹ It is widely accepted that the theory underlying the rule can be traced to the historical concept of the responsibility of the head of a household for the conduct of his family and servants.⁶² However, the social and economic changes that have taken place over the last three centuries have given rise to varying explanations for the rule’s survival.⁶³

⁵⁸ *Northern Sandblasting Pty Ltd v Harris* (1997) 188 CLR 313 per Kirby J at 395. Brennan CJ at 332 also noted the difficulty of defining relationships that give rise to non-delegable duties:

Apart from well-established relationships that give rise to non-delegable duties, it is not easy to distinguish between the circumstances which give rise to a duty that is discharged by the selection of a competent independent contractor to undertake a particular task and the circumstances which give rise to a duty that can be discharged only by the non-negligent performance of the task. [note omitted]

⁵⁹ *Jones v Bartlett* (2000) 176 ALR 137 per Callinan J at 201. This view was based on a concern that, in some circumstances, it may be difficult for a person on whom a non-delegable duty is imposed ever to be sure that the duty has been satisfied.

⁶⁰ *Rose v Plenty* [1976] 1 WLR 141 per Scarman LJ at 147.

⁶¹ Williams GL, “Vicarious Liability and the Master’s Indemnity” (1957) 20 *MLR* 220 at 228.

⁶² See *Hollis v Vabu Pty Ltd* (2001) 181 ALR 263 per Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ at 273. See also Fleming JG, *The Law of Torts* (9th ed, 1998) at 409.

⁶³ Williams GL, “Vicarious Liability and the Master’s Indemnity” (1957) 20 *MLR* 220 at 228.

It may be that some of the early judgments truly state the reasons that commended themselves to the judges of the time; but this does not mean that these reasons will be equally acceptable today. It is possible for an institution introduced for one reason to be continued for another. Finding a reason *ex post facto* is rationalisation, but there is no harm in this if the reason found is a convincing one ...

In Australia, the High Court has recognised that the continued existence of vicarious liability is grounded in policy considerations.⁶⁴

Four broad policy grounds have been identified as supporting the principle of vicarious liability:⁶⁵

First, the vicarious liability regime allows the plaintiff to obtain compensation from someone who is financially capable of satisfying a judgment. ... The plaintiff benefits greatly from the doctrine of vicarious liability, which allows access to the deep pockets of the [employer] even when the [employer] is blameless in any ordinary sense.

Second, a person, typically a corporation, who employs others to advance its own economic interest should in fairness be placed under a corresponding liability for losses incurred in the course of the enterprise. ...

Third, the regime promotes a wide distribution of the tort losses since the employer is a most suitable channel for passing them on through liability insurance and higher prices. ...

Fourth, vicarious liability is also a coherent doctrine from the perspective of deterrence. ... Given that it [the employer] will ... be held liable ... it has every incentive to encourage its employees to perform well on the job and to discipline those who are guilty of wrongdoing.

However, the “usual explanations” given for the rule have been criticised as being “hollow”.⁶⁶ The High Court has recognised that, of the various policy bases put forward as justifying the imposition of vicarious liability:⁶⁷

Each of these particular reasons is persuasive to some degree but, given the diversity of conduct involved, probably none can be accepted, by itself, as completely satisfactory for all cases.

64 *Hollis v Vabu Pty Ltd* (2001) 181 ALR 263 per Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ at 273, citing with approval the view expressed by Fullagar J in *Darling Island Stevedoring and Lighterage Co Ltd v Long* (1957) 97 CLR 36 at 56-57.

65 *London Drugs Ltd v Keuhne and Nagel International Ltd* [1992] 3 SCR 299 per La Forest J at 338-340.

66 Williams GL, “Vicarious Liability and the Master’s Indemnity” (1957) 20 *MLR* 220 at 229.

67 *Hollis v Vabu Pty Ltd* (2001) 181 ALR 263 per Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ at 273-274.

(a) Providing an injured plaintiff with a financially viable defendant

The first policy basis for the imposition of vicarious liability is that an injured plaintiff should not go uncompensated because of the tortfeasor's lack of means:⁶⁸

... in tort the actual tortfeasor is in principle liable, and the effect of vicarious liability is to add a defendant, often unknown to and un contemplated by the victim; on one view its purpose is simply to find a defendant who can pay.

This explanation is based upon the consideration that, when someone is injured as a result of the fault of another who has insufficient resources to pay, the injured person should be able to seek compensation from another who, although not at fault, is relevantly connected to the cause of the loss:⁶⁹

However distasteful the theory may be, we have to admit that vicarious liability owes its explanation, if not its justification, to the search for a solvent defendant. It is commonly felt that when a person is injured (particularly when the injury is a bodily one), he ought to be able to obtain recompense from someone; and if the immediate tortfeasor cannot afford to pay, then he is justified in looking around for the nearest person of substance who can plausibly be identified with the disaster.

(b) Employment of others to advance the economic interest of an enterprise

The second policy reason advanced in support of the principle of vicarious liability is that the person on whom vicarious liability is imposed profits or benefits from the labours of the tortfeasor and so should bear the cost of any damage sustained by a third party as a result of a tort committed in the course of those labours.⁷⁰

The general rule is, that the master is answerable for every such wrong of the servant or agent as is committed in the course of the service and for the master's benefit ...

It has been suggested that:⁷¹

... the feeling that one who derives a benefit from an act should also bear the risk of loss from the same act is probably a deep-rooted one which has played its part in the formulation of the modern law.

This rationale for the imposition of vicarious liability has recently received recognition in the High Court:⁷²

⁶⁸ *National Mutual Property Services (Australia) Pty Ltd v Citibank Savings Ltd (No 1)* (1995) 132 ALR 514 per Lindgren J at 534, referring to *Bowstead on Agency* (15th ed, 1985) at 386.

⁶⁹ Williams GL, "Vicarious Liability and the Master's Indemnity" (1957) 20 *MLR* 220 at 232. See also *Hollis v Vabu Pty Ltd* (2001) 181 ALR 263 per McHugh J at 288.

⁷⁰ *Barwick v English Joint Stock Bank* (1867) LR 2 Ex 259 per Willes J at 265.

⁷¹ Atiyah PS, *Vicarious Liability in the Law of Torts* (1967) at 18.

⁷² *Scott v Davis* (2000) 175 ALR 217 per Gummow J at 282. See also *Hollis v Vabu Pty Ltd* (2001) 181 ALR 263 per McHugh J at 288-289.

The doctrine of vicarious liability in modern times derives support from the notion that a party who engages others to advance that party's economic interests should be placed under a liability for losses incurred by third parties in the course of the enterprise.

It has also been considered to be in the interests of fairness that it should be the person who put the tortfeasor in a position to commit the tort, rather than an innocent victim, who should bear the resulting loss. For example, an employer who selects and appoints an employee, and is therefore better placed than a third party to assess the risk of wrongful conduct by the employee, should be liable to an injured third party for the consequences of the employee's conduct:⁷³

... it is more just to make the person who has entrusted his servant with the power of acting in his business responsible for injury occasioned to another in the course of so acting, than that the other and entirely innocent party should be left to bear the loss.

In recent decisions, courts have focused on the concept of "enterprise risk" as justifying the imposition of vicarious liability. The underlying theory is that if an enterprise carries with it certain risks, responsibility for injury caused by those risks should be borne by the person who created the enterprise and therefore the risk:⁷⁴

... where the employee's conduct is closely tied to a risk that the employer's enterprise has placed in the community, the employer may justly be held vicariously liable for the employee's wrong.

(c) Distributing the loss

The third policy reason advanced in support of the principle of vicarious liability is the principle of loss distribution. On this view, the loss resulting from the commission of a tort should be spread across those persons who have a sufficient nexus with the tortfeasor. An example of this would be the relationship between an employer and a negligent employee acting in the course and scope of his or her employment.

In these cases, it is said to be more prudent and equitable to require employers to carry appropriate insurance to cover such liability. As a general rule, those involved in business can more easily insure against such loss or pass on the loss by way of increased prices.⁷⁵

⁷³ *Bugge v Brown* (1919) 26 CLR 110 per Isaacs J at 117. See also *Hern v Nichols* 1 Salk 289, 91 ER 256; *Hamlyn v Houston & Co* [1903] 1 KB 81 per Collins MR at 85-86.

⁷⁴ *Bazley v Curry* [1999] 2 SCR 534 per McLachlin J at 548-549. See also *Hollis v Vabu Pty Ltd* (2001) 181 ALR 263 per Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ at 275 and per McHugh J at 288-289.

⁷⁵ Fleming JG, *The Law of Torts* (9th ed, 1998) at 410.

(d) Deterrence of future harm

The fourth policy reason advanced in support of the principle of vicarious liability is the incentive it provides to employers to exercise their powers of control over their employees in such a way as to minimise the likelihood of loss or injury to third parties occurring in the future:⁷⁶

... deterrent pressures are most effectively brought to bear on larger units like employers who are in a strategic position to reduce accidents by efficient organisation and supervision of their staff.

An employer has the capacity to exercise control over the workplace activities of an employee. An employer may discipline an employee and, ultimately, an employer can terminate the employment of an employee. It is argued that the imposition of vicarious liability on an employer for the wrongful conduct of an employee might encourage the employer to exercise these powers, thereby reducing the risk of future harm.⁷⁷

4. THE ROLE OF INSURANCE

Insurance is often seen as giving effect to the principle of loss distribution, in that the loss is spread across a number of people, who each pay premiums to an insurance company. Although the existence of an insurance policy is sometimes regarded as being relevant to the question of liability, it does not determine the issue.⁷⁸

... courts often wrongly assume that insurance is readily obtainable and that the increased cost of an extension of liability can be spread among customers by adding the cost of premiums to the costs of services or goods. In *Caltex* Stephen J rejected the contention that the existence of insurance or the more general concept of “loss spreading” were valid considerations in determining whether a duty of care existed.⁷⁹ I agree with his Honour. They do not assist but rather impede the relevant inquiry.⁸⁰

76 Ibid.

77 See for example *Bazley v Curry* [1999] 2 SCR 534. See also *Hollis v Vabu Pty Ltd* (2001) 181 ALR 263 per Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ at 275 and per McHugh J at 289.

78 *Perre v Apand Pty Ltd* (1999) 198 CLR 180 per McHugh J at 230. See also *Davie v New Merton Board Mills Ltd* [1959] AC 604 per Viscount Simonds at 626-627. Balkin RP and Davis JLR in *Law of Torts* (2nd ed, 1996) at 14 note:

While some judges occasionally refer to the availability to the defendant of third party insurance as a reason for fixing that person with liability, others (though even more rarely) point to the fact that the plaintiff is likely to have first party insurance so that the loss which has been suffered can be spread through that cover and not transferred to the defendant. But in the great majority of cases the availability and effect of insurance is ignored.

The matter of insurance as a basis for imposing or extending liability was also discussed by the House of Lords in *Launchbury v Morgans* [1973] AC 127. See for example per Viscount Dilhorne at 138, per Lord Pearson at 141-143 and per Lord Salmon at 147.

79 Referring to *Caltex Oil (Australia) Pty Limited v The Dredge “Willemstad”* (1976) 136 CLR 529 at 580-581.

80 But see *Canadian National Railway Co v Norsk Pacific Steamship Co* [1992] 1 SCR 1021 per McLachlin J at 1120-1125.

Loss spreading is not synonymous with economic efficiency - which will sometimes be a relevant factor in determining duty. Australian courts, however, have not accepted that loss spreading is the guiding rationale for the law of negligence or that it should be.

However, although not determinative of the question of liability, the availability of insurance has influenced the development of the common law:⁸¹

Everyone knows that all prudent, professional men carry insurance, and the availability and cost of insurance must be a relevant factor when considering which of two parties should be required to bear the risk of a loss.

The availability of insurance has also had an effect on the development of the principle of vicarious liability:⁸²

... it seems plain that considerations of insurance and the relative capacity of employers and employees to pay damages have had a significant influence on the development of vicarious liability, even if they may not provide a unifying or sufficient justification for the rules that have developed.

Whether a defendant is insured against a particular loss is likely to affect whether a claim proceeds to trial in the first place:⁸³

... if one is injured - whether the injury be to one's person, property or reputation - there is little point in seeking to exercise even an undoubted legal right unless the wrongdoer has liability insurance. Few people have the financial resources to meet even a modest award of damages made against them, together with the costs involved; ...

The High Court has referred to the prospect of litigation occurring where there is no insurance to cover the loss. It concluded that, in cases where the tortfeasor was not insured, "it is much less likely, as a matter of practical reality, that litigation will ensue".⁸⁴

The capacity to pass on, or absorb, or insure against the cost of liability is a relevant consideration when considering any statutory extension of the principle of vicarious liability to relationships such as those between parents and children, teachers and pupils and adult supervisors and those in their charge.⁸⁵

81 *Smith v Eric S Bush* [1990] 1 AC 831 per Lord Griffiths at 858. See also *Morris v Ford Motor Co* [1973] 1 QB 792 per Lord Denning MR at 798.

82 *Scott v Davis* (2000) 175 ALR 217 per Hayne J at 295-296.

83 Balkin RP and Davis JLR, *Law of Torts* (2nd ed, 1996) at 13.

84 *Kars v Kars* (1996) 187 CLR 354 per Toohey, McHugh, Gummow and Kirby JJ at 382.

85 These relationships are examined in Chapter 4 of this Report.

5. SUBMISSIONS

The majority of submissions received by the Commission in response to the Discussion Paper⁸⁶ did not specifically address the policy considerations underlying the application of the principle of vicarious liability, although a number of respondents implicitly supported the continued existence of the principle, at least in relation to the employer/employee relationship.⁸⁷

Three submissions expressly stated support for the principle.⁸⁸ The Department of Family and Community Services, for example, while cautious about extending the principle any further, agreed that, as currently applied, it should remain part of the common law.⁸⁹ A former Queensland Anti-Discrimination Commissioner⁹⁰ and the Transport Workers' Union (Qld Branch)⁹¹ also expressed support.

Two respondents referred to the importance of ensuring that victims of tortious conduct are able to sue a defendant who is likely to be able to meet a successful claim.⁹² The former Queensland Anti-Discrimination Commissioner noted that:⁹³

Vicarious liability ensures that persons with some financial responsibility and capability are involved in providing redress.

Similarly, the submission by the Transport Workers' Union (Qld Branch) noted:⁹⁴

The central issue is ensuring that those who suffer loss as a result of negligence or wrongful conduct are properly compensated.

One of the submissions, however, suggested that there could be cases "where the tortfeasor has a deeper pocket than the principal".⁹⁵

One respondent also identified an employee's contribution to the employer's enterprise as a basis for the imposition of vicarious liability on the employer.⁹⁶

⁸⁶ Queensland Law Reform Commission, Discussion Paper, *Vicarious Liability* (WP 48, July 1995).

⁸⁷ Submissions 6, 7, 8, 9, 11, 13, 14.

⁸⁸ Submissions 5, 10, 12.

⁸⁹ Submission 12.

⁹⁰ Submission 10. At the time Mr John Briton was the Anti-Discrimination Commissioner (Qld).

⁹¹ Submission 5.

⁹² Submissions 5, 10.

⁹³ Submission 10. At the time Mr John Briton was the Anti-Discrimination Commissioner (Qld).

⁹⁴ Submission 5.

⁹⁵ Submission 2A.

⁹⁶ Submission 5.

Where loss or damage results from the negligence of an employee ... it arises because the employee is engaged on the employer's enterprise. ... There is clearly a place for strict (no fault) vicarious liability in our law which operates to protect employees.

The abolition of the principle of vicarious liability was advocated by two respondents:⁹⁷

No one who is personally blameless would relish meeting an account for damages that were caused by an irresponsible junior especially if the guilty party was well able to pay, and was, maybe, acting against orders.

Although recognising the need for compensation in many cases, the respondents suggested in their joint submission that a more equitable way of providing compensation must be found. They suggested the establishment of a fund for this purpose.⁹⁸

6. THE COMMISSION'S VIEW

(a) Retaining the principle of vicarious liability

In the Commission's view, there are sound policy considerations justifying the retention of the general principle of vicarious liability, although there is no single policy ground that can always be identified as a sufficient justification. In some circumstances, the element of control over the activities of the tortfeasor will be the paramount consideration; in other cases, there may be only minimal control, but the benefit to the other party of the tortfeasor's conduct will justify the application of the principle.

However, the Commission considers that a financial capacity to meet an award of damages is, on its own, an unacceptable basis for imposing vicarious liability. It should be the overall nature of the relationship between the parties, and the circumstances of the case, that determine whether policy considerations justify the application of the principle.

Further, the Commission is conscious of the need for caution in extending the application of the principle of vicarious liability to the other relationships identified in the terms of reference.

⁹⁷ Submission 2.

⁹⁸ Ibid.

(b) Non-delegable duty

Because the liability imposed for breach of a non-delegable duty is personal rather than vicarious,⁹⁹ the law relating to non-delegable duties is outside the terms of this reference.

The Commission has, however, given some consideration to the question of whether there is a need for legislation to define with more precision the circumstances that should give rise to a non-delegable duty.

The Commission notes that certain legislative provisions impose a non-delegable duty on individuals or organisations.¹⁰⁰ These statutory provisions, which are specific and protective in nature, impose liability in circumstances where the person charged with the statutory duty engages another person to carry out the obligations imposed by the statute.

Notwithstanding the existence of these provisions, the Commission is not in favour of attempting to define the circumstances in which the duty will arise according to specified relationships. In the Commission's view, this approach would impose an undesirable restriction on the categories of case to which the principle might properly be applied. The Commission considers that it is important for the law in this area to be flexible, and that flexibility is best achieved by retaining the common law, with cases being decided according to their particular circumstances.

Further, the Commission does not favour a more general definition based on concepts such as control and vulnerability.¹⁰¹ In the Commission's view, such a definition would not advance the law in this area, since these concepts are already recognised by the common law as indicia of a non-delegable duty.

The Commission is therefore of the view that there should not be a statutory definition of the circumstances that will give rise to a non-delegable duty.

99 See pp 7-9 of this Report.

100 Examples of such legislative provisions include liability arising under the *Residential Tenancies Act 1994* (Qld) s 103 and the *Workplace Health and Safety Act 1995* (Qld) s 28.

101 See for example the comments of Mason J (with whom Deane and Dawson JJ agreed) in *Kondis v State Transport Authority* (1984) 154 CLR 672 at 687, discussed at p 7 of this Report.

CHAPTER 3

EMPLOYMENT

1. INTRODUCTION

The most common example of vicarious liability is the liability of an employer for the torts of an employee, committed in the course and scope of his or her employment. The imposition of liability on an employer for the torts of an employee demonstrates some of the underlying policy considerations said to justify the development of the principle of vicarious liability:¹⁰²

This ... may be regarded as a judicial decision of policy that the employer is to bear the financial responsibility for those torts committed by servants in the course of conducting the enterprise - both because the employer is better able to stand the loss (or can insure against it) and pass it on to the public in the form of increased prices, and because the employer will be encouraged to maintain higher standards of conduct in the running of the business.

In this context, the imposition of vicarious liability is limited to those relationships that the law regards as an employer/employee relationship. If a worker who negligently causes loss or injury to another person is, for example, an independent contractor rather than an employee, the principal will not be vicariously liable.¹⁰³

A principal is not liable for the wrongs of an independent contractor except where the principal is under a duty that cannot be delegated¹⁰⁴ or the principal has authorised the tortious act.¹⁰⁵ However, in these cases, the liability does not arise vicariously, but is the result of a breach of a duty owed by the principal personally.¹⁰⁶

In order to decide whether a person is vicariously liable for a tort committed by a worker, it is necessary to determine at the outset whether the worker is, in fact, an employee.

It is also necessary to consider whether the employee was acting in the course and scope of his or her employment. If the act or omission of the employee was outside the scope of his or her employment, the employer will not be vicariously liable.¹⁰⁷

102 Balkin RP and Davis JLR, *Law of Torts* (2nd ed, 1996) at 739.

103 *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16.

104 *Kondis v State Transport Authority* (1984) 154 CLR 672 at 688; *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16 at 44.

105 Including cases where the independent contractor acts as agent with the apparent authority of the principal. See pp 5-6 of this Report concerning agency.

106 See pp 4-5 of this Report for an explanation of the difference between personal and vicarious liability.

107 See pp 31-36 of this Report.

In this chapter, the Commission examines:

- whether there should be any change to the present law in relation to whether a worker is an employee or an independent contractor;
- whether a principal should be vicariously liable for the tort of an independent contractor;
- whether a general employer should be vicariously liable for the tort of an employee who has been lent to a third party;
- whether the present law concerning the liability of an employer for the tort of an employee exercising an independent discretionary function is adequate; and
- whether the present law concerning the liability of the State for the tort of a person who is not an employee, but who is performing a function on behalf of the State, is adequate.

2. DETERMINING WHETHER A WORKER IS AN EMPLOYEE OR AN INDEPENDENT CONTRACTOR

(a) Introduction

Although a number of Acts include a definition of “worker” or “employee”, each definition applies only for the purposes of the particular Act in which it is found.¹⁰⁸ There is no general statutory definition of employee for the purpose of the law of vicarious liability. The question whether a tortfeasor is an employee or an independent contractor is determined by the common law, taking into account the circumstances of each case.

At common law, the difference between an employee and an independent contractor is, in essence, whether the worker is engaged under a contract of service or under a contract for services. An independent contractor is engaged under a contract for services, whereas an employee is engaged under a contract of service.

Although the terms of a contract will be of considerable importance in determining whether a contract is one of service or for services,¹⁰⁹ they will not be decisive.¹¹⁰ A

108 Examples include the definition of employee or worker under the *WorkCover Queensland Act 1996* (Qld) and the *Workplace Health and Safety Act 1995* (Qld). See Appendix 2 of this Report for the definition of worker under the *WorkCover Queensland Act 1996* (Qld).

109 *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16 per Wilson and Dawson JJ at 37.

110 *Queensland Stations Pty Ltd v Federal Commissioner of Taxation* (1945) 70 CLR 539 per Dixon J at 552.

variety of indicia are used to distinguish between the two:¹¹¹

Those [indicia] suggesting a contract of service rather than a contract for services include the right to have a particular person do the work, the right to suspend or dismiss the person engaged, the right to the exclusive services of the person engaged and the right to dictate the place of work, hours of work and the like. Those which indicate a contract for services include work involving a profession, trade or distinct calling on the part of the person engaged, the provision by him of his own place of work or of his own equipment, the creation by him of goodwill or saleable assets in the course of his work, the payment by him from his remuneration of business expenses of any significant proportion and the payment to him of remuneration without deduction for income tax.

Other considerations taken into account include the mode of remuneration, provision for holidays and the ability of the worker to delegate performance of the contract to another person.¹¹²

The tests that have been used by the courts to distinguish between an employee and an independent contractor are the control test, the organisation test and the multi-facet test.

(b) The control test

The control test developed from a series of cases that emphasised the degree of control that could be exercised over a worker.¹¹³ The distinction between an employee and an independent contractor was explained in *Performing Right Society Ltd v Mitchell & Booker (Palais De Danse) Ltd*.¹¹⁴

A servant is a person subject to the command of his master as to the manner in which he shall do his work. ... An independent contractor is one who undertakes to produce a given result, but so that in the actual execution of the work he is not under the order or control of the person for whom he does it, and may use his own discretion in things not specified beforehand. [notes omitted]

The application of the test meant that, for a long time, employers were not considered to be vicariously liable for the actions of their professional staff where those actions involved the exercise of professional skill. An example can be found in *Hillyer v The Governors of St Bartholomew's Hospital*.¹¹⁵ The plaintiff suffered a

¹¹¹ *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16 per Wilson and Dawson JJ at 37-38.

¹¹² *Id* per Mason J at 24. See also *Performing Right Society Ltd v Mitchell and Booker (Palais De Danse) Ltd* [1924] 1 KB 762.

¹¹³ See for example *Performing Right Society Ltd v Mitchell & Booker (Palais De Danse) Ltd* [1924] 1 KB 762 per McCardie J at 767; *Honeywill & Stein Ltd v Larkin Bros Ltd* [1934] 1 KB 191 at 196, where it was noted that a person is a servant if the employer "retains the control of the actual performance" of the work; *Humberstone v Northern Timber Mills* (1949) 79 CLR 389 per Latham CJ at 396; *Queensland Stations Pty Ltd v Federal Commissioner of Taxation* (1945) 70 CLR 539 per Latham CJ at 545 and per Rich J at 548-549.

¹¹⁴ [1924] 1 KB 762 per McCardie J at 768, quoting Pollock F, *The Law of Torts* (12th ed, 1923) at 79.

¹¹⁵ [1909] 2 KB 820.

severe burn while under anaesthetic, but was unable to say how it occurred, although it was known that, at the relevant time, a number of doctors, nurses and wardsmen had been present. The Court held that the doctors could not be regarded as servants or employees as they exercised skill according to their own discretion. The same principle was said to apply to nurses except where they were undertaking some administrative function.

The traditional control test was found to be unsatisfactory as the exclusive means of determining who was an employee.¹¹⁶

... a false criterion is involved in the view that if, because the work to be done involves the exercise of a particular art or special skill or individual judgment or action, the other party could not in fact control or interfere in its performance, that shows that it is not a contract of service but an independent contract. ... The duties to be performed may depend so much on special skill or knowledge or they may be so clearly identified or the necessity of the employee acting on his own responsibility may be so evident, that little room for discretion or command in detail may exist.

Technological developments and increased specialisation in the workplace have meant that an employee often exercises a degree of skill and expertise inconsistent with the notion of being subject to the control of the employer.¹¹⁷ Control is therefore now regarded as having more to do with the right of the employer to exercise control, rather than the actual exercise of it, although even this test is not considered conclusive.¹¹⁸

In many, if not most, cases it is still appropriate to apply the control test in the first instance because it remains the surest guide to whether a person is contracting independently or serving as an employee. That is not now a sufficient or even an appropriate test in its traditional form in all cases because in modern conditions a person may exercise personal skills so as to prevent control over the manner of doing his work and yet nevertheless be a servant. This has led to the observation that it is the right to control rather than its actual exercise which is the important thing but in some circumstances it may even be a mistake to treat as decisive a reservation of control over the manner in which work is performed for another. ... [As Dixon J observed] the reservation of a right to direct or superintend the performance of the task cannot transform into a contract of service what in essence is an independent contract. [notes omitted]

116 *Zuijs v Wirth Brothers Pty Ltd* (1955) 93 CLR 561 at 570, 571. See also *Gold v Essex County Hospital* [1942] 2 KB 293; *Cassidy v Ministry of Health* [1951] 2 KB 343.

117 *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16 per Mason J at 28-29. See also *Hollis v Vabu Pty Ltd* (2001) 181 ALR 263 per Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ at 275-276.

118 *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16 per Wilson and Dawson JJ at 36.

(c) The organisation or integration test

The “organisation test” or “integration test” was developed as an alternative to the control test. It relied upon the role played by the worker within the organisation for which the work was performed:¹¹⁹

... under a contract of service, a man is employed as part of the business, and his work is done as an integral part of the business; whereas, under the contract for services, his work, although done for the business, is not integrated into it but is only accessory to it.

The application of the test is demonstrated by a case concerning the employment status of honorary (or visiting) medical officers. These were private practitioners who also treated public patients. The plaintiff, who was a public patient, sued the hospital for the negligence of two of its honorary medical officers. In determining whether the hospital was vicariously liable as employer, the Court suggested that, if the doctors could be said to be part of the organisational structure of the hospital, they were to be regarded as employees, in which case the hospital would be vicariously liable for their negligence. The type of evidence that was said to be important in deciding this issue consisted of an account of the doctors’ activities in the hospital, the use of, and compliance with, hospital procedure and routines and the operation of the by-laws governing the administration of the hospital.¹²⁰

Although the organisation test avoids any suggestion of subordination and makes it easier to determine the position of those persons whose work involves the exercise of a high degree of skill or autonomy, the application of the test, nevertheless, raises another problem:¹²¹

The test does no more than shift the focus of attention to the equally difficult question of determining when a person is part of an organization such that his wrongs may be imputed to that organization. I doubt that the suggested test moves any closer toward a clarification of the fundamental problems of vicarious liability. ... Moreover, on this approach, the organization test has the effect of imposing liability on the proprietor of the organization, whether he had the capacity to control the contractor or not. [notes omitted]

The organisation test has not generally been applied in Australia.

(d) The multi-facet test

The High Court has held that the proper approach for determining whether a relationship is one of employer and employee, or principal and independent contractor, is to apply what can be described as the multi-facet test. This test

¹¹⁹ *Stevenson, Jordan and Harrison Ltd v MacDonald and Evans* (1952) 1 TLR 101 per Denning LJ at 111.

¹²⁰ *Albrighton v Royal Prince Alfred Hospital* [1980] 2 NSWLR 542 per Reynolds JA (with whom Hope and Hutley JJA agreed) at 557.

¹²¹ *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16 per Mason J at 28.

requires the court to look firstly to the element of control (so far as there is scope for it) and then to consider the totality of the relationship between the parties.¹²² For example, Mason J has observed:¹²³

A prominent factor in determining the nature of the relationship between a person who engages another to perform work and the person so engaged is the degree of control which the former can exercise over the latter.

...

But the existence of control, whilst significant, is not the sole criterion by which to gauge whether a relationship is one of employment. The approach of this Court has been to regard it merely as one of a number of indicia which must be considered in the determination of that question. [notes omitted]

However, although courts may take into account a variety of factors¹²⁴ when determining whether a worker is an employee or an independent contractor,¹²⁵ no checklist of factors will be definitive in every case:¹²⁶

... any attempt to list the relevant matters, however incompletely, may mislead because they can be no more than a guide to the existence of the relationship of master and servant. The ultimate question will always be whether a person is acting as the servant of another or on his own behalf and the answer to that question may be indicated in ways which are not always the same and which do not always have the same significance.

The multi-facet test requires a balancing of factors. On the one hand, this makes the test prone to uncertainty; on the other hand, it provides a degree of flexibility so that each case can be considered on its merits.

For example, in *Climaze Holdings Pty Ltd v Dyson*,¹²⁷ the question arose as to whether the relationship between the first respondent (Dyson) and the appellant was that of employer and employee or principal and independent contractor. Dyson carried on a roof plumbing business in partnership with his son.¹²⁸ While they were

¹²² Id at 29. See also *Hollis v Vabu Pty Ltd* (2001) 181 ALR 263 per Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ at 276 and the discussion at pp 25-27 of this Report.

¹²³ *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16 at 24.

¹²⁴ These factors were discussed by the High Court in *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16. For a comprehensive list of factors that can be taken into account when determining whether at common law a worker is an employee or an independent contractor see Falvey S, "The Workcover Queensland Act: who is a worker post July 1?" *Proctor* (November 2000) 20 at 21.

¹²⁵ For a recent application of this approach see *Rauk v Transtate Pty Ltd* (2001) Aust Torts Reports ¶81-592.

¹²⁶ *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16 per Wilson and Dawson JJ at 37. See also Balkin RP and Davis JLR, *The Law of Torts* (2nd ed, 1996) at 742.

¹²⁷ (1995) 13 WAR 487.

¹²⁸ The partnership between Dyson and his son was formed some two years before the accident, when his son was only 15 years of age. At the time, his son was having difficulty in obtaining work as a roof plumber as the relevant union would not issue him with a "ticket" unless he would be paid a full roof plumber's wage. This impasse was resolved by the formation of the partnership between Dyson and his son. This issue is discussed at (1995) 13 WAR 487 at 492.

engaged on a job by the appellant, which itself traded as a roofing contractor, Dyson fell from a ladder and was injured.

The trial judge considered various features of the relationship between the appellant and Dyson and observed that a number of facts had been common ground during the trial. These included the fact that the partnership was given jobs by the appellant either at an hourly rate for father and son respectively or at a lump sum fixed by reference to the actual team that was to perform the work, and the fact that Dyson and his son worked exclusively for the appellant.¹²⁹ The trial judge also found that the partnership was subject to the appellant's control and that all materials and mechanical accessories such as cranes were supplied at the discretion of the appellant.¹³⁰

While these factors supported the argument that the appellant was the employer of Dyson, several other factors did not support such a finding. For example, the weekly invoices rendered by the partnership sometimes reflected amounts due to a Mr Ward, who often assisted Dyson and his son.¹³¹ Further, holiday pay was not paid to Dyson and there was no guarantee of work from the appellant.¹³²

However, despite the business structure adopted by Dyson and his son, the trial judge held that the relationship between the appellant and Dyson was that of employer and employee.¹³³

On appeal, the Full Court of the Supreme Court of Western Australia acknowledged that "the working relationship which existed between the appellant and the first respondent" was "not easily categorised".¹³⁴ It found that the relationship between the appellant and Dyson was that of principal and independent contractor:¹³⁵

It seems to me, when the whole of the evidence is considered, that the relationship between the first respondent and the appellant was that of principal and independent contractor.

There appears, as I have said, to be no doubt that a partnership was, in truth, created between the first respondent and his son Bradley. The partnership rendered tax returns and it invoiced the appellant for the work performed by it.

129 Id per Steytler J (with whom Malcolm CJ and Rowland J agreed) at 494.

130 Id at 494-495.

131 Id at 494.

132 Id at 495.

133 Id at 494.

134 Id at 492.

135 Id at 495.

It seems to me that the whole concept of rendering invoices for work done (more particularly by a partnership comprising two persons trading under a business name) is quite foreign to an ordinary employment relationship.

While the Full Court found that there were indicia - such as the scope for control, the provision of a long service leave number and the payment of superannuation scheme contributions - that pointed to the existence of an employer/employee relationship, it held that these indicia were outweighed by other considerations, such as the rendering by the partnership of invoices that included amounts due to Mr Ward.¹³⁶

The distinction between an employee and an independent contractor was recently considered by the High Court in *Hollis v Vabu Pty Ltd*,¹³⁷ which involved a claim by a pedestrian who was injured when he was knocked over on a footpath by an unidentified courier riding a bicycle and wearing the uniform of a courier company. The pedestrian claimed that the courier was riding the bicycle as the company's employee and agent. The High Court, by majority, found that the courier was an employee of the company:¹³⁸

... Vabu's business involved the marshalling and direction of the labour of the couriers, whose efforts comprised the very essence of the public manifestation of Vabu's business. It was not the case that the couriers supplemented or performed part of the work undertaken by Vabu or aided from time to time; rather, as the two documents relating to work practices suggest, to its customers they *were* Vabu and effectively performed all of Vabu's operations in the outside world. It would be unrealistic to describe the couriers other than as employees. [original emphasis]

In a joint judgment, five judges of the High Court applied the multi-facet test¹³⁹ and not only looked to the contractual terms between the couriers and Vabu, but also examined the "the system which was operated thereunder and the work practices imposed by Vabu"¹⁴⁰ to establish the totality of the relationship between the parties.

The joint judgment took the following factors into account:

- the courier was not engaged in an independent business of his own;¹⁴¹

136 Id at 495-496.

137 (2001) 181 ALR 263.

138 Id per Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ at 279. McHugh J held that the courier was neither an employee (at 284) nor an independent contractor (at 282), but an agent of the company for whose conduct the company should be liable (at 284). Callinan J, who dissented, held that the courier was an independent contractor.

139 Id per Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ at 275-276.

140 Id at 270.

141 Id at 277.

- the courier was not providing skilled labour or labour which required special qualifications;¹⁴²
- the couriers had little control over the manner of performing their work;¹⁴³
- the courier company exercised considerable actual control over the activities of the couriers;¹⁴⁴
- the couriers were required to wear company livery as a means of identification,¹⁴⁵ and were presented to the public and those using the courier service as emanations of the company;¹⁴⁶
- the uniforms and radios used by the couriers for communicating with the company were provided by the company;¹⁴⁷
- the company superintended the couriers' finances, making deductions for unsubstantiated charges and for insurance, and penalising the couriers for damage to or failure to return company property;¹⁴⁸
- there was no scope for the couriers to bargain for the rate of their remuneration;¹⁴⁹ and
- the company controlled the times at which couriers could take leave, and leave was not permitted at certain particularly busy periods such as Christmas and Easter.¹⁵⁰

The respondent's argument that the company's method of paying the couriers made the couriers independent contractors rather than employees was not considered persuasive.¹⁵¹

142 *Ibid.*

143 *Ibid.*

144 *Id* at 279.

145 *Id* at 277-278.

146 *Id* at 277.

147 *Id* at 279.

148 *Id* at 278.

149 *Ibid.*

150 *Id* at 278-279.

151 *Id* at 278.

The method of payment, per delivery and not per time period engaged, is a natural means to remunerate employees whose sole duty is to perform deliveries, not least for ease of calculation and to provide an incentive more efficiently to make deliveries.

Similarly, the joint judgment expressed the view that the couriers were not independent contractors simply because they owned their own bicycles, bore the expense of running them and supplied many of their own accessories.¹⁵²

Although a more beneficent employer might have provided bicycles for its employees and undertaken the cost of their repairs, there is nothing contrary to a relationship of employment in the fact that employees were here required to do so. This is all the more so because the capital outlay was relatively small and because bicycles are not tools that are inherently capable of use only for courier work but provide a means of personal transport or even a means of recreation outside of work time. The fact that the couriers were responsible for their own bicycles reflects only that they were in a situation of employment more favourable than not to the employer; ...

However, the joint judgment conceded that a different conclusion may have been appropriate if the couriers had been required to make a greater investment in capital equipment and had needed greater skill and training to operate it.¹⁵³

3. EXTENDING THE PRINCIPLE OF VICARIOUS LIABILITY TO PRINCIPALS FOR THE TORTS OF INDEPENDENT CONTRACTORS

(a) Introduction

The general rule is that a principal is not vicariously liable for the tort of an independent contractor.¹⁵⁴ Where a tort is committed in the course of the performance of work for the benefit of another person, that other person cannot be vicariously liable unless the tortfeasor was the person's employee or unless the person directly authorised the doing of the tortious act.¹⁵⁵

The work, although done at his request and for his benefit, is considered as the independent function of the person who undertakes it, and not as something which the person obtaining the benefit does by his representative standing in his place and, therefore, identified with him for the purpose of liability arising in the course of its performance. The independent contractor carries out his work, not as a representative but as a principal.

152 Id at 279.

153 Id at 276-277.

154 See the discussion at pp 22-27 of how the multi-facet test is applied to determine whether a worker is an employee or an independent contractor.

155 *Colonial Mutual Life Assurance Society Ltd v Producers and Citizens Co-operative Assurance Co of Australia Ltd* (1931) 46 CLR 41 per Dixon J at 48. This proposition comes from *Quarman v Burnett* (1840) 6 M & W 499; 151 ER 509 at 512. See also *Northern Sandblasting Pty Ltd v Harris* (1997) 188 CLR 313 per Brennan CJ at 329-330 and per McHugh J at 366; *Glenmont Investments Pty Ltd v O'Loughlin (No 2)* (2000) 79 SASR 185 per Doyle CJ, Nyland and Martin JJ at 215.

A number of submissions received by the Commission suggested there was a need to change the law in this area.¹⁵⁶ A former Queensland Anti-Discrimination Commissioner observed:¹⁵⁷

We regularly see cases in anti-discrimination law in which the individual respondent is unable to be located and there is difficulty identifying a vicariously liable respondent due to independent contractor relationships. The complainant is therefore unable to pursue an avenue of redress.

A submission from the Transport Workers' Union argued for an extension of the principle of vicarious liability to apply in respect of certain independent contractors.¹⁵⁸

Any legislation protecting employees from liability should be enlightened by the social circumstances of work in the manner that Workers' Compensation, Industrial, Taxation, Social Security and Superannuation legislation has extended the definition of "employee" to include persons who would otherwise be regarded as contractors.

The totality and reality of the relationship should be considered. Economic circumstances effectively force people into moving outside traditional work patterns although the reality and totality of the relationship may be little different to the traditional employer/employee relationship.

The respondent concluded that:¹⁵⁹

... a more expansive definition of employee is required to cover certain categories of independent contractor.

Two members of the High Court have expressed the view that in an appropriate case it may be necessary to reconsider the question of vicarious liability as it relates to the torts of independent contractors.¹⁶⁰

¹⁵⁶ Submissions 5, 7, 10. The submission from the Insurance Council of Australia (Submission 9B) did not specifically support the extension of the principle of vicarious liability to independent contractors, but noted:

... there could be a case to make a change in the law to provide that firms who require "employees" or operatives to wear the firm's uniform or other outward signs should be the "deemed employer" for the purposes of vicarious liability.

¹⁵⁷ Submission 10.

¹⁵⁸ Submission 5.

¹⁵⁹ Ibid.

¹⁶⁰ *Northern Sandblasting Pty Ltd v Harris* (1997) 188 CLR 313 per McHugh J at 366 and per Kirby J at 392. McHugh J noted:

Nearly 30 years ago Professor Atiyah marshalled the arguments which would justify imposing liability on employers for the acts of independent contractors as well as employees. Those arguments seem as convincing to me today as they did when his work was first published in 1967.

In *Hollis v Vabu Pty Ltd* (2001) 181 ALR 263, Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ noted at 273:

It has long been accepted, as a general rule, that an employer is vicariously liable for the tortious acts of an employee but that a principal is not liable for the tortious acts of an independent contractor. That general rule was not challenged in this appeal. This fact and the availability of a full answer to the appeal within current doctrine makes this an unsuitable case in which to explore the larger question reserved by McHugh J and Kirby J in *Northern Sandblasting*. [notes omitted]

(b) Policy considerations

The question of whether the principle of vicarious liability should be extended so that a principal is vicariously liable for the tort of an independent contractor should be examined in the light of the policy considerations discussed in Chapter 2 of this Report. These considerations are the provision of an injured plaintiff with a financially viable defendant, the employment of others to advance the economic or other interests of an enterprise, the distribution of losses and the deterrence of future harm.

(i) Providing an injured plaintiff with a financially viable defendant

The imposition of vicarious liability on an employer for the tort of an employee is said to be justified on the basis that an employer is usually wealthier than an employee and is therefore in a better position to meet an award of damages.¹⁶¹ However, it has been suggested that a principal who engages an independent contractor is not necessarily any wealthier than the contractor.¹⁶² This view was also expressed by the Department of Family and Community Services:¹⁶³

The principal may also be of a lesser financial standing than the contractor.

(ii) Advancement of the economic interest of an enterprise

A further rationale for imposing vicarious liability on an employer for the tort of an employee is that the employer benefits as a result of the employee's efforts.¹⁶⁴

For over thirty years, the receipt of a benefit has been advanced by academics as a basis for making principals vicariously liable for the torts committed by independent contractors. Writing in 1967 Atiyah argued that the justification for imposing vicarious liability on a principal for the torts of an independent contractor lay in the advantage to the principal of having the work done:¹⁶⁵

The essential point it is argued, is not, who is to blame for the injury or damage caused, but, who should take the risk of such injury or damage? The justification for imposing vicarious liability on employers, it is said, is equally applicable to liability for independent contractors. When a person employs a contractor, it is his business which is being done, he is the party

161 See p 11 of this Report.

162 See for example Williams GL, "Liability for Independent Contractors" (1956) 14 *Cambridge Law Journal* 180 at 195-196.

163 Submission 12.

164 See pp 11-12 of this Report.

165 Atiyah PS, *Vicarious Liability in the Law of Torts* (1967) at 333.

benefiting from the work, and in the long run he should pay his share of the costs - as indeed, he will since the contractor will charge him appropriately, bearing in mind the liabilities which the law imposes on him. Further, the imposition of liability for independent contractors encourages employers to seek out and contract with financially responsible contractors who can meet any damages awarded against them (or indemnify the employer against liabilities imposed on him) and this is in the public interest.

The submission from the Transport Workers' Union identified the benefit to a principal of the work of an independent contractor as justifying a more expansive definition of employee that would include an independent contractor:¹⁶⁶

Principals should be liable for the acts of independent contractors so that liability is assimilated to that of the liability of employers for employees. ... The principal of the independent contractor is the ultimate beneficiary of the independent contractor's work.

(iii) Distributing the loss

It has been suggested that a principal who engages an independent contractor may not necessarily be better able to spread the cost of the damage.¹⁶⁷ The principal may not be in a position to pass on the loss in the form of higher prices, and may not be covered by insurance against damage caused by the negligence of an independent contractor.

(iv) Deterrence of future harm

An employer, by virtue of the ability to direct the manner in which work is carried out, may be able to deter an employee from acting carelessly and thus to reduce the risk of future harm.¹⁶⁸ However, a principal who engages an independent contractor to perform a task may have less knowledge and expertise about the task than the independent contractor, and therefore little capacity to control the independent contractor's actions.

This view was reflected in the submission from the Department of Family and Community Services:¹⁶⁹

166 Submission 5.

167 See for example Williams GL, "Liability for Independent Contractors" (1956) 14 *Cambridge Law Journal* 180 at 195-196. See also p 12 of this Report.

168 See p 13 of this Report.

169 Submission 12.

To make a principal vicariously liable for the torts of an independent contractor would in many cases shift the financial burden of payment of damages to a principal who may have absolutely no expertise or knowledge of the field in which the contractor has been employed, and may be less knowledgeable of standard business practices, such as insurance. ... This Department does not believe that a principal should be made vicariously liable for the torts of an independent contractor.

In contrast, the Transport Workers' Union submitted that, in a number of situations, the control a principal can exercise over an independent contractor is at least as extensive as the control an employer can exercise over the actions of an employee.¹⁷⁰

The Transport Industry, like other industries such as the building and construction industry, has a class of persons who fall into the legal category of "independent contractors". It is typical of many of these people that, although they own and supply a vehicle, they work solely for the one organisation, the vehicle carries that organisation's livery, they wear the uniform of that organisation and all aspects of their work are dictated by the organisation.

4. ACTING IN THE COURSE AND SCOPE OF EMPLOYMENT

(a) The common law test

If, on the evidence, it is established that an employer/employee relationship exists, then in order to impose vicarious liability on the employer for a tort committed by the employee, it is necessary for the plaintiff to show that the tort was committed in the course and scope of the employee's employment.

The test for determining this issue is whether the employee was pursuing the interests of the employer - that is, doing the employer's work. The employer will be vicariously liable if the employee was engaged in an activity for which he or she was employed, or was engaged in an activity incidental to his or her employment, even if that work was undertaken in an unauthorised way.¹⁷¹

170 Submission 5.

171 See for example *Rose v Plenty* [1976] 1 WLR 141. That case involved a breach of an employer's prohibition on employees using children to assist with milk deliveries. Although the employee was in breach of the prohibition, the employer was held to be vicariously liable for injuries caused as a result of the employee's negligence to a child who was paid by the employee to assist him. In *Bugge v Brown* (1919) 26 CLR 110 the employee was involved in the lighting of a fire at an unauthorised place. The employer was held to be vicariously liable for the consequent damage. In *New South Wales v Jeffery* (2000) Aust Torts Reports ¶181-580 it was held that harassment of the plaintiff (respondent) by his supervisor was an unauthorised mode of performing an authorised role, namely that of directing and supervising the respondent in the performance of his work.

However, if the employee was engaged in an activity for which he or she was not employed, then the employer will not be vicariously liable.¹⁷²

... there are prohibitions which limit the sphere of employment, and prohibitions which only deal with conduct within the sphere of employment. A transgression of a prohibition of the latter class leaves the sphere of employment where it was, and consequently will not prevent recovery of compensation. A transgression of the former class carries with it the result that the man has gone outside the sphere.

An employee who takes a detour for his or her own purposes,¹⁷³ may also be acting outside the scope of his or her employment:¹⁷⁴

If he was going out of his way, against the 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.

For example, infantrymen were said to be on a frolic of their own when they took a shell home in breach of army regulations. The shell was found by a subsequent occupant of the house and used as an ornament. It exploded when it was dropped.

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Plumb v Cobden Flour Mills Co Ltd [1914] AC 62 per Lord Dunedin at 67. In *Commonwealth of Australia v Connell* (1986) 5 NSWLR 218, Glass JA commented (at 221):

I would conclude that conduct by an apprentice sailor is within the scope of his service or duty or authority if it is authorised expressly or impliedly or is incidental to what he is authorised to do even though it may be performed in an unauthorised way. If, however, it is not authorised expressly or impliedly and is not so connected with authorised conduct as to be an improper mode of performing it, it is an independent unauthorised act and is outside the scope of his service.

In *Deatons Pty Ltd v Flew* (1949) 79 CLR 370 the employer was held not to be vicariously liable for injury caused when a barmaid threw a glass at a customer. Dixon J (at 382) described the barmaid's conduct as "a spontaneous act of retributive justice", which was not part of or incidental to her employment.

In *Kooragang Investments Pty Ltd v Richardson & Wrench Ltd* [1982] AC 462 an employee was held to be acting outside the scope of his employment when, in breach of a prohibition on making property valuations for a group of companies, he continued to make valuations while at the same time being a director of one of the group's member companies. See also *Keppel Bus Co Ltd v Sa'ad bin Ahmad* [1974] 2 All ER 700.

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Compare for example the cases of *Chaplin v Dunstan Ltd* [1938] SASR 245 and *Storey v Ashton* (1869) LR 4 QB 476. In the first case, the employee was a foreman for a quarry company. He was instructed to take a company truck to one of the company's quarries to dismantle a faulty piece of machinery and take it back to Adelaide for repairs. The assignment involved a round trip of about 140 miles, in addition to several hours hard manual labour to dismantle the machine and load it on the truck. The employee started work at approximately 5.30am. The quarry was closed as it was a public holiday. The trial judge found that the employee had no instructions as to where he was to get anything to eat or drink. Late that afternoon, on the way back to Adelaide, the employee turned off the road to get a drink at a hotel. Unfortunately, he gave insufficient indication of his intention to turn and, as a result, the truck collided with and injured an overtaking motorcyclist. His employer argued that it was not vicariously liable for his negligence because it was not within the course and scope of his employment to diverge from the road to the hotel. It was held that, in the circumstances, it was reasonably incidental to the employment on that day that he should make a detour to the hotel for a drink. In the second case, the employee deviated from the most direct route for the purpose of visiting a member of the family of the person who was travelling with him. During this deviation the plaintiff was injured as a result of the employee's negligence. The employer was held not to be vicariously liable for the plaintiff's injury because the deviation was not merely a roundabout way of returning, but was a new and independent journey in the opposite direction. See also *Harvey v RG O'Dell Ltd* [1958] 2 QB 78, where the employer was vicariously liable for the death of a side car passenger due in part to the negligence of the employee who, at the time, was driving to a nearby town for tools and materials and to have refreshments.

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Joel v Morison (1834) 6 Car & P 502; 172 ER 1338 per Parke B at 1339. See also *Harrison v Michelin Tyre Co Ltd* [1985] 1 All ER 918.

The Court held that the Commonwealth was not vicariously liable for the acts of the infantrymen.¹⁷⁵

The fact that an employer is not vicariously liable when an employee is on a “frolic of his own” is consistent with the considerations underlying the principle of vicarious liability, in particular, that an employer has the capacity to exercise control over the activities of the employee during the course of his or her employment and that an employee, acting in the course of employment, advances the economic or other interests of the employer.

(b) Intentional torts

An intentional tort can give rise to civil and/or criminal liability. An assault, for example, can constitute a breach of the criminal law,¹⁷⁶ and can also give rise to a civil action for damages as a trespass to the person.¹⁷⁷ A reference to liability in this Report is a reference to civil, rather than criminal, liability.¹⁷⁸

An issue raised by the Commission in the Discussion Paper¹⁷⁹ concerned the incongruity of an intentional tort, for example an assault, being committed “in the course of employment”.

Nevertheless, there is little doubt that an employer can be vicariously liable for intentional torts committed by an employee in the same way that an employer is liable for the negligence of an employee.¹⁸⁰ Where the employee intends to further the interests of the employer, the act will be within the scope of the employment as long as it is reasonably incidental to the performance of the work that the employee was employed to do.¹⁸¹ Even where the act is done for the employee’s own purposes and not for the benefit of the employer, it will be within the scope of the

175 *McClure v Commonwealth* [1999] NSWCA 392 (26 October 1999) per Priestley, Beazley, Fitzgerald JJA.

176 *Criminal Code* (Qld) s 245.

177 A reason why there are few civil actions for trespass to the person is that a court in criminal proceedings is empowered, if an accused person is convicted on indictment of a personal offence or is convicted on indictment and a personal offence is taken into account on sentence, to order the convicted person to pay compensation to the injured person: *Criminal Offence Victims Act 1995* (Qld) s 24. For a discussion of the appropriate method of assessing, subject to a statutory maximum, the amount of compensation to be awarded, see *McClintock v Jones* (1995) Aust Torts Reports ¶81-339.

178 The question of vicarious liability for the criminal acts of another person is outside the terms of this reference. See Chapter 1 of this Report.

179 Queensland Law Reform Commission, Discussion Paper, *Vicarious Liability* (WP 48, July 1995) at 30.

180 See for example *Poland v John Parr and Sons* [1927] 1 KB 236; *Canterbury Bankstown Rugby League Football Club Pty Ltd v Rogers* (1993) Aust Torts Reports ¶81-246; *Lloyd v Grace, Smith & Co* [1912] AC 716. In *Racz v Home Office* [1994] 2 AC 45 the House of Lords held that a party may be vicariously liable for acts of others amounting to misfeasance in public office. In that case, prison officers were accused of ill-treating the plaintiff while he was on remand. See also Swanton J, “Master’s Liability for the Wilful Tortious Conduct of his Servant” (1985-86) 16 *UWA Law Rev* 1.

181 *Canterbury Bankstown Rugby League Football Club Pty Ltd v Rogers* (1993) Aust Torts Reports ¶81-246.

employment if it is sufficiently connected to an activity that the employee was authorised to carry out.¹⁸²

Vicarious liability has been imposed on employers for non-physical intentional torts. In one case, for example, a firm of cleaners was held to be vicariously liable to the owner of a mink coat which was stolen by one of the firm's employees. The imposition of vicarious liability was based on the fact that the employer, in the course of its business, had given the employee the care of the fur.¹⁸³

It was one of their servants to whom they had entrusted the care and custody of the fur for the purpose of doing work upon it who converted it by stealing it. Why should they not be vicariously liable for this breach of their duty by the [person] whom they had chosen to perform it?

Vicarious liability has also been imposed for physical torts. A football club has been found vicariously liable for an assault committed during the course of a professional game. It was held that the assault, intended to assist in the defeat of the opposing team, was committed in the course of employment, even though an illegitimate tackle had been used.¹⁸⁴ The employee's conduct was held by the court to be an unauthorised mode of carrying out an activity for which the employee had been employed.

However, the employer of a barmaid, who struck a customer in the face with a beer glass, was held not to be vicariously liable for the assault.¹⁸⁵ In coming to this decision, the Court had regard to considerations such as whether the act was in furtherance of the interests of the employer and whether it was so connected with an authorised act as to make the employer vicariously liable.¹⁸⁶ The Court found that the barmaid's conduct was outside the course of her employment:¹⁸⁷

... the act of the barmaid was not expressly authorized, it was not so connected with any authorized act as to be a mode of doing it, but was an independent personal act which was not connected with or incidental in any manner to the work which the barmaid was employed to perform.

182 *Lloyd v Grace, Smith & Co* [1912] AC 716; *Morris v CW Martin and Sons Ltd* [1966] 1 QB 716.

183 *Morris v CW Martin and Sons Ltd* [1966] 1QB 716 per Lord Diplock at 733.

184 *Canterbury Bankstown Rugby League Football Club Ltd v Rogers* (1993) Aust Torts Reports ¶81-246.

185 *Deatons Pty Ltd v Flew* (1949) 79 CLR 370.

186 *Id* per Latham CJ at 379, per Dixon J at 380, per Williams J at 387 and per Webb J at 388. In *Auckland Workingmen's Club and Mechanics Institute v Rennie* [1976] 1 NZLR 278 at 284 Mahon J applied a similar test before concluding:

... the assault committed by the house manager, although associated with his contractual duty to his employer and originating from an altercation which first took place as a result of the house manager's proper discharge of his duties, was nevertheless commenced, carried out and completed after any need to preserve order existed, and was done in a spirit of personal retribution in no way connected with the interests of the employer.

187 *Deatons v Flew Pty Ltd* (1949) 79 CLR 370 per Latham CJ at 379.

In England, the House of Lords recently emphasised the necessity of establishing a close connection between the nature of the employment and the particular tort:¹⁸⁸

What has essentially to be considered is the connection, if any, between the act in question and the employment. If there is a connection, then the closeness of that connection has to be considered. The sufficiency of the connection may be gauged by asking whether the wrongful actings can be seen as ways of carrying out the work which the employer had authorised.

In that case, the defendant was the employer of the warden of the boarding annexe of a school, run as a commercial enterprise by the defendant, for children with emotional and behavioural difficulties. The warden was employed to care for the children living in the annexe. The claimants, who had resided in the annexe as children and been sexually abused by the warden, sought damages from the defendant. The Court found that there was evidence of a sufficiently close connection between the warden's employment and the abuse to hold the defendant vicariously liable.¹⁸⁹

... the employers entrusted the care of the children ... to the warden. ... the sexual abuse was inextricably interwoven with the carrying out by the warden of his duties ...

The "connection" test has also been used in Canada to impose vicarious liability on the operator of a residential care facility for the sexual abuse by an employee of a child in its care:¹⁹⁰

... there must be a strong connection between what the employer was asking the employee to do (the risk created by the employer's enterprise) and the wrongful act. It must be possible to say that the employer significantly increased the risk of the harm by putting the employee in his or her position and requiring him to perform the assigned tasks. ... What is required is a material increase in the risk as a consequence of the employer's enterprise and the duties he entrusted to the employee ... [original emphasis]

The Court emphasised, however, that the test was not to be applied mechanically, but rather required a trial judge "to investigate the employee's specific duties and determine whether they gave rise to special opportunities for wrongdoing".¹⁹¹ This approach is reflected in another Canadian case, where a boys' and girls' club was held not to be vicariously liable for a sexual assault committed by one of its employees. A majority of the Court was of the view that there was not a sufficient link between the alleged tort and the employment duties to justify the imposition of vicarious liability. The assaults occurred at the home of the employee outside

188 *Lister v Hesley Hall Ltd* [2001] 2 WLR 1311 per Lord Clyde at 1325.

189 *Id* per Lord Steyn at 1323. See also per Lord Clyde at 1330 and per Lord Millet at 1343.

190 *Bazley v Curry* [1999] 2 SCR 534 per McLachlin J at 560-561.

191 *Id* at 563.

working hours and the opportunity afforded by the club for the employee to abuse his power in the course of his duties was slight.¹⁹²

The Queensland Court of Appeal recently doubted whether vicarious liability could be imposed on either the State of Queensland or the Minister for Education for acts of sexual abuse committed by a teacher employed by the State education authority against pupils at a school maintained by the authority:¹⁹³

... in Australia ... an employer is generally not vicariously liable for an assault by an employee that is an independent and personal act not connected with or incidental in any way to the work the employee is expressly or impliedly authorised to perform.

The acts of abuse committed by the teacher were described as “inimical to the purposes of the employment” and “the very antithesis of what (the teacher) was employed to do”.¹⁹⁴

5. THE LENT EMPLOYEE

(a) The common law

At common law, where an employer (the general employer) lends an employee to a third party and the employee commits a tort while carrying out work for the third party, the general employer will be vicariously liable for the tort of the employee unless the general employer can prove that the employee had become an employee *pro hac vice* - an employee “for the time being” or “for the occasion” - of the third party.¹⁹⁵

The onus of proving the transfer of the employee rests with the general employer and is a “heavy onus, which can only be discharged in quite exceptional circumstances”.¹⁹⁶

In *Mersey Docks and Harbour Board v Coggins and Griffith (Liverpool) Ltd*,¹⁹⁷ a harbour authority (the board) hired a mobile crane and driver to a stevedoring company. Although the power to dismiss the driver remained with the board, the general hiring conditions stipulated that the driver was to be the servant of the hirer.

¹⁹² *Jacobi v Griffiths* [1999] 2 SCR 570.

¹⁹³ *Rich v State of Queensland* [2001] QCA 295 (27 July 2001) per McPherson JA at [6]. See also per Thomas JA at [24]. The case was argued on the issue of non-delegable duty. See pp 7-9 of this Report for a discussion of a non-delegable duty.

¹⁹⁴ Id per Thomas JA at [24].

¹⁹⁵ *Mersey Docks and Harbour Board v Coggins and Griffith (Liverpool) Ltd* [1947] AC 1 per Lord Macmillan at 13.

¹⁹⁶ *Deutz Australia Pty Ltd v Skilled Engineering Ltd* (2001) 162 FLR 173 per Ashley J at 189, referring to *Mersey Docks and Harbour Board v Coggins and Griffith (Liverpool) Ltd* [1947] AC 1 per Viscount Simon at 10.

¹⁹⁷ [1947] AC 1.

In the course of operating the crane, the driver negligently injured an employee of the stevedoring company. The board unsuccessfully argued that it was not the employer of the driver at the time of the accident and therefore was not vicariously liable for his negligence. Notwithstanding the agreement between the board and the hirer, the House of Lords held that the board had failed to satisfy the burden of proving that a transfer from the general employer had taken place:¹⁹⁸

[When] the plaintiff has proved injury caused by the negligence of Newall [the lent employee], and the question arises who is answerable as “superior” for such negligence, this question is not to be determined by any agreement between the owner and the hirer of the crane, but depends on all the circumstances of the case. Even if there were an agreement between the ... board and the ... company that in the event of the ... board being held liable for negligent driving of the crane while it is under hire to the latter, the latter will indemnify the ... board, this would not in the least affect the right of the plaintiff to recover damages from the ... board as long as the ... board is properly to be regarded as the crane driver’s employer. It is not disputed that the burden of proof rests on the general or permanent employer - in this case the ... board - to shift the prima facie responsibility for the negligence of servants engaged and paid by such employer so that this burden in a particular case may come to rest on the hirer who for the time being had the advantage of the service rendered.

In *Denham v Midland Employers Mutual Assurance Ltd*,¹⁹⁹ Lord Denning described the “supposed transfer”²⁰⁰ as:²⁰¹

... nothing more than a device - a very convenient and just device, mark you - to put liability on to the temporary employer. ... It only applies when the servant is transferred so completely that the temporary employer has the right to dictate, not only *what* the servant is to do, but also *how* he is to do it. [original emphasis]

The issue of liability for lent employees was recently considered by the Victorian Supreme Court in *Deutz Australia Pty Ltd v Skilled Engineering Ltd*.²⁰² After recognising the concept of employee transfer as a policy device,²⁰³ Ashley J concluded:²⁰⁴

... the courts have had to construct a framework for deciding when circumstances have been disclosed which are sufficient to shift the responsibility of vicarious liability from general to temporary employer.

198 Id per Viscount Simon at 10.

199 [1955] 2 QB 437.

200 Id at 443-444.

201 Id at 444.

202 (2001) 162 FLR 173.

203 Id at 188.

204 Id at 189.

Ashley J identified the following circumstances as those in which a transfer may be discerned.²⁰⁵

- Where the hirer can direct not only what the workman is to do, but how he is to do it.
- Where the hirer is entitled to tell the employee the way in which he is to do the work.
- Where the complete dominion and custody over the servant has passed from the one to the other.
- Where, by an agreement “the employer vests in the third party complete, or substantially complete, control of the employee, so that he is not only entitled to direct the employee what he is to do, but how he is to do it”.
- Where it can be said that the hirer has such authority to control the manner in which the worker does his work that it can be said that the worker is serving the hirer, not merely serving the interests of the hirer.
- Where it cannot be said that the reason that the worker subjected himself to control of the so-called temporary employer as to what he did and how he did it was that his general employer told him to do so.
- Where it can be said that the servant was transferred, not merely the use and benefit of his work. [notes omitted]

Although it is difficult for a general employer to avoid being found vicariously liable for a wrongful act committed by a lent employee,²⁰⁶ one case in which there was held to be a transfer of employment was *McDonald v The Commonwealth*.²⁰⁷ In that case the Commonwealth hired a vehicle and a driver for a purpose of which the general employer was unaware. The Commonwealth had available to it the services of the driver for about nine months, during which time the general employer saw him only occasionally. The vehicle and the driver were not hired by the Commonwealth to do a particular job, or even a particular class of work. They were both made available to the Commonwealth which, at the time, did not even know the general nature of the work to be done or where it was to be done, and they were used under the instructions of a Commonwealth foreman for any purposes that arose incidental to the work that the foreman was carrying out.

The driver negligently caused injury to another worker. In finding the Commonwealth liable, Jordan CJ applied the following test:²⁰⁸

205 Id at 189-190.

206 Id per Ashley J at 189. See also Balkin RP and Davis JLR, *Law of Torts* (2nd ed, 1996) at 744:

In most cases where a worker is lent with a machine or where a skilled worker is lent so as to exercise a skill for the benefit of the temporary employer, a transfer of control is deemed not to take place. This has been explained on the basis that the parties do not contemplate a transfer, there being an understanding that the worker is to obey the directions of the person with whom the permanent employer has a contract, but only in so far as is necessary or convenient for the purpose of carrying out the contract.

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

207 (1945) 46 SR (NSW) 129.

208 Id at 132.

Prima facie, it is the general employer who is liable ... and liability is not shifted to the particular employer by the fact that even a considerable degree of control is exercisable by him; but the greater his right to control, the greater the likelihood that it is open to a tribunal of fact to find that his has become the relevant control, and that a shift of liability has occurred.

...

I think that the principles established by the authorities are as follow. If by the agreement the employer vests in the third party complete, or substantially complete, control of the employee, so that he is entitled not only to direct the employee what he is to do but how he is to do it, and the employee was performing services stipulated for, or authorised by, the third party at the time, the third party is liable. If the control vested in the third party is only partial, so that, although the third party is entitled to give directions to the employee as to what he is to do, he is not entitled to direct him how he is to do it, the employer remains liable. If, however, the third party, though not entitled to do so as between himself and the employer, assumes to give a special direction to the employee as to how he is to do a particular act, or if he directs him to do an act outside the scope of the stipulated services, and the employee, in complying with the direction, negligently causes the injury, it is the third party who is liable. [notes omitted]

Legislation may also impose liability on a party for the torts of a person who is not an employee of that party. For example, in *Oceanic Crest Shipping Co v Pilbara Harbour Services Pty Ltd*²⁰⁹ a statutory scheme of compulsory pilotage made the shipowner liable for the negligence of the pilot who was an employee of Pilbara Harbour Services.

(b) Submissions

The Commission received three submissions in relation to the question of who should be vicariously liable for a tort committed by a lent employee.²¹⁰ Each of these submissions expressed the view that the general employer should remain vicariously liable.²¹¹

The Queensland Nurses' Union noted:²¹²

The matter of the "lent" employee is the cause of increasing concern to this Union. ... [The] general employer [should maintain] accountability and liability for the "lent" employee.

209 (1986) 160 CLR 626.

210 Submissions 7, 8, 12.

211 *Ibid.* The submission from the Transport Workers' Union (Submission 5) did not indicate whether the general employer or third party should be vicariously liable, but noted:

As between employers, where an employee is "lent" by one to the other, such an employee should always remain protected and indemnified by one or other of the employers.

212 Submission 8.

One of the reasons advanced for this view was that it reduced the uncertainty faced by a plaintiff. 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 third party. This makes the litigation more complex and difficult to settle and illustrates the need for greater certainty in determining who is to be vicariously liable for the loss or injury suffered.

In its submission, the ACTU (Qld Branch) commented:²¹³

... the identification of any criteria in which the liability passed from the general employer to another employer would create in our view a potential litigious situation wherein establishment of who was the employer would need to occur. This could be prevented by maintaining simplicity of operation and identifying in all circumstances the general employer.

The submission from the Department of Family and Community Services also supported the need for greater certainty in the law:²¹⁴

This Department also believes that it would be advantageous from the point of view of clarity of the law, thereby reducing litigation on the point, to make employers statutorily vicariously liable for the negligence of an employee who has been "lent" to a third party.

(c) The position under WorkCover concerning lent employees

The term "worker" is defined in the *WorkCover Queensland Act 1996* (Qld) to mean an individual who works under a contract of service.²¹⁵ It also includes a person mentioned in schedule 2 part 1 of the Act.²¹⁶ That schedule includes as a "worker":

5. A person who is a party to a contract of service with another person who lends or lets on hire the person's services to someone else.
6. A person who is party to a contract of service with a labour hire agency or a group training organisation that arranges for the person to do work for someone else under an arrangement made between the agency or organisation and the other person.
7. A person who is party to a contract of service with a holding company whose services are let on hire by the holding company to another person.

213 Submission 7.

214 Submission 12.

215 *WorkCover Queensland Act 1996* (Qld) s 12(1). See Appendix 2 of this Report for the full definition of worker under the *WorkCover Queensland Act 1996* (Qld).

216 *WorkCover Queensland Act 1996* (Qld) s 12(2).

The term “employer” is defined in the legislation to mean a person who employs a worker.²¹⁷ The term also includes a person mentioned in schedule 2A of the Act.²¹⁸ That schedule includes as “persons who are employers”:

1. A person who lends or lets on hire the services of a worker who is party to a contract of service with that person continues to be the worker’s employer while the worker’s services are lent or let on hire.
2. If a labour hire agency or group training organisation arranges for a worker who is party to a contract of service with the agency or organisation to do work for someone else, the agency or organisation continues to be the worker’s employer while the worker does the work for the other person under an arrangement made between the agency or organisation and the other person.
3. If a holding company lets on hire the services of a worker who is party to a contract of service with the holding company, the holding company continues to be the worker’s employer while the worker’s services are let on hire.

The effect of these provisions is that an employer who has a contract of service with a worker remains the employer of that worker (for the purposes of the Act) even when the worker is lent on hire.²¹⁹

6. LIABILITY OF THE STATE

At common law, the State²²⁰ could not itself commit a tort or be vicariously liable for torts committed by its servants.²²¹ However, all Australian jurisdictions have now enacted legislation which, in most circumstances, imposes vicarious liability on the State, as on any other employer, for torts committed by its employees.²²²

217 *WorkCover Queensland Act 1996* (Qld) s 32(1). An employer includes a government entity that employs a worker (s 32(1)(a)) and a deceased employer’s legal personal representative (s 32(1)(b)).

218 *WorkCover Queensland Act 1996* (Qld) s 32(2).

219 Advice from WorkCover Queensland dated 16 August 2000 notes:

The only circumstances where the ‘host employer’ would be responsible for workers’ compensation for a lent worker would be where the lent worker actually entered into a ‘contract of service’ with the ‘host employer’ for the period of the temporary employment.

220 Also referred to as the Crown.

221 *Tobin v The Queen* (1864) 16 CB (NS) 310; 143 ER 1148. See also *Downs v Williams* (1971) 126 CLR 61 per Gibbs J at 96.

222 *Crown Proceedings Act 1992* (ACT) s 5; *Judiciary Act 1903* (Cth) ss 56, 64; *Crown Proceedings Act 1988* (NSW) s 5; *Crown Proceedings Act* (NT) s 5; *Crown Proceedings Act 1980* (Qld) s 9; *Crown Proceedings Act 1992* (SA) s 5; *Crown Proceedings Act 1993* (Tas) s 5; *Crown Proceedings Act 1958* (Vic) s 23(1)(b); *Crown Suits Act 1947* (WA) s 5. The formula used is either that “the rights of the parties shall as nearly as possible be the same as in an ordinary case between subject and subject”, or that the same substantive law applies in proceedings against the Crown as in proceedings between subjects.

(a) State employees

Where a person who is an employee of the State - for example, a person employed in the State Public Service - commits a tort in the course of his or her employment, the State is, subject to certain exceptions,²²³ vicariously liable. The State's liability arises from the employer/employee relationship which exists between the person who committed the tort and the State.

(b) Persons in the service of the State

There are other persons who perform certain work or functions for the State, but who are not under any contract of employment with the State. In a number of cases these persons are appointed by the executive council to commissions or boards and hold office by virtue of such appointment. The New South Wales Law Reform Commission considered the status of people who hold appointments of this kind and noted:²²⁴

We consider that the most satisfactory description of an officer of the State, where that person is not a servant of the State, is that notwithstanding that the relationship between [the person] and the State is not that of servant and master, [the person] is "in the service" of the State. ... Again, there are holders of many statutory offices who clearly are "in the service" of the State - albeit that they have only statutory duties to perform and, during their term of office, enjoy statutory independence.

Such officers are not employees in the sense in which the word is used to define the employer/employee relationship and therefore the State is not vicariously liable for their torts.

A consequence of this is that a plaintiff will have to look to the individual tortfeasor, rather than to the State, for compensation for loss or injury arising from the tort. In some circumstances, the State may be liable directly, but only if it can be established that the tortfeasor was acting as agent for, or on behalf of, the State or that the State was in breach of a non-delegable duty.²²⁵

223 See pp 43-52 of this Report for a discussion of the exercise of an independent discretionary function.

224 New South Wales Law Reform Commission, Report, *Proceedings By and Against the Crown* (LRC 24, 1975) at 63.

225 See pp 5-9 of this Report.

7. THE EXERCISE OF AN INDEPENDENT DISCRETIONARY FUNCTION

(a) Introduction

The independent discretionary function principle is a common law development that has been recognised by the courts for almost one hundred and forty years.²²⁶ It provides an exception to the rule that an employer is vicariously liable for the tortious conduct of an employee committed within the course of employment.

The principle applies when an employee is performing a duty or exercising an authority conferred on the employee not by the employer but by common law or statute.²²⁷

... the question is whether the person who committed the tort was acting in the performance (or supposed performance) of a duty imposed by law (either by statute or by common law) or whether his authority to act was derived from his employment.

The application of the principle requires, in addition to a duty imposed by law on the employee, the exercise by the employee of an independent discretion in performing the duty. Accordingly, the principle will not apply if, in carrying out the duty, the employee is not exercising a discretion,²²⁸ or if the performance of the duty in question is subject to the employer's control, in which case the exercise of the discretion cannot be described as independent.²²⁹

The effect of the principle is to confer an immunity on an employer for the consequences of a tort committed by an employee in the exercise of an independent discretion.²³⁰

... any public officer whom the law charges with a discretion and responsibility in the execution of an independent legal duty is alone responsible for tortious acts which he may commit in the course of his office and that for such acts the government or body which appointed him incurs no vicarious liability. [notes omitted]

226 *Tobin v The Queen* (1864) 16 CB (NS) 310; 143 ER 1148. *Tobin's* case was decided by an English Court. It was followed by the High Court of Australia in *Enever v The King* (1906) 3 CLR 969, which established the independent discretionary principle as part of the law in Australia. The principle was recently confirmed in *Cubillo v Commonwealth (No 2)* (2000) 174 ALR 97 per O'Loughlin J at 443-444.

227 *Oceanic Crest Shipping Company v Pilbara Harbour Services Pty Ltd* (1986) 160 CLR 626 per Gibbs CJ at 637.

228 See for example *Oriental Foods (Wholesalers) Co Pty Ltd v Commonwealth* (1983) 50 ALR 452. In that case the Commonwealth of Australia was sued by an importer of goods for the alleged negligence of a customs officer who damaged the goods while inspecting them. Yeldham J held (at 459) that the "mere examination and repacking" of the goods was "a purely ministerial and somewhat menial task", not involving any special duty or discretion.

229 See for example *Bennett v Minister for Community Welfare* (1988) Aust Torts Reports ¶180-210. Nicholson J, in the Supreme Court of Western Australia, held (at 68,089) that, where a statute conferred a duty on the Director of a government Department and provided that the Director was subject to the direction of the relevant Minister, the Minister could not invoke the principle. See also the discussion of the principle in *Cubillo v Commonwealth* (2000) 174 ALR 97 at 443-444.

230 *Little v The Commonwealth* (1947) 75 CLR 94 per Dixon J at 114.

The independent discretionary function principle is generally invoked in relation to employees of the State or persons in the service of the State.²³¹ Courts have held the Crown, as employer, not vicariously liable for certain acts committed by police officers,²³² legal aid officers,²³³ magistrates,²³⁴ Crown prosecutors²³⁵ and the Commissioner of Taxation.²³⁶

However, the Crown will not escape liability as employer simply because the person who committed the tort belongs to any specific class of worker. The immunity depends not on the position of the person alleged to have committed the tort, but rather on whether the requirements for the application of the independent discretionary function principle have been satisfied - that is, whether the conduct alleged to constitute the tort occurred in the discharge of a duty conferred on the person by either common law or statute and involved the exercise of an independent discretion:²³⁷

... if the tort committed by ... a Crown employee is not connected with his independent authority and is otherwise within the course of his employment, the Crown is vicariously liable. It can be sued, for example, if the customs officer circulates a libel, or a police constable negligently drives a car.

The basis for the immunity is that, where an employee must exercise an independent discretion in the performance of his or her obligations, the employer has no authority either to discharge the duty or to control the performance of the duty by the employee.²³⁸

231 However, two members of the High Court have suggested that its operation is not confined to the torts of public officers. See *Oceanic Crest Shipping Company v Pilbara Harbour Services Pty Ltd* (1986) 160 CLR 626 per Gibbs CJ at 638 and per Wilson J, who observed (at 650):

It is immaterial whether the employer be the Crown, ... a statutory corporation, ... or a private company ...

Both Brennan J (at 664) and Deane J (at 679) expressed the view that the principle did not apply where the employer was a private trading company having a commercial interest in its employees' exercise of a statutory responsibility. Dawson J considered (at 681-682) the application of the principle in the context of private employment to be "a question of some difficulty", but found (at 682) that, on the facts of the case, the question did not arise.

232 See for example *Enever v The King* (1906) 3 CLR 969; *Irvin v Whitrod (No 2)* [1978] Qd R 271. Liability for torts committed by police officers in the execution of their duty is discussed at pp 46-48 of this Report.

233 *Field v Nott* (1939) 62 CLR 660. In that case Dixon J noted (at 675):

When a public officer, although a servant of the Crown, is executing an independent duty which the law casts upon him, the Crown is not liable for the wrongful acts he may commit in the course of his execution. ... The Crown is not acting through him and is not vicariously responsible for his tort.

234 *Thompson v Williams* (1914) 32 WN (NSW) 27.

235 *Grimwade v State of Victoria* (1997) Aust Torts Reports ¶81-422 per Harper J at 64,076.

236 *Clyne v Deputy Commissioner of Taxation (NSW) (No 5)* (1982) 13 ATR 677.

237 *Oriental Foods (Wholesalers) Co Pty Ltd v Commonwealth* (1983) 50 ALR 452 per Yeldham J at 458.

238 *Oceanic Crest Shipping Company v Pilbara Harbour Services Pty Ltd* (1986) 160 CLR 626 per Brennan J at 662. See also *Enever v The King* (1906) 3 CLR 969 per Barton J at 982.

When the Crown or a public authority is the employer of a public officer who is charged by statute with the exercise of an “independent responsibility cast on him by law”, what is done in discharge of that responsibility is not done on behalf of the employer. The Crown or public authority, having no authority either to discharge that responsibility or to control its discharge, is not acting through the officer and what is done by the officer in the discharge of the independent responsibility by the employee is not regarded as done in the course of his employment as a servant of the Crown or public authority. [notes omitted]

(b) Criticisms of the principle

The principle has been subject to academic criticism for over thirty years:²³⁹

If public officials of this nature are held not to be servants of anybody it follows that they alone can be liable for any tort committed in the course of carrying out their public functions, and the result must inevitably be to impose personal liability for loss either on the official himself, if he is financially able to meet it, or on the innocent victim, if he is not.

The following criticisms of the independent discretionary function principle have been made.²⁴⁰

First, it was only from around the middle of the last century that one could begin reasonably to speak of officer holders under the Crown being in some instances in a position similar to employees. And these, for the most part, were the holders of minor positions. ... It is to this writer not at all obvious why it should be assumed that Crown liability should turn on the quite arbitrary fashion in which functions were - and are - allocated by statute.

Secondly, ... [i]t is precisely in those cases where officials exercise independent functions that they act as the Executive State. ... Here, where the core issue is the nature of the relationship of the Crown *not* with its officials but with its subjects - a citizen-State matter - there is, I would venture, reason enough to contemplate a departure from applying the law as between subject and subject.

There is no merit in the independent discretion rule. It has been abolished by statute in most jurisdictions of major common law countries. [original emphasis]

The Australian Law Reform Commission recently considered the effect of the principle on the liability of the Commonwealth²⁴¹ and noted:²⁴²

239 Atiyah PS, *Vicarious Liability in the Law of Torts* (1967) at 78. See also *Cubillo v Commonwealth* (2000) 174 ALR 97 per O’Loughlin J at 443-444.

240 Finn P, “Claims against government legislation” in *Essays on Law and Government Vol 2* (1996) at 36-37. See also Fleming JG, *The Law of Torts* (9th ed, 1998) at 418-419.

241 Australian Law Reform Commission, Report, *The Judicial Power of the Commonwealth: A Review of the Judiciary Act 1903 and Related Legislation* (ALRC 92, October 2001).

242 Id at 491, 492.

[it] is outdated and creates an inappropriate exception to the general abrogation of the Commonwealth's immunity from tort.

...

... the principle should be clearly abolished in respect of the Commonwealth ...

Abrogation of the principle by legislation was supported in numerous submissions made to the Commission.²⁴³

The Australian Council of Trade Unions (Queensland) argued that the legislation should apply to both private and public sector employees.²⁴⁴

The ACTUQ is particularly interested in the identification within the paper [Discussion Paper WP 48] of a legislative framework to accommodate instances of independent discretionary function ...

... although [legislation] offers a positive option of addressing the issue of independent discretionary function, we would however indicate that [such legislation] would need to have [broad] application to include both employees of the Crown, [and] also employees employed within the private sector.

The Department of Family and Community Services supported this view:²⁴⁵

This Department believes that there is room for statutory reform ... to impose vicarious liability on employers for the torts of employees exercising an independent discretionary function.

(c) Members of the police service

At common law, the performance by members of the police service of their duties did not arise out of a relationship of employer and employee.²⁴⁶ For example, where the duties related to preservation of the peace or the apprehension of offenders, neither superior officers, nor the State itself, could direct the detailed manner in which the officer was to perform them and so the State could not be held responsible as

243 Submissions 7, 8, 10, 12, 13.

244 Submission 7.

245 Submission 12.

246 *Irvin v Whitrod (No 2)* [1978] Qd R 271 per DM Campbell J at 276; *Enever v The King* (1906) 3 CLR 969. In *Enever*, the plaintiff sued the Crown in right of Tasmania in respect of his wrongful arrest by a police officer following a disturbance on the streets in Hobart. The officer's personal liability was not in question. The Government argued that it was not vicariously liable because the officer was not its "officer, agent or servant" as provided for by s 4 of the *Crown Redress Act 1891* (Tas). The High Court discussed the history of the office of constable, 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 should be liable for a constable's wrongs. Griffith CJ (at 977) 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". Accordingly, it was held that no action lay against the Government for the wrongful arrest of the plaintiff by the constable.

employer for any torts committed by the officer in the course of carrying out those duties.²⁴⁷ It is in this respect especially that the principle has been criticised.²⁴⁸

In all Australian jurisdictions the common law has been modified by legislation that imposes vicarious liability on the State for torts committed by police officers in the course of duty.²⁴⁹

In Queensland, section 10.5(1) of the *Police Service Administration Act 1990* (Qld) makes the State liable as a joint tortfeasor for a tort committed by an “officer, staff member or recruit or volunteer, acting, or purporting to act, in the execution of duty as an officer, a staff member, recruit or volunteer, in like manner as an employer is liable for tort committed by the employer’s servant in the course of employment”. Section 10.5(4) provides that, for the purposes of the section, “an action done or omission made by an officer acting, or purporting to act, in the capacity of a constable is taken to have been done or made by the officer acting, or purporting to act, in the execution of duty as an officer”.

The effect of section 10.5(1) and (4) is to remove the independent discretionary function principle in relation to a tort committed by a police officer.²⁵⁰

However, section 10.5(2) provides that the State is not liable to pay punitive damages.²⁵¹ Punitive damages, which are sometimes referred to as exemplary

247 *Attorney-General for New South Wales v Perpetual Trustee Co Ltd* (1952) 85 CLR 237 per Kitto J at 303-304.

248 See for example Goode MR, “The Imposition of Vicarious Liability to the Torts of Police Officers: Considerations of Policy” (1975) 10 *MULR* 47 at 48-50; Kirby The Hon Justice M, “Controls over Investigation of Offences and Pre-Trial Treatment of Suspects” (1979) 53 *ALJ* 626 at 641; Churches SC, “‘Bona Fide’ Police Torts and Crown Immunity: a paradigm of the case for judge made law” (1980) 6 *U Tas LR* 294 at 303-305.

249 *Australian Federal Police Act 1979* (Cth) s 64B; *Law Reform (Vicarious Liability) Act 1983* (NSW) s 8; *Police Administration Act* (NT) s 163; *Police Service Administration Act 1990* (Qld) s 10.5(1); *Police Act 1998* (SA) s 65; *Police Regulation Act 1898* (Tas) s 52; *Police Regulation Act 1958* (Vic) s 123; *Police Act 1892* (WA) s 137. Commonwealth, New South Wales, Northern Territory and Queensland legislative provisions make the State liable as a joint tortfeasor with the police officer. The provisions in Victoria, South Australia, Tasmania and Western Australia make the Crown alone liable.

250 Although s 10.5(1) refers to the liability of the Crown as being the same as an employer (and therefore subject to the application of the independent discretionary function principle), s 10.5(4) appears to impose liability on the Crown in circumstances that would otherwise be regarded as the exercise of an independent discretionary function.

The provisions of the *Police Service Administration Act 1990* (Qld) do not apply to community police appointed under the *Community Services (Aborigines) Act 1984* (Qld) or the *Community Services (Torres Strait) Act 1984* (Qld). Community police appointed by local councils under these Acts remain liable for torts committed by them in the execution of their duties. However, the State may indemnify an Aboriginal or Island police officer who incurs legal liability for committing a tort while acting, or purporting to act, in the execution of duty as an officer, provided that the officer acted honestly and without gross negligence. If the legal liability is incurred as a result of helping, directly or indirectly, a person suffering, or apparently suffering, from illness or injury in circumstances that the officer reasonably considers to be an emergency, and the officer has acted honestly and without gross negligence, the State must indemnify the officer: *Community Services (Aborigines) Act 1984* (Qld) s 41A; *Community Services (Torres Strait) Act 1984* (Qld) s 39A.

251 See for example *Henry v Thompson* [1989] 2 Qd R 412. In that case the plaintiff recovered damages, including exemplary or punitive damages, against three defendants who were police officers whom the trial judge found had assaulted the plaintiff. At the hearing of the appeal against the decision, the Court was told that, in all probability, the State would meet the award for compensatory damages, including aggravated damages. However, Williams J noted (at 416) that the then statutory equivalent to s 10.5(2) (s 69B of the *Police Act 1937* (Qld)) did not extend the liability of the State to pay punitive damages. Similar provisions exempt the Commonwealth, Northern Territory and Western Australian governments from liability to pay punitive or exemplary damages: *Australian Federal Police Act 1979* (Cth) s 64B(3); *Police Administration Act* (NT) s 163(3); *Police Act 1892* (WA) s 137(6).

damages, may be imposed by a court to punish a defendant or to deter a defendant and others from engaging in reprehensible conduct. They are awarded only if the court considers the defendant's conduct:²⁵²

... wanton, as where it discloses fraud, malice, violence, cruelty, insolence or the like, or, ... in contumelious disregard of the plaintiff's rights.

It has been suggested that it is not appropriate to impose punitive damages on a person who is merely vicariously liable for damage caused by a tortfeasor:²⁵³

It is difficult to conceive that such a derivative liability would call for punishment in the circumstances that the payer of damages is liable by imputation rather than action ...

Although there is little judicial authority on this issue in Australia, two recent cases indicate that courts recognise the existence of a discretion to award punitive damages against an employer who is vicariously liable for the tort of an employee.²⁵⁴

The effect of section 10.5(2) is therefore to place the State in a different position from other employers, in that a court will not have a discretion, as it does in the ordinary employer/employee relationship, to impose vicarious liability on the State for punitive damages resulting from the commission of a tort by a member of the police service.

The submission from the Queensland Police Union of Employees noted:²⁵⁵

... [the] specific prohibition on the Crown being liable for any award of exemplary or punitive damages ... gives rise to injustices in circumstances where a Court is mindful to award punitive damages in favour of the Plaintiff and where a police officer is sued personally together with the Crown and thus the police officer is the sole target against whom an award of exemplary damages may be made.

(d) Persons in the service of the State

An independent discretionary function may also be conferred on an individual who is a person in the service of the State.²⁵⁶ For example, legislation creating a statutory board or commission may confer functions on members appointed to the board or commission.

²⁵² *Uren v John Fairfax and Sons Pty Ltd* (1966) 117 CLR 118 per McTiernan J at 122, citing *Mayne & McGregor on Damages* (12th ed, 1961) at 196.

²⁵³ *McDonald v State of New South Wales* [1999] NSWSC 350 (20 April 1999) per Grove J at [56]. See also *Canterbury Bankstown Rugby League Football Club Ltd v Rogers* (1993) Aust Torts Reports ¶81-246 per Giles AJA (with whom Handley JA agreed) at 62,554 and Todd S, "Exemplary Damages" (1998) 18 *NZULR* 145 at 182-184. But, for a contrary view, see also the Law Commission (England), Consultation Paper No 132, *Aggravated, Exemplary and Restitutionary Damages* (1993) 148, 149 and *Carrington v Attorney-General and Murray* [1972] NZLR 1106 at 1111.

²⁵⁴ *Canterbury Bankstown Rugby League Football Club v Rogers* (1993) Aust Torts Reports ¶81-246; *McDonald v State of New South Wales* [1999] NSWSC 350 (20 April 1999).

²⁵⁵ Submission 13B.

²⁵⁶ See p 42 of this Report for a discussion of persons in the service of the State.

As mentioned earlier,²⁵⁷ under the existing law in Queensland, the State is not generally liable for a tort committed by a person in the service of the State, irrespective of whether the person is exercising, or purporting to exercise, an independent discretion.

(e) Legislation in other jurisdictions

In two Australian jurisdictions (New South Wales and South Australia), the effect of the independent discretionary function principle has been abrogated by statute. The relevant provisions are set out below. In other jurisdictions it has been abrogated only in relation to police officers.²⁵⁸

The Australia Law Reform Commission recently recommended that the principle should be expressly abolished in relation to the Commonwealth.²⁵⁹

The principle has also been abrogated in relation to Crown employees in New Zealand,²⁶⁰ England²⁶¹ and in most Canadian Provinces.²⁶²

(i) New South Wales

The New South Wales legislation extends to employees in the public and private sectors and also applies to persons in the service of the State, whether or not they are exercising an independent discretionary function.

The *Law Reform (Vicarious Liability) Act 1983* (NSW) implemented recommendations made by the New South Wales Law Reform Commission in its 1975 Report on *Proceedings By and Against the Crown*.²⁶³

The New South Wales Law Reform Commission was of the opinion that an employer (including the State and State instrumentalities) should be liable for a tort committed by an employee in the performance or purported

257 See p 42 of this Report.

258 See p 47 of this Report.

259 Australian Law Reform Commission, Report, *The Judicial Power of the Commonwealth: A Review of the Judiciary Act 1903 and Related Legislation* (ALRC 92, October 2001), Recommendation 25-1 at 492.

260 *Crown Proceedings Act 1950* (NZ) s 6(3).

261 *Crown Proceedings Act 1947* (UK) s 2(3).

262 See Hogg PW and Monahan PJ, *Liability of the Crown* (3rd ed, 2000) at 126 for those jurisdictions where legislation expressly allows an action to be brought against the Crown for a tort committed by an officer of the Crown in the exercise of an independent discretionary function. In relation to those provinces where Crown proceedings legislation does not expressly abolish the independent discretionary function rule, the authors refer to the judgment of LeDain J in *Baird v The Queen* [1984] 2 FC 160 at 186 and observe (at note 94) that, arguably, in the federal jurisdiction "the rule did not survive ... despite the absence of an express abolition".

263 New South Wales Law Reform Commission, Report, *Proceedings By and Against the Crown* (LRC 24, 1975). See especially Part 13 at 38-64.

performance of a function (including a power or a duty) conferred or imposed on the employee by law if the performance or purported performance was:²⁶⁴

- (a) directed to or incidental to the carrying on of any business, enterprise, undertaking or activity of the master; or
- (b) an incident of (the employee's) service (whether or not it was a term of (the employee's) contract of service that (the employee) perform the function).

The Commission also recommended that the State should be liable for torts of persons in the service of the State committed in the performance of an independent function.²⁶⁵

In presenting the Bill to the Parliament, the then Minister emphasised that the Government's intention was that the legislation should apply to all persons (Crown and private employees and to persons in the service of the Crown) who exercise functions "conferred by law" and that the Bill put the liability of such persons in line with common law principles of vicarious liability.²⁶⁶ The New South Wales Act provides:²⁶⁷

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 the servant's 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

264 Id at 58.

265 Id at 63.

266 New South Wales, *Parliamentary Debates*, Legislative Assembly, 17 March 1983 at 4764, 4765.

267 For a discussion of the Act see Kneebone S, "The Independent Discretionary Function Principle and Public Officers" (1990) 16 *Mon LR* 184 at 204-206.

- (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 the master's 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 the servant's service for his or her master or is an incident of the servant's service (whether or not it was a term of his or her contract of service that the servant perform the function); or
 - (b) is directed to or is incidental to the carrying on of any business, enterprise, undertaking or activity of the servant's 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 the person's service with the Crown or is an incident of the person's service (whether or not it was a term of the person's appointment to the service of the Crown that the person 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 the person on the person's own account; or
 - (b) carried on by any partnership, of which the person is a member, on account of the partnership.

Section 8 of the Act imposes on the Crown a wider liability than that envisaged by the New South Wales Law Reform Commission. That Commission's recommendation in relation to a person in the service of the

State applied only where the tort was committed by such a person in the exercise of an independent discretionary function.²⁶⁸

(ii) South Australia

In South Australia, section 10(2) of the *Crown Proceedings Act 1972 (SA)* abolished the independent discretionary function principle. That section provided:²⁶⁹

In any proceedings in tort against the Crown no defence based upon an actual or presumed independent discretion on the part of the person whose act or default is alleged to constitute the tort shall be admitted unless a similar defence would be admitted in the case of proceedings between subject and subject.

Although that Act was subsequently repealed by the *Crown Proceedings Act 1992 (SA)*, the common law rule was not revived.²⁷⁰ However, the 1972 abrogation of the rule applied only to proceedings against the Crown and did not extend to private sector employees, for example the pilot in the *Oceanic Crest Shipping Company case*.²⁷¹

8. THE COMMISSION'S VIEW

(a) The determination of whether a worker is an employee or an independent contractor

In the view of the Commission, the question of whether a person is an employee for the purposes of the principle of vicarious liability should continue to be determined by reference to the common law multi-facet test. The Commission recognises the vagaries of the test, based as it is on a consideration of different indicia. However, the test provides flexibility for a consideration of the issues on a case by case basis, and allows liability to be imposed on an employer for the torts of those workers whose work is closely aligned with that of the employer.

The Commission does not support the introduction of a statutory definition of “employee” for the purposes of the principle of vicarious liability. It is concerned that it would be difficult to formulate a definition that is sufficiently precise to distinguish between a worker who is so closely associated with the work of the employer that the employer should be vicariously liable for his or her torts, and a worker who

²⁶⁸ New South Wales Law Reform Commission, Report, *Proceedings By and Against the Crown* (LRC 24, 1975) at 63.

²⁶⁹ The section was discussed in *State of South Australia v Kubicki* (1987) 46 SASR 282. See also *De Bruyn v South Australia* (1990) 54 SASR 231 per Legoe J at 242.

²⁷⁰ *Acts Interpretation Act 1915*(SA) s 16.

²⁷¹ *Oceanic Crest Shipping Company v Pilbara Harbour Services Pty Ltd* (1986) 160 CLR 626.

operates an entirely independent business, contracting with a number of persons. The Commission is of the view that the existing common law test²⁷² provides the flexibility necessary to deal with varying types of employment relationships and the changing nature of work practices.

(b) The question of extending the principle of vicarious liability to the torts of independent contractors

The Commission considers that the policy considerations that support the application of the principle of vicarious liability to the employer/employee relationship do not apply, in the same way, to the relationship between a principal and an independent contractor. Consequently, the Commission is of the view that a principal should not be made vicariously liable for the tort of an independent contractor.

The imposition of vicarious liability on an employer for the torts of an employee is said to be justified on the basis that it provides an injured plaintiff with a financially viable defendant. However, the Commission recognises that a principal who engages an independent contractor may be of a lesser financial standing than the independent contractor. Further, the Commission is of the view that the financial capacity of a party to meet an award of damages is, on its own, an unacceptable basis for imposing vicarious liability.²⁷³

The fact that an independent contractor advances the economic or other interests of the principal's business has been said to justify extending the law concerning vicarious liability.²⁷⁴ However, the relationship between the parties may be one where the independent contractor is engaging in his or her own business, quite apart from any business of the principal and where there is no on-going relationship between the principal and the independent contractor.

The Commission acknowledges the view of the Transport Workers' Union²⁷⁵ that the application of the principle of vicarious liability should be extended so that a principal is vicariously liable for a tort committed by an independent contractor who wears the uniform of the principal's organisation and who owns and supplies a vehicle carrying that organisation's livery.²⁷⁶ However, in the Commission's view, these matters are already taken into account in the test for determining the question of whether a worker is an employee or an independent contractor.²⁷⁷ As discussed above, the application of the multi-facet test allows for inclusion within the status of "employee"

272 See pp 22-27 of this Report.

273 See p 16 of this Report.

274 Atiyah PS, *Vicarious Liability in the Law of Torts* (1967) at 333.

275 Submission 5.

276 See p 31 of this Report.

277 See pp 22-27 of this Report.

of a worker who might, on a narrower test, be found to be an independent contractor. In the Commission's view, the circumstances outlined by the Transport Workers' Union do not, by themselves, justify the application of the principle of vicarious liability to a principal for a tort committed by an independent contractor.

The imposition of vicarious liability on an employer for the torts of an employee is also said to be a means of loss distribution as an employer can insure against the loss or pass on the loss by way of increased prices. In the Commission's view, a principal may be in no better position to spread the loss than an independent contractor.

In the employer/employee relationship, the imposition of vicarious liability on an employer is said to constitute an incentive for the employer to exercise control over the workplace activities of employees and to adopt strategies to minimise the risk of loss or injury to third parties. However, in the Commission's view, the relationship between a principal and an independent contractor may be one where there is no capacity for lawful control over the work of the independent contractor. In these circumstances, the Commission considers that the imposition of vicarious liability on the principal cannot be regarded as analogous to its imposition in the employer/employee relationship.

(c) The requirement that an employee must be acting in the course and scope of employment

At common law, for vicarious liability to arise, an employee must be acting in the course and scope of his or her employment. The Commission regards this requirement as an appropriate basis on which to distinguish between those acts and omissions for which an employer should be made liable and those acts or omissions that should not give rise to vicarious liability on the part of an employer. The Commission is therefore of the view that there should be no legislative change to the common law in this area.

Further, the Commission does not recommend any change to the common law concerning the application of the principle of vicarious liability where an employee commits an intentional tort. The same policy considerations that ground the vicarious liability of an employer for the negligence of an employee apply with equal force to intentional torts committed by an employee. No cogent reasons have been advanced to change this aspect of the law, although the requirement that an employee must be "acting in the scope of employment" might be more difficult to meet in cases of serious assaults. The view of the Commission is that, where the injury was caused by a tort of the employee committed in the course and scope of the employment, the employer should be vicariously liable regardless of whether the tort arose from a negligent or an intentional act.

(d) The lent employee

The Commission has considered who should be vicariously liable for the tort of a lent employee.²⁷⁸ The view of the Commission is that, while a contract of service remains in place between a general employer and an employee, the general employer should remain vicariously liable for the torts of the employee committed in the course of his or her engagement with the third party.

The rationale for this view is that the general employer is in a better position to control the arrangements under which the employee is lent. The cost of insurance against loss or injury caused by the lent employee can often be absorbed into the hiring charges and, in some instances, risks may be insured against more conveniently by the general employer than by the third party because of the general employer's broader experience with the particular kind of risk, such as the operation of equipment.²⁷⁹

A general employer may also be able to impose upon the third party, as a condition of the arrangement, a contractual obligation requiring the third party to indemnify the general employer against any loss or liability incurred as a result of the actions of the lent employee.

The Commission is also concerned about the possibility that an injured plaintiff could be disadvantaged if the employee who caused the damage had been lent to an impecunious or uninsured third party.

The common law position, under which liability for the torts of a lent employee might be shifted from the general employer to the third party, can also lead to uncertainty if the plaintiff is unable to identify the correct defendant. In such a case, it would be necessary to join both the general employer and the third party as defendants. This would make the litigation more complex and could hinder a negotiated settlement of the plaintiff's claim.

In the Commission's view, the introduction of legislation to the effect that, where a worker is lent to a third party, vicarious liability will remain with the general employer, would provide increased certainty while not imposing any significantly greater burden on a general employer than that already carried by an employer for the acts or omissions of a lent employee. It would mean that the vicarious liability of a general employer could not be shifted to a third party, even where the common law would presently regard there to have been a transfer of the employee's services sufficient to impose vicarious liability on the third party.²⁸⁰ Legislation to this effect would not prohibit a general employer from entering into an agreement with the third party concerning the time, circumstances, purpose, or conditions under which a worker is

²⁷⁸ See pp 36-41 of this Report for a discussion of vicarious liability for the torts of a lent employee.

²⁷⁹ Fleming JG, "Borrowed Servants and the Theory of Enterprise Liability" (1967) 76 *Yale Law Journal* 807 at 816-817.

²⁸⁰ See for example *McDonald v The Commonwealth* (1945) 46 SR (NSW) 129.

lent. This agreement could also include a term concerning indemnification of the general employer by the third party for liability incurred as a result of a tort committed by the lent employee. However, where a person suffered loss or injury as a result of the tortious conduct of a lent employee, any agreement between the general employer and the third party would not affect the injured person's entitlement to recover damages from the general employer.

In coming to this view, the Commission is conscious that liability might be imposed on an employer who may not be able to exercise control over the activities of the lent employee. However, vicarious liability can presently be imposed in circumstances where, because of the particular skill of an employee, an employer is unable to exercise control over that employee.

For these reasons, the Commission is of the view that, provided a lent employee retains a contract of service with the general employer, the general employer should be vicariously liable for the torts of the employee to the same extent as if the employee had not been lent. This view is consistent with the statutory arrangements concerning workers' compensation in Queensland.²⁸¹

(e) The exercise of an independent discretionary function

The Commission is of the view that the common law concerning liability for a tort committed in the exercise of an independent discretionary function is in need of reform.

(i) Employees of the State

The State should not be able to avoid liability on the ground that a tort committed by an employee in the course of, or arising out of, the employee's employment with the State, was done in the exercise of a duty conferred by law.

The independent discretionary function principle has been subject to judicial and academic criticism and has been abrogated in some jurisdictions.²⁸² The Commission agrees with the criticisms of the principle expressed by academic writers, judges and those who made submissions to the Commission.

The Commission is therefore of the view that the State should be vicariously liable for a tort committed by an employee in the performance of an independent discretionary function to the same extent that it would have been vicariously liable if the tort had not been committed in the performance or purported performance of an independent discretionary function.

281 The relevant WorkCover provisions are set out at pp 40-41 of this Report.

282 See pp 45-52 of this Report.

(ii) Employees in the private sector

At present, there is some uncertainty as to whether the independent discretionary function principle applies to employees of private enterprises. The Commission is therefore of the view that, to put the matter beyond doubt, legislation should be enacted to provide that employers other than the State, are liable for torts committed by employees in the exercise or purported exercise of an independent discretionary function.

(iii) Persons in the service of the State

The Commission is also concerned that, where a person in the service of the State commits a tort in the exercise or purported exercise of an independent discretionary function, the injured plaintiff is unable to hold the State vicariously liable. An amendment to the law so as to extend the vicarious liability of employers to the torts of employees arising out of the exercise of an independent discretionary function would not assist the injured plaintiff in these circumstances. The Commission is therefore of the view that any recommendation to impose vicarious liability on the State for a tort committed in the exercise of an independent discretionary function should apply to the torts not only of employees but also of persons in the service of the State.

(f) Members of the police service

The Commission's view is that the State should continue to be vicariously liable for torts committed by members of the police service in the course and scope of their employment, in the same way that an employer is vicariously liable for the torts of an employee. However, in light of the legislation proposed by the Commission there is no need to retain sections 10.5(1) and (1A) of the *Police Service Administration Act 1990* (Qld).

The liability of the State should, in appropriate cases, include any claims for punitive damages. The view of the Commission is that, where it can be established that a member of the police service was acting in the course and scope of his or her employment, it should be open to a court to make a finding of punitive damages against the State. This is consistent with the general position regarding other employer/employee relationships.

Although courts will rarely exercise the discretion to award punitive damages against an employer who is vicariously liable for the tort of an employee,²⁸³ the Commission considers that it is undesirable that the blanket prohibition in section 10.5(2) of the *Police Service Administration Act 1990* (Qld), on the award of punitive damages against the State when it is found vicariously liable for the tortious conduct of a member of the police service, should put the State in a different position from other

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Gray v Motor Accident Commission (1998) 196 CLR 1 per Gleeson CJ, McHugh, Gummow and Hayne JJ at 6. See p 48 of this Report.

employers. The Commission is also concerned that a consequence of the prohibition on the award of punitive damages against the State is that an individual member of the police service may be solely liable for any punitive damages that are awarded to the plaintiff, in circumstances where, for other employees, the court would have the option to order that the employer and employee be jointly liable.²⁸⁴

(g) Vicarious liability of the State for a function (other than an independent discretionary function) performed by a person in the service of the State

For the purposes of vicarious liability, the relationship between the State and a person in the service of the State should be the same as the relationship between an employer and an employee. It would be inconsistent with the views expressed in this Report if the State were held vicariously liable for a tort committed by a person in the service of the State in the exercise of an independent discretionary function, but not for a tort committed by the person in the performance of duties involved in the person's service that did not involve the exercise of an independent discretion. The Commission is therefore of the view that the State should be liable where the tort of the person in the service of the State does not arise from the exercise of an independent discretionary function but nevertheless arises out of his or her service of the State.

9. RECOMMENDATIONS

The Commission recommends that:

- 3.1 There should be no legislative change to the common law concerning the principle of vicarious liability as it currently applies to the employer/employee relationship.**
- 3.2 There should be no legislative change to the common law concerning the determination of whether a worker is an employee or an independent contractor.**
- 3.3 There should be no legislative change to the common law concerning the vicarious liability of a principal for the torts of an independent contractor.**

²⁸⁴

See pp 102-106 of this Report for a discussion of contribution.

- 3.4** Legislation should be introduced to provide that, where an employer, including the State, lends or lets on hire an employee's services to another person and the employee commits a tort while there continues to be a contract of service between the employer and the employee, the employer is vicariously liable for the tort to the same extent, if any, that the employer would have been vicariously liable if the employer had not lent or let the employee's services to the other person.²⁸⁵
- 3.5** Legislation should be introduced to provide that, unless otherwise provided for by statute:
- (a) an employer is vicariously liable for a tort committed by an employee in the performance or purported performance of an independent function to the same extent, if any, as if the tort had not been committed in the performance or purported performance of an independent function.²⁸⁶
 - (b) the State is vicariously liable for a tort committed by a State employee²⁸⁷ in the course of, or arising out of, the State employee's employment, including a tort committed in the performance or purported performance of an independent function, to the same extent, if any, that an employer would be vicariously liable for the tort if:
 - (i) the tort had been committed by an employee, other than a State employee; and
 - (ii) for a tort committed in the performance or purported performance of an independent function, the tort had not been committed in the performance or purported performance of an independent function.²⁸⁸
 - (c) the State is vicariously liable for a tort committed by an individual in the service of the State in the performance or purported performance of a function conferred on the individual, including an independent function, to the same extent, if any, that an employer would be vicariously liable for the tort if:

²⁸⁵ See cl 3 of the draft legislation (proposed s 11F of the *Law Reform Act 1995* (Qld)). The draft legislation is set out in Appendix 4 to this Report.

²⁸⁶ See cl 3 of the draft legislation (proposed s 11D of the *Law Reform Act 1995* (Qld)).

²⁸⁷ As to what is meant by a State employee in this context see p 42 of this Report and see cl 3 of the draft legislation (proposed s 11C of the *Law Reform Act 1995* (Qld)).

²⁸⁸ See cl 3 of the draft legislation (proposed s 11E of the *Law Reform Act 1995* (Qld)).

(i) the tort had been committed by an employee, other than a State employee; and

(ii) for a tort committed in the performance or purported performance of an independent function, the tort had not been committed in the performance or purported performance of an independent function.²⁸⁹

3.6 Section 10.5(1), (1A) and (2) of the *Police Service Administration Act 1990* (Qld) should be repealed.²⁹⁰

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See cl 3 of the draft legislation (proposed s 11E of the *Law Reform Act 1995* (Qld)).

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See Part 3 of the draft legislation. For a discussion of those provisions within s 10.5 of the *Police Service Administration Act 1990* (Qld) that relate to indemnity and contribution, see Chapter 5 of this Report.

CHAPTER 4

VICARIOUS LIABILITY FOR THE TORTS OF CHILDREN

1. INTRODUCTION

The terms of this reference²⁹¹ require an examination of the law of vicarious liability, with particular reference to:

- parent/child relationships;
- adult supervisor/child relationships; and
- teacher/pupil relationships.

When a person suffers a loss or an injury as the result of an act or omission of a child,²⁹² the question arises as to whether the child, or anyone else, may be liable for the act or omission in question. As noted earlier in this Report, the principle of vicarious liability operates for the most part in the area of employment.²⁹³ Under the existing law, vicarious liability is not imposed in any of the relationships referred to above. The possible extension of the principle of vicarious liability to these relationships raises the question of whether a parent, adult supervisor or teacher should be liable for the loss or injury caused by a child in circumstances where the parent, adult supervisor or teacher has not breached any personal duty²⁹⁴ owed to the person who has suffered the relevant loss or injury.²⁹⁵

In the Commission's view, this question should be considered in the light of the policy considerations that underlie the principle of vicarious liability generally in order to identify whether there are features of these relationships that would justify a change to the existing law.²⁹⁶

The Commission is also of the view that the question of whether vicarious liability should be imposed in these relationships needs to be considered in the light of the existing law concerning two related issues.

291 The full terms of this reference are set out at p 1 of this Report.

292 In Queensland, the age of majority is 18 years of age: *Law Reform Act 1995* (Qld) s 17. For the purposes of this reference, the Commission uses the term "child" to mean a person under the age of 18.

293 See Chapter 3 of this Report.

294 See pp 4-5 of this Report for an explanation of the difference between personal and vicarious liability.

295 The personal liability of a parent, adult supervisor or teacher is considered at pp 64-66, 70-71 and 72-74 of this Report.

296 See pp 9-13 of this Report for a discussion of the policy bases of vicarious liability.

The first issue concerns the liability of a child for a tortious act. Even if the law were changed so that a parent, adult supervisor or teacher could be held to be vicariously liable for the tort of a child, it would be necessary, in order to establish vicarious liability on the part of the relevant adult, to prove liability on the part of the child. If, on the facts of a particular case, it could not be proved that the act or omission of the child was negligent or that the act was committed with intent, the child would not be liable in respect of his or her conduct, and no question of vicarious liability would arise.

The second issue concerns the extent to which a parent, adult supervisor or teacher may, under the existing law, be personally liable for loss or injury caused to a third party by a child in his or her care. The fact that a parent, adult supervisor or teacher is not vicariously liable for a tort committed by a child does not necessarily mean that a person whose loss or injury is caused by the child will be left without redress against one of these adults.

Consequently, this chapter will examine:²⁹⁷

- the personal liability of a child whose act or omission causes loss or injury to another person;
- the personal liability of a parent, adult supervisor and teacher for the loss or injury caused to a person by the conduct of a child; and
- whether the law in relation to vicarious liability should be changed so that these adults will be vicariously liable for a tort committed by a child.

2. LIABILITY OF A CHILD FOR TORTIOUS ACTS

There is no particular age below which a child cannot be liable for a tort that he or she commits.²⁹⁸ It may nevertheless be difficult, in light of a child's age, to show that the child has in fact committed a tort. This is particularly so in an action for negligence as the standard of care required of a child differs from that required of an adult.

In *McHale v Watson*,²⁹⁹ the High Court considered the question of the standard of care required of a child in a negligence action. In that case, a 9 year old girl was injured while playing with a 12 year old boy. During the course of play the boy threw

²⁹⁷ In view of the terms of reference, the Commission's recommendations will be confined to the last of these issues.

²⁹⁸ By contrast, a person under the age of 10 years is not criminally responsible for any act or omission, and a person under the age of 14 years is not criminally responsible for an act or omission, unless it is proved that, at the time of doing the act or making the omission, the person had capacity to know that he or she ought not to do the act or make the omission: *Criminal Code* (Qld) s 29.

²⁹⁹ (1966) 115 CLR 199.

a sharp pointed metal rod, resembling a home-made dart, at a wooden post. The rod either missed the post or glanced off it, striking the girl and causing a serious injury to her eye. The girl brought an action against the boy and his parents, but the action was dismissed against all three defendants.³⁰⁰ The appeal to the High Court was confined to the question of the boy's liability in negligence. It was argued, among other grounds, that the trial judge erred in holding that the standard of care to be exercised by the boy differed from the standard of care that would have been required of him if he had been an adult.³⁰¹

The majority of the High Court dismissed the appeal, holding that the trial judge had not misdirected himself as to the degree of care reasonably to be expected of a 12 year old boy.³⁰² In considering this question, Owen J commented:³⁰³

There is ... a considerable body of opinion amongst the text-book writers, supported by decisions in Canada and the United States, that where an infant defendant is charged with negligence, his age is a circumstance to be taken into account and the standard by which his conduct is to be measured is not that to be expected of a reasonable adult but that reasonably to be expected of a child of the same age, intelligence and experience.

In relation to the factual question of whether the respondent's conduct had fallen below the standard to be expected of a 12 year old boy, Kitto J held:³⁰⁴

... what the respondent did was the unpremeditated, impulsive act of a boy not yet of an age to have an adult's realization of the danger of edged tools or an adult's wariness in the handling of them. ... To expect a boy of that age to consider before throwing the spike whether the timber was hard or soft, to weigh the chances of being able to make the spike stick in the post, and to foresee that it might glance off and hit the girl, would be, I think, to expect a degree of sense and circumspection which nature ordinarily withholds till life has become less rosy.

In relation to an intentional tort, such as trespass to the person, a child will be liable if he or she intended to commit the act that caused the loss or injury.³⁰⁵ Although this is the same test that applies to an adult, it seems that it is more likely that a child will be found to be lacking the requisite intent. For example, in *Hogan v Gill*,³⁰⁶ the defendant, who was 6 years old at the time of the incident, shot a 4 year old boy

300 (1964) 111 CLR 384 at 386. The trial was heard by Windeyer J, exercising the original jurisdiction of the High Court under s 75(iv) of the Australian Constitution in relation to matters between residents of different States. The decision in relation to the claim against the parents is discussed at pp 65-66 of this Report.

301 (1966) 115 CLR 199 at 204.

302 Id per McTiernan ACJ at 210, per Kitto J at 215 and per Owen J at 234.

303 Id at 234.

304 Id at 215-216.

305 *McHale v Watson* (1964) 111 CLR 384 at 389. Windeyer J found (at 396) that the dart was not thrown with intent at the plaintiff, but that the boy threw it at the wooden post expecting it to stick in it. The subsequent appeal did not concern this finding, but related to the issue of negligence.

306 (1992) Aust Torts Reports ¶181-182.

during a game of cowboys and indians. The defendant used his father's rifle, which had been left with a bullet in the barrel. The Supreme Court of Queensland dismissed the action against the boy, holding that, although the squeezing of the trigger was a voluntary act, the boy was unaware that the chamber contained a bullet and did not intend to actually fire the bullet.³⁰⁷

On the facts of *McHale v Watson*³⁰⁸ and *Hogan v Gill*,³⁰⁹ it would not have assisted the plaintiff in either case if a parent could have been found vicariously liable for the torts of his or her child, as neither of the child defendants was held to be liable for the injuries caused. Consequently, there was no tort for which vicarious liability could be imposed on any of the parents.

3. LIABILITY OF A PARENT FOR LOSS OR INJURY CAUSED BY A CHILD

(a) Vicarious liability

At common law, a parent is not, by reason of that relationship, vicariously liable for a tort committed by his or her child.³¹⁰ A parent who is the employer of his or her child will, however, be vicariously liable as employer for a tort committed by his or her child in the course of the employment relationship.³¹¹

(b) Personal liability

The fact that a parent is not vicariously liable for the loss or injury caused by his or her child does not mean that a parent cannot be held liable on any other basis. A parent will be liable in respect of the loss or injury suffered by a person as the result of an act of his or her child "if the parent has in some way participated in, directed, or ratified the wrongdoing" of the child³¹² or if the parent has breached a personal duty owed to the injured party:³¹³

³⁰⁷ Id at 61,584. See pp 65-66 of this Report for a discussion of the action that was successfully brought against the boy's father.

³⁰⁸ (1964) 111 CLR 384.

³⁰⁹ (1992) Aust Torts Reports ¶181-182.

³¹⁰ *Smith v Leurs* (1945) 70 CLR 256 per Latham CJ at 259, per Starke J at 260, per Dixon J at 261 and per McTiernan J at 264; *McHale v Watson* (1964) 111 CLR 384 per Windeyer J at 386.

³¹¹ *Smith v Leurs* (1945) 70 CLR 256 per Latham CJ at 259; *McHale v Watson* (1964) 111 CLR 384 per Windeyer J at 386.

³¹² *McHale v Watson* (1964) 111 CLR 384 at 386.

³¹³ Ibid. See pp 4-5 of this Report for an explanation of the difference between personal and vicarious liability.

A parent is, generally speaking, not legally liable for the wrongdoing of his child. This is the rule of the common law. In other systems a different view is taken and parents are required by law to make good the harm that their children do. In our law that is so if the parent has in some way participated in, directed, or ratified the wrongdoing of his child ... A parent may also be liable for the consequence of his child's wrongdoing if his own negligence caused or provided the occasion for it. In that case the parent is not vicariously liable: he is liable because of his own negligence.

It is not necessary in an action against a parent for breach of the duty to control his or her child to prove that the child committed a tort. That argument was rejected by the New South Wales Court of Appeal in *Haines v Rytmeister*.³¹⁴

Nothing in their Honours' judgment [in *Smith v Leurs*] suggests that the duty of a person having care of a child is limited to preventing the child from committing a tort. In principle, the duty should be one in which the person having the care of the child owes a duty to prevent the child causing injury. In the case of a very young child, he or she could not commit a tort: cf *McHale v Watson* (1964) 111 CLR 384. It would unnecessarily complicate actions against persons having the care and control of young children to require the plaintiff to prove that both the defendant and the child were negligent.

In *McHale v Watson*,³¹⁵ Windeyer J commented on the conduct that could amount to negligence on the part of a parent:³¹⁶

Such negligence may arise from his failure to exercise a reasonable control of the activities of his child. It may in some cases arise from his arming the child with an instrument which it could reasonably be thought might be used by the child in a manner that would be dangerous to other persons.

In order to establish the personal liability of a parent for the loss or injury caused by his or her child, a plaintiff must prove that the parent could reasonably have foreseen the particular risk.³¹⁷ In *McHale v Watson*,³¹⁸ Windeyer J found, contrary to what the plaintiff alleged, that the boy's father had not given him the metal rod that caused the injury to the plaintiff.³¹⁹ Nevertheless, his Honour considered what the position would have been if that had been the case.³²⁰

It is not negligent merely to allow a boy of twelve to have such a thing. Suppose he were allowed to have a pocket knife, a wooden sword, or even a toy bow and arrow. A parent does not incur responsibility for a misuse, not reasonably foreseeable, that a child makes of a thing that he could reasonably be expected to use safely. The case

314 (1986) 6 NSWLR 529 per McHugh JA (with whom Hope and Glass JJA agreed) at 531. The facts of this case are discussed at pp 70-71 of this Report.

315 (1964) 111 CLR 384.

316 *Id* at 386-387.

317 *Id* at 401.

318 (1964) 111 CLR 384.

319 *Id* at 401.

320 *Ibid*.

here is quite different from allowing a child, not old enough to be trusted with a firearm or not properly taught how to handle firearms, to have a gun. A gun is a thing that in its normal use must be handled with skill.

An example of a breach by a parent of a personal duty owed to a third party is found in *Hogan v Gill*.³²¹ In that case, a young boy was seriously injured when he was shot by a 6 year old boy using his father's rifle. Although the action against the boy who fired the rifle was dismissed,³²² the Supreme Court of Queensland held that the father's negligence had caused the plaintiff's injuries:³²³

The shooting of a child in play clearly fell within the class of reasonably foreseeable risks if the first defendant failed to properly check the rifle to ensure that the magazine and barrel were empty of live bullets or otherwise ensure that if a child did pick up the rifle it had been rendered harmless to any other person. I am well satisfied that the plaintiff's injury and its consequences were caused by the first defendant's negligence.

(c) Statutory liability

(i) Queensland

In Queensland, although there has been no statutory modification to the general principle that a parent is not vicariously liable for the torts of his or her child, the *Juvenile Justice Act 1992* (Qld) does impose a degree of liability on a parent whose child has been convicted of a personal or property offence.³²⁴ Under section 198 of that Act, a parent may be ordered to pay compensation up to a specified amount, if the court is satisfied, among other matters, that the parent "may have contributed to the fact the offence happened by not adequately supervising the child". The relevant provisions of the Act are as follows:

197 Notice to parent of child offender

- (1) This section applies if it appears to a court, on the evidence or submissions in a case against a child found guilty of a personal or property offence, that -
 - (a) compensation for the offences should be paid to anyone; and

³²¹ (1992) Aust Torts Reports ¶181-182. See also *Curmi v McLennan* [1994] 1 VR 513 and *Pask v Owen* [1987] 2 Qd R 421 per Andrews CJ (with whom Kelly SPJ agreed) at 431.

³²² See pp 63-64 of this Report.

³²³ (1992) Aust Torts Reports ¶181-182 at 61,582.

³²⁴ The term "parent" is defined in s 196 of the *Juvenile Justice Act 1992* (Qld) to mean "a guardian of the child, other than the chief executive". The term "child" is defined in s 5 of the Act to mean a person who has not turned 17 years of age. There is provision in s 6 of the Act for that age to be increased by one year.

- (b) a parent of the child may have contributed to the fact the offence happened by not adequately supervising the child; and
 - (c) it is reasonable that the parent should be ordered to pay compensation for the offence.
- (2) The court may decide to call on a parent of the child to show cause, as directed by the court, why the parent should not pay the compensation.
- (3) The court may act under subsection (2) on its own initiative or on the prosecution's application.
- ...
- (8) A proceeding under this section or section 198 is a civil proceeding and a court may make an order for the costs of the proceeding.
- (9) In this section -
- “**compensation**” for the offence means compensation for -
- (a) loss caused to a 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
 - (b) injury suffered by a person, whether as the victim of the offence or otherwise, because of the commission of the offence. [emphasis added]

198 Show cause hearing

- ...
- (5) If, on consideration of evidence and submissions ... a court is satisfied of the matters mentioned in section 197(1)(a), (b) and (c), the court may make an order requiring the parent to pay compensation.
- (6) The court is to make its decision on the basis of proof beyond a reasonable doubt.
- (7) The maximum amount of compensation payable under an order is 67 penalty units.³²⁵
- ...
- (9) 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.
- ...

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For the purposes of the *Juvenile Justice Act 1992* (Qld), the value of a penalty unit is \$75: *Penalties and Sentences Act 1992* (Qld) s 5. Consequently, the maximum penalty under s 195 of the *Juvenile Justice Act 1992* (Qld) is \$5025.

(ii) Northern Territory

Legislation in the Northern Territory provides that, in certain circumstances, a parent may be liable, to a maximum of \$5,000, for property damage caused intentionally by his or her child. Section 29A of the *Law Reform (Miscellaneous Provisions) Act 1956* (NT) provides:³²⁶

Liability for damage to property caused by children

- (1) In this section, "child" means a person who has not attained the age of 18 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 time 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 \$5,000 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).

Unlike the Queensland legislation, the Northern Territory provision does not extend to cases where a child is found guilty of a personal offence.

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This provision was inserted by s 3 of the *Law Reform (Miscellaneous Provisions) Amendment Act (No 2) 1991* (NT).

(d) Submissions

Three submissions received by the Commission in response to its Discussion Paper³²⁷ addressed the issue of the liability of a parent for loss or injury caused by a child.³²⁸

The Queensland Teachers' Union argued that the law concerning the liability of parents should not be changed.³²⁹ Similarly, the Department of Family and Community Services argued that strict liability should not be imputed to parents "and that it is unlikely that any public support such a measure might attract would outweigh the entailed disadvantages and unfairness".³³⁰

The submission from the Queensland Police Union of Employees, however, expressed a contrary view. Although the Union acknowledged that it was likely that there would be public opposition to any extension of the law of vicarious liability to the parent/child relationship, it supported some imposition of liability on parents on the grounds that it would be likely to lead to increased supervision of children:³³¹

The Union is mindful that any legislative action to impose on parents, vicarious liability for the actions of their children is likely to be strenuously opposed by some community groups and is likely to be something of a political hot potato. However, the Union is likewise mindful that in certain areas of the State the police service are engaged for up to 70% of its available man hours in dealing with juvenile crime.

...

It is felt by the Union that to impose on parents a financial obligation to pay compensation for damage to person or property caused by the intentional actions of a child is likely to have a positive effect in ensuring that children are more adequately supervised by their parents.

4. LIABILITY OF AN ADULT SUPERVISOR FOR LOSS OR INJURY CAUSED BY A CHILD

(a) The expression "adult supervisor"

The terms of this reference refer simply to an "adult supervisor", without further elaboration as to who is intended to be encompassed by that expression, which is capable of a very broad interpretation. For the purpose of this reference, the Commission uses the expression to mean a person, whether paid or unpaid, who

³²⁷ Queensland Law Reform Commission, Discussion Paper, *Vicarious Liability* (WP 48, July 1995).

³²⁸ Submissions 3, 12, 13.

³²⁹ Submission 3.

³³⁰ Submission 12.

³³¹ Submission 13.

has occasion to supervise a child. On that basis, the expression would encompass a broad range of persons whose work or function includes the supervision of a child. It would, for example, include a nanny or babysitter who is paid for his or her services, as well as a person who provides his or her services on a purely voluntary basis, such as a scout leader, a person engaged in community activities such as a sports coach, or a parent who assists with activities at his or her child's school, in the course of which the parent supervises a number of children.

(b) Vicarious liability

At common law, an adult supervisor is not vicariously liable for a tort committed by a child under his or her supervision.

(c) Personal liability

It would seem that an adult supervisor may owe a duty of care, analogous to that which is owed by a parent,³³² to exercise reasonable care in the supervision of a child so as to avoid loss or injury to a third party by reason of the child's conduct.

In *Smith v Leurs*,³³³ Dixon J stated that, as a general rule, "one man is under no duty of controlling another man to prevent his doing damage to a third".³³⁴ His Honour observed, however, that "special relations" could subject a person to a duty to control the actions of another person, referring in particular to the duty of a parent to control a child.³³⁵

There are, however, special relations which are the source of a duty of this nature. It appears now to be recognized that it is incumbent upon a parent who maintains control over a young child to take reasonable care so to exercise that control as to avoid conduct on his part exposing the person or property of others to unreasonable danger.

The circumstances that may give rise to a duty to control the conduct of a child have been further considered by the New South Wales Court of Appeal in *Haines v Rytmeister*.³³⁶ In that case, the plaintiff, who was the President of the Ladies Auxiliary of a school, was injured by boys who were assisting her to erect a catwalk for a fashion parade to be held at the school. The plaintiff alleged that the teachers who were supervising the boys at the relevant time owed her a duty to take

³³² See the discussion of a parent's duty to control his or her child at pp 64-66 of this Report.

³³³ (1945) 70 CLR 256. This case concerned the liability of parents in respect of an injury caused to a child by their son's use of a shanghai.

³³⁴ *Id* at 262.

³³⁵ *Ibid*.

³³⁶ (1986) 6 NSWLR 529.

reasonable care to prevent the boys causing harm to her.³³⁷ Although the case concerned the duty owed by a teacher to a third party,³³⁸ rather than the duty owed by a person who was merely an “adult supervisor”, the judgment was expressed in terms that would seem to apply to a person who was in a relationship of supervision to a child. As noted earlier,³³⁹ the Court rejected the defendant’s³⁴⁰ argument that “the duty owed was not one to prevent the boys causing harm to the plaintiff but was merely a duty to prevent them from engaging in tortious conduct”.³⁴¹ In doing so, the Court expressed the relevant principle in terms of the duty owed by “the person having the care” or the “care and control” of a child to prevent the child from causing injury.³⁴² That principle is broad enough to apply not only to a teacher, but also to a person who is the adult supervisor of a child.

(d) Submissions

Two submissions received by the Commission in response to its Discussion Paper,³⁴³ addressed the issue of whether an adult supervisor should be vicariously liable for loss or injury caused by a child under the adult supervisor’s care.³⁴⁴ Both respondents were opposed to such a change in the law. The Department of Family and Community Services commented:³⁴⁵

... the imposition of strict vicarious liability on adult supervisors does not merit further deliberation. The effect of imposition of strict vicarious liability on such persons would be to disadvantage children themselves by providing a massive disincentive to sports coaches, community group volunteers (such as scoutmasters) and child minders, from involving themselves in the supervision of children at all.

337 Id at 531.

338 See p 74 of this Report for a discussion of the duty of care owed by teachers to third parties.

339 See p 65 of this Report.

340 The action was brought against a nominal defendant who was sued on behalf of the Government of New South Wales and the Department of Education. See the *Claims against the Government and Crown Suits Act 1912* (NSW) in relation to the mechanism under which the Governor may appoint a nominal defendant to defend a claim that is to be made against the Government of New South Wales.

341 (1986) 6 NSWLR 529 per McHugh JA (with whom Hope and Glass JJA agreed) at 531.

342 Ibid.

343 Queensland Law Reform Commission, Discussion Paper, *Vicarious Liability* (WP 48, July 1995).

344 Submissions 3, 12.

345 Submission 12.

5. LIABILITY OF A TEACHER FOR LOSS OR INJURY CAUSED BY A PUPIL

(a) Vicarious liability

At common law, a teacher is not vicariously liable for a tort committed by a pupil under his or her care or supervision.³⁴⁶

(b) Personal liability

The fact that a teacher is not vicariously liable for the loss or injury caused by a pupil under his or her care or supervision does not mean that a teacher cannot be held liable on any other basis. A teacher will be liable in respect of loss or injury caused by a pupil under his or her care or supervision if the teacher has breached a personal duty owed to the injured party.

(i) The duty of care owed to pupils

It is well established that a teacher owes to his or her pupil a duty to take reasonable care for the safety of the pupil.³⁴⁷

In *Richards v State of Victoria*,³⁴⁸ the Full Court of the Supreme Court of Victoria examined the basis of a teacher's duty of care to a pupil and commented:³⁴⁹

... it may be stated as a general proposition that a man owes a duty of care to his "neighbour" and only to his "neighbour" and that "neighbours" are those persons who are so closely and directly affected by his conduct that they ought reasonably to be in his contemplation as being so affected when directing his mind to the conduct in question. ... But there are other cases in which the existence of the requisite duty of care may properly be considered to exist prior to and independently of the particular conduct alleged to constitute a breach of that duty. One such class of case in which a pre-existing duty may be considered to exist is that derived from the relationship of employer and employee ...

... we think that the relationship of schoolmaster and pupil is another example of the class of case in which the duty springs from the relationship itself.

³⁴⁶ But see *Duncan by her next friend Duncan v Trustees of the Roman Catholic Church for the Archdiocese of Canberra and Goulburn* [1998] SCACT 109 (14 October 1998) per Higgins J at [42]-[46], where the view was expressed that a teacher was vicariously liable for the tortious conduct of a pupil who, at the relevant time, was acting with the authority of the teacher and in the capacity of a volunteer.

³⁴⁷ *Richards v State of Victoria* [1969] VR 136; *State of Victoria v Bryar* [1970] ALR 809; *Geyer v Downs* (1977) 138 CLR 91.

³⁴⁸ [1969] VR 136.

³⁴⁹ *Id* at 140.

The Court explained that the reason for imposing a duty of care where there was a teacher/pupil relationship was:³⁵⁰

... the need of a child of immature age for protection against the conduct of others, or indeed of himself, which may cause him injury coupled with the fact that, during school hours the child is beyond the control and protection of his parent and is placed under the control of the schoolmaster who is in a position to exercise authority over him and afford him, in the exercise of reasonable care, protection from injury ...

As the duty a teacher owes to his or her pupil stems from the teacher/pupil relationship itself, in order for a teacher to be found personally liable for the loss or injury caused by a pupil, it is necessary to prove that the circumstances which resulted in loss or injury occurred at a time when a teacher/pupil relationship was in existence.

This issue was considered by the High Court in *Geyer v Downs*.³⁵¹ In that case, the plaintiff, an 8 year old pupil, was injured when she was accidentally struck on the head by a baseball bat being used by another pupil in the school playground at 8.50am. Under the Department of Education Daily Routine the school day did not officially commence until 9.00am. The defendant schoolmaster argued that he could not be personally liable for the injury to the plaintiff caused by another pupil of the school, as there was no teacher/pupil relationship in existence at the time the injury to the plaintiff occurred. Consequently, no concomitant duty of care could be imposed on him to take reasonable care for the safety of the plaintiff. In rejecting that argument, the High Court held that the question of whether the teacher/pupil relationship existed “will be determined by the circumstances of the relationship on the particular occasion in question”.³⁵²

The Court held that the relationship of teacher and pupil could exist outside normal school hours:³⁵³

There seems no basis for ... a rule that there can be no duty of supervision outside “ordinary school hours” or “before school started”. The question must depend upon the nature of the general duty to take reasonable care in all the circumstances. It is not enough to look only at the Departmental Instructions and to say that the duty of supervision arises only during the periods referred to in those Instructions.

Many factors in this case indicated the existence of the relationship at the time the injury to the plaintiff occurred. These included the fact that the schoolmaster opened the school grounds at 8.15am every day; his knowledge

350 Id at 138-139.

351 (1977) 138 CLR 91.

352 Id per Stephen J (with whom Mason and Jacobs JJ agreed) at 93.

353 Id per Murphy and Aickin JJ (with whom Mason and Jacobs JJ agreed) at 104.

that up to 200 pupils may be at the school prior to 9.00am; and his recognition of the possible risks involved in playing ball games in the school grounds without supervision and his direction to students and fellow teachers that such activities were not permitted prior to 9.00am.³⁵⁴

(ii) The duty of care owed to third parties

A teacher may also owe a duty of care to a person who is not a pupil. In those circumstances, the duty is to exercise reasonable care in the supervision of a pupil so as to avoid loss or injury to the person by reason of the pupil's conduct.

In *Haines v Rytmeister*,³⁵⁵ the President of the Ladies Auxiliary of a school successfully brought an action in respect of an injury caused by a group of schoolboys who were assisting her to erect a catwalk. The New South Wales Court of Appeal held that the two teachers who had charge of the boys had been negligent in not supervising their activities and in failing to instruct them to be careful in putting down the boxes that would form the catwalk.³⁵⁶ The Court expressed the relevant duty to be:³⁵⁷

... one in which the person having the care of the child owes a duty to prevent the child causing injury.

(c) Submissions

Three submissions received by the Commission in response to its Discussion Paper³⁵⁸ addressed the issue of whether a teacher should be made vicariously liable for the loss or injury caused by a pupil.³⁵⁹ Each of the submissions expressed the view that vicarious liability should not be imposed upon a teacher.³⁶⁰

The Department of Family and Community Services did not believe that “any of the possible policy objectives of vicarious liability would outweigh the unfairness which such liability would represent to individual teachers”.³⁶¹

354 Id per Stephen J (with whom Mason and Jacobs JJ agreed) at 94-95 and per Murphy and Aickin JJ (with whom Mason and Jacobs JJ agreed) at 96.

355 (1986) 6 NSWLR 529. The facts of this case are discussed at pp 70-71 of this Report.

356 Id per McHugh JA (with whom Hope and Glass JJA agreed) at 532.

357 Id at 531.

358 Queensland Law Reform Commission, Discussion Paper, *Vicarious Liability* (WP 48, July 1995).

359 Submissions 3, 4, 12.

360 Ibid.

361 Submission 12.

The Queensland Teachers' Union suggested that, in the same way that a supervisor in the workplace is not vicariously liable for those under his or her supervision, a teacher, as an employee, should not be liable for the torts of pupils:³⁶²

... the present law that teachers are not vicariously liable for torts committed by students in their care or under their supervision should be maintained ... there is no proper policy basis for imposing such liability on teachers who are merely employees.

This view was supported in another submission that noted:³⁶³

Teachers are not the employers of the students in their charge and therefore should not be held liable as an employer for the tort of the employee.

That respondent argued that a further consideration against the imposition of vicarious liability on a teacher for the torts of a pupil is that a teacher has only a limited power and authority over pupils:³⁶⁴

Neither the teacher nor the education authority can have any control over a student who has made a deliberate decision to act in an inappropriate manner.

It was also submitted that the imposition of vicarious liability would be financially detrimental to teachers:³⁶⁵

Teachers are unable to obtain affordable (if any) insurance to indemnify themselves against loss that might be occasioned as a result of a claim for vicarious liability.

6. LIABILITY OF A SCHOOL AUTHORITY FOR LOSS OR INJURY CAUSED BY A PUPIL

A teacher's personal duty to take reasonable care for the safety of a pupil "devolves not only on the individual teacher but also on the school authority itself".³⁶⁶ Consequently, in addition to a possible action for breach of personal duty against a teacher, an injured party may have a direct cause of action against a school authority for loss or injury caused by a pupil of the school.³⁶⁷

362 Submission 3.

363 Submission 4.

364 Ibid.

365 Ibid.

366 Heffey PG, "The duty of schools and teachers to protect pupils from injury" (1985) 11 *MonLR* 1. The personal and non-delegable duty of a school authority towards its pupils is discussed at pp 76-77 of this Report.

367 A school authority will be vicariously liable as employer for a tort committed by an employee of the school authority within the course and scope of his or her employment. See Chapter 3 of this Report for a discussion of the vicarious liability of an employer.

(a) Vicarious liability

At common law a school authority is not vicariously liable for a tort committed by a pupil of the school.³⁶⁸

In *Commonwealth v Introvigne*,³⁶⁹ Murphy J suggested, however, that in circumstances where injury is caused by one pupil to another it may be appropriate to impose vicarious liability on a school authority for the tort of the pupil:³⁷⁰

Where a student is injured by the negligence of another student (and perhaps by act or omission which if it were that of 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; ...

(b) Personal liability

The duty of care owed by a school authority differs according to whether or not the injured party is a pupil of the school.

(i) The duty of care owed to pupils

A school authority owes a personal and non-delegable duty to take reasonable care to protect pupils against the risk of injury.³⁷¹

A school authority owes to its pupil a duty to ensure that reasonable care is taken of them whilst they are on the school premises during hours when the school is open for attendance.

... the duty is not discharged by merely appointing competent teaching staff and leaving it to the staff to take appropriate steps for the care of the children. It is a duty to ensure that reasonable steps are taken for the safety of the children, a duty the performance of which cannot be delegated.

The reason underlying the non-delegable nature of the duty is attributed to the "immaturity and inexperience of the pupils and their propensity for mischief".³⁷²

³⁶⁸ But see *Duncan by her next friend Duncan v Trustees of the Roman Catholic Church for the Archdiocese of Canberra and Goulburn* [1998] SCACT 109 (14 October 1998) per Higgins J at [42]-[46], where it was held that a school authority was vicariously liable for the injury caused by the act of a pupil who, at the relevant time, was acting in the capacity of a volunteer of the school.

³⁶⁹ (1982) 150 CLR 258.

³⁷⁰ Id at 275.

³⁷¹ Id per Mason J at 269, 270. For a discussion of non-delegable duties see Chapter 2 of this Report.

³⁷² *Commonwealth v Introvigne* (1982) 150 CLR 258 per Mason J at 271.

The duty of care owed by a school authority “depends in no way upon the actions of the teaching staff, [it] arises directly by reason of its acceptance of a child as a pupil in the school”.³⁷³

The personal and non-delegable duty of a school authority is not an absolute duty to protect pupils from any harm:³⁷⁴

It is not to be equated with a warranty, promise or undertaking to indemnify or hold them harmless against injury. It goes no further than a duty ... to take reasonable steps to prevent them from being harmed. It does not guarantee the safety of school children against injury from sources or events like mad dogs, venomous snakes, kidnappers, serial killers and rapists, and other dangerous hazards of life, unless it is shown that they ought in the circumstances to have been foreseen and guarded against ... or, in other words, that reasonable steps might and should have been taken ... to prevent danger from sources like those.

(ii) The duty of care owed to third parties

A school authority may also owe a duty of care to a person who is not a pupil. The duty is to exercise reasonable care in the control and supervision of a pupil so as to avoid loss or injury to the person by reason of the pupil's conduct.

In *Carmarthenshire County Council v Lewis*,³⁷⁵ a 4 year old boy, attending a school under the management of the Council, escaped from the school premises onto a busy road where a lorry driver, in an attempt to avoid hitting the child, swerved, hit a telegraph pole and was killed. The widow of the lorry driver brought an action for damages for negligence against the pupil's teacher and the Council.

The House of Lords held that there was no negligence on the part of the teacher, who had left the boy unsupervised for a short period of time while attending to another injured pupil. However, the Court held that the Council itself had breached a personal duty owed to the lorry driver by not taking

373 Id per Brennan J at 279.

374 *Rich v State of Queensland* [2001] QCA 295 (27 July 2001) per McPherson JA at [13]. See also *Richards v State of Victoria* [1969] VR 136 per Winneke CJ at 138; *Carmarthenshire County Council v Lewis* [1955] AC 549 per Lord Reid at 566. The Commission notes that, in *Lepore v State of New South Wales* (2001) Aust Torts Reports ¶81-609, the majority of the New South Wales Court of Appeal (Mason P and Davies AJA, Heydon JA dissenting) expressed a different view of the scope of a non-delegable duty. Mason P commented (at 67,016):

In my view the State's obligations to school pupils on school premises and during school hours extends to ensuring that they are not injured physically at the hands of an employed teacher (whether acting negligently or intentionally).

In *Rich v State of Queensland* [2001] QCA 295 (27 July 2001) the Queensland Court of Appeal (per McPherson JA at [18], per Thomas JA at [29] and per Williams JA at [48]) declined to follow the decision in *Lepore v State of New South Wales* (2001) Aust Torts Reports ¶81-609. Applications have been filed in the High Court for special leave to appeal against the decisions in *Lepore v State of New South Wales*: S104/2001 and *Rich v State of Queensland*: B70/2001.

375 [1955] AC 549.

reasonable and practicable precautions to ensure the child did not escape from the school premises and cause injury to any person:³⁷⁶

The [Council] maintain a nursery and infant school ... and are, in my opinion, under a duty to take care that the children themselves neither become involved in nor cause [an] ... accident.

7. THE COMMISSION'S VIEW

As explained earlier in this chapter, the Commission is of the view that the question of the imposition of vicarious liability on parents, adult supervisors and teachers for torts committed by children in their care should be considered in the light of the policy considerations that support the principle of vicarious liability generally.³⁷⁷

These policy considerations, which are examined in Chapter 2, are:

- the provision of an injured plaintiff with a financially viable defendant;
- the employment of others to advance the economic or other interests of an enterprise;
- the distribution of losses; and
- the deterrence of future harm.

In relation to the first of these considerations, there could be no certainty, however, that the imposition of vicarious liability on a parent, adult supervisor or teacher for a tort committed by a child in the adult's care would, on its own, achieve that result.

Unless a parent, adult supervisor or teacher were insured against liability for loss or injury caused by the child, the particular adult would have only his or her personal assets with which to meet an award of damages. Whether the parent, adult supervisor or teacher could meet an award of damages would depend on his or her individual financial position and on the size of the claim. In many cases, it would be expected that the parent, adult supervisor or teacher could not meet an award of damages, especially where the award was a substantial one.

If the law were changed so that vicarious liability could be imposed on a parent, adult supervisor or teacher, it may well be the case that many of these adults might decide to take out insurance in respect of that liability and, in a sense, become financially viable defendants. The Commission considers, however, that the fact that a parent, adult supervisor or teacher may be able to insure against a liability of this kind is not

³⁷⁶ Id per Lord Goddard at 561.

³⁷⁷ See p 61 of this Report.

a valid reason for recommending the imposition of vicarious liability on these persons if such a change in the law would not otherwise be justified having regard to the other policy considerations that support the principle of vicarious liability generally. Further, as noted above, the Commission is of the view that the financial capacity of a party to meet an award of damages is, on its own, an unacceptable basis for imposing vicarious liability.³⁷⁸

The relevance of the other policy considerations that support the principle of vicarious liability are considered below in relation to parents, adult supervisors, teachers and school authorities.

(a) Parents

In the employment context, the fact that the activities of an employee advance the economic or organisational interests of an employer is a compelling reason for the imposition of vicarious liability on an employer for the torts of an employee.³⁷⁹ The requirement that an employee must be acting within the course and scope of his or her employment before the employer will be vicariously liable demonstrates the nexus between the vicarious liability of the employer and the promotion of the employer's interests. It could not be said, in most cases, that a child advances the economic or other interests of his or her parents.

The imposition of vicarious liability on an employer for the torts of an employee is also said to be a means of loss distribution, as an employer can insure against the loss or pass on the loss by way of increased prices for goods or services sold.³⁸⁰ A parent, however, would not have an opportunity to pass on the loss occasioned by the imposition of vicarious liability or the cost of any insurance premiums that it became necessary to pay to avoid incurring such a loss. This factor does not provide any support for the imposition of vicarious liability on a parent for the tort of a child. Further, not all parents would be in a position to insure against a liability of this kind. Damages payable by a parent found vicariously liable for a tort committed by his or her child could have serious consequences for the financial position of the whole family.

Finally, the imposition of vicarious liability on an employer is said to constitute an incentive for the employer to adopt strategies to minimise the risk of loss or injury to third parties by his or her employee.³⁸¹ An employer has the capacity to control and direct the conduct of an employee and, ultimately, to dismiss an employee. Although the parent/child relationship affords a parent the opportunity to provide guidance and instruction to a child, where, despite the best efforts made by a parent, the child

378 See p 16 of this Report.

379 See pp 11-12 of this Report.

380 See p 12 of this Report.

381 See p 13 of this Report.

nevertheless causes loss or injury to another person, the parent is not able to terminate his or her relationship with the child. This is likely to be a significant limitation on the extent to which the imposition of vicarious liability on a parent would operate as a deterrent to future harm being caused by the child.

Having regard to these considerations, the Commission is of the view that there is insufficient justification for making a parent vicariously liable for the torts of his or her child. The Commission is therefore of the view that the common law in relation to a parent's liability in respect of a tort committed by his or her child should not be changed by legislation. As explained earlier in this chapter, a person who suffers a loss or injury as the result of a child's conduct may, however, have a cause of action against the child's parent if the parent has breached a personal duty owed to the injured person.

(b) Adult supervisors

The relationship of adult supervisor and child can arise in a variety of circumstances. The extent to which the policy bases that underlie the principle of vicarious liability are relevant to the relationship of adult supervisor and child needs to be considered in the light of the range of circumstances that can give rise to such a relationship.

In many cases, adult supervisors provide their services on a voluntary basis, rather than for the furtherance of any commercial enterprise. However, even where they are paid, it could not be said that the children they supervise advance the economic or other interests of the adult supervisor in the way that an employee advances the economic or organisational interests of his or her employer. This feature of the employer/employee relationship does not, in the Commission's view, support the imposition of vicarious liability on an adult supervisor for the tort of a child in his or her care.

As noted above, the imposition of vicarious liability on an employer for the torts of an employee is also said to be a means of loss distribution.³⁸² In the Commission's view, this argument for the imposition of vicarious liability has little relevance to the relationship of adult supervisor and child, however, given that many adult supervisors are not engaged in any commercial activity and would, therefore, have no opportunity to pass on to customers either the loss itself or the cost of any insurance premiums paid.

In the employment context, the imposition of vicarious liability on an employee is said to constitute an incentive for the employer to adopt strategies to minimise the risk of loss or injury to third parties.³⁸³ Because the relationship of adult supervisor and child will often be transient and informal in nature, an adult supervisor is likely to have even less opportunity than a parent to adopt strategies, other than direct

³⁸² See p 12 of this Report.

³⁸³ See p 13 of this Report.

supervision of the child, to minimise the risk that the child will cause loss or injury to a third person.

Having regard to these considerations, the Commission is of the view that there is insufficient justification for making an adult supervisor vicariously liable for the tort of a child in his or her care. Further, the Commission is of the view that the imposition of vicarious liability on an adult supervisor could have the undesirable effect of substantially reducing the number of people prepared to participate as volunteers in social, community and sporting activities.

The Commission is therefore of the view that the common law in relation to an adult supervisor's liability in respect of a tort committed by a child in his or her care should not be changed by legislation. As explained earlier in this chapter, a person who suffers a loss or injury as the result of a child's conduct may, however, have a cause of action against the child's supervisor if the supervisor has breached a personal duty owed to the injured person.

(c) Teachers

Unlike parents and many adult supervisors, teachers are remunerated in respect of their services. It could not be said, however, that a pupil advances the economic or other interests of a teacher in the way that an employee advances the economic or organisational interests of his or her employer. Although the presence of pupils at a school provides, in a general sense, the opportunity for the teacher's employment, a teacher does not secure any financial or other benefit from a pupil.

The imposition of vicarious liability on an employer for the torts of an employee is also said to be a means of loss distribution, as an employer can insure against the loss or pass on the loss by way of increased prices for goods or services sold.³⁸⁴ However, a teacher, like a parent or many adult supervisors, would not have an opportunity to pass on the loss occasioned by the imposition of vicarious liability or the cost of any insurance premiums.

Finally, as noted above, the imposition of vicarious liability on an employer is said to constitute an incentive for the employer to adopt strategies to minimise the risk of loss or injury to third parties by his or her employee.³⁸⁵ The teacher/pupil relationship affords a teacher the opportunity to supervise the pupil and to instruct the pupil on the manner in which specific tasks should be carried out. The extent to which a teacher may exercise control over a pupil is limited, however, by the fact that a teacher has no power to expel a pupil from the school. It is possible that a pupil may cause loss or injury to a person (who may or may not be another pupil) in a manner that could not have been prevented by any step the teacher could reasonably have taken. In those circumstances, it is difficult to see how the

384 See p 12 of this Report.

385 See p 13 of this Report.

imposition of vicarious liability on the teacher would operate as a deterrent against future harm being caused by that or another pupil.

Having regard to these considerations, the Commission is of the view that there is insufficient justification for making a teacher vicariously liable for the torts of his or her pupil. The Commission is therefore of the view that the common law in relation to a teacher's liability in respect of a tort committed by a pupil should not be changed by legislation. As explained earlier in this chapter, a person (whether or not the person is also a pupil) who suffers a loss or injury as the result of a pupil's conduct may, however, have a cause of action against the teacher of the pupil who has caused the loss or injury if the teacher has breached a personal duty owed to the injured person.

(d) School authorities

The terms of this reference did not expressly raise the issue of whether a school authority should be vicariously liable for a tort committed by a pupil at the school. That issue is, however, closely related to the issue that the terms of reference raise directly in relation to the liability of a teacher.

As Murphy J suggested in *Commonwealth v Introvigne*,³⁸⁶ the imposition of vicarious liability on a school authority for the loss or injury caused by a pupil, at least where the loss or injury is sustained by another pupil, would be a means of spreading the loss.³⁸⁷ The financial capacity of a school authority to meet an award of damages would obviously be much greater than the capacity of an individual teacher. The Commission has, however, expressed the view that the financial capacity of a party to meet an award of damages does not, of itself, provide a valid reason for imposing vicarious liability on that party for loss or injury caused by someone else. The imposition of vicarious liability must be justifiable on other grounds.

In the Commission's view, a pupil does not advance the financial or other interests of a school authority. Further, given that a school authority already owes a personal duty of care to its pupils and may owe a duty of care to other persons, and is vicariously liable for the torts of its teachers committed within the course and scope of their employment, the Commission does not consider that the imposition of vicarious liability on a school authority for the torts of its pupils would operate as any additional deterrent to a school authority in respect of loss or injury that may be caused by its pupils.

If the Commission had been asked to consider whether a school authority should be vicariously liable for the loss or injury caused by one its pupils, its view would be that the common law concerning a school authority's liability in respect of a tort committed by a pupil should not be changed.

³⁸⁶ (1982) 150 CLR 258.

³⁸⁷ Id at 275.

8. RECOMMENDATIONS

The Commission recommends that:

- 4.1 There should be no legislative change to the common law concerning the vicarious liability of parents for torts committed by their children.**
- 4.2 There should be no legislative change to the common law concerning the vicarious liability of adult supervisors for torts committed by children in their care.**
- 4.3 There should be no legislative change to the common law concerning the vicarious liability of teachers for torts committed by pupils in their care.**

CHAPTER 5

INDEMNITY AND CONTRIBUTION

1. INTRODUCTION

The imposition of vicarious liability on one person for the tort of another person does not, of itself, relieve the latter of liability. In some situations, a person who is found to be vicariously liable for the tort of another person may be able to recover from that person all or part of the damages that the person who is vicariously liable is ordered to pay the plaintiff.

This situation can arise where the person who is vicariously liable is entitled to be indemnified by, or to claim contribution from, the person who committed the tort, in respect of his or her liability to the plaintiff.

2. INDEMNITY

An indemnity is an obligation to compensate a person for liability, loss or expense incurred by the person.³⁸⁸ The right to an indemnity can arise in a number of ways. In the employment relationship, either an employer or, in certain circumstances, an employee may be entitled to be indemnified by the other in respect of damages paid to a person who suffers loss or injury as a result of a tort committed by the employee in the course of employment.

(a) The rule in *Lister v Romford Ice*

At common law, if an employer is vicariously liable for the tort of an employee, the employer may claim the right to an indemnity from the employee, with the effect that the employee will compensate the employer in respect of damages the employer has to pay as a result of the employee's tort.³⁸⁹ The right of an employee to an indemnity from an employer in respect of damages paid by the employee to a person for loss or injury arising from the employee's tortious conduct is more limited.³⁹⁰

388 *Yeoman Credit Ltd v Latter* [1961] 1 WLR 828 per Holroyd Pearce LJ at 831: "An indemnity is a contract by one party to keep the other harmless against loss ..."

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

390 *Ibid.* In Queensland, certain statutory provisions require the State to indemnify an employee who is sued for tortious conduct arising out of his or her employment. See for example s 39 of the *Ambulance Service Act 1991* (Qld), which provides for an indemnity in respect of acts done or omitted to be done in good faith for the purposes of exercising the powers of an authorised officer under the Act. Section 10.5(5) of the *Police Service Administration Act 1990* (Qld) requires the State to indemnify an 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.

The effect of the rule, which takes its name from the English case of *Lister v Romford Ice and Cold Storage Co Ltd*,³⁹¹ is that an employer who is vicariously liable for a tort committed by an employee has the right to be indemnified by the employee, unless the employer required the employee to engage in activity that was in breach of the employment contract or the law.³⁹²

The case involved an action brought by an insurance company, under its right of subrogation, in the name of an employer (Romford Ice).

The term subrogation refers to the entitlement of an insurer “to exercise, in the name of the insured, any rights of the insured against third parties which relate to the subject matter of the contract of insurance”.³⁹³ Where an insurer indemnifies an insured, any right that the insured person had against a third party in respect of the loss is transferred to the insurer. Accordingly, if the loss for which an insurer indemnifies an insured was caused by a tort committed by a third party, the rights of the insured against the tortfeasor are transferred to the insurer, and the insurer is then able to sue the tortfeasor in the insured’s name to try to recover the amount paid to the insured. The insurer is said to be subrogated to the rights of the insured.³⁹⁴

In *Lister v Romford Ice and Cold Storage Co Ltd*,³⁹⁵ Romford Ice was vicariously liable for damages for personal injuries to an employee, which were caused by the negligence of another employee (Lister). Although Romford Ice was insured against its liability to the injured employee, its insurer sought to recover the damages from Lister.

The facts of the case raised two competing issues.

On the one hand, the insurer argued, on behalf of Romford Ice, that there was an implied term in the employment contract to the effect that the employee would take all reasonable care in the performance of his or her duties and that a failure to take such care would amount to a breach of that implied term. It was argued further that breach by the employee of the implied term would enable Romford Ice to sue the employee to recover damages that it incurred as a result. The insurer claimed, in effect, that the contract of employment required the employee to indemnify the employer for damages paid by the employer as a result of the employee’s negligence.³⁹⁶

391 [1957] AC 555.

392 See pp 86-90 of this Report for a discussion on the application of the rule.

393 *Halsbury’s Laws of Australia*, 235, Insurance, Chapter 9: Subrogation at [235-930].

394 An insurer’s right of subrogation exists only in respect of contracts of indemnity, for example, fire insurance contracts. No right of subrogation exists in respect of liability contracts, for example, life insurance contracts: *John Edwards and Co v Motor Union Insurance Co Ltd* [1922] 2 KB 249.

395 [1957] AC 555.

396 *Id* per Viscount Simonds at 573.

On the other hand, Lister argued that there was an implied term in the employment contract to the effect that the employer would ensure that the employee was protected by insurance from any third party liability arising from his negligence and that neither the employer nor its insurers would sue the employee in respect of that liability.³⁹⁷

The House of Lords decided in favour of Romford Ice, accepting the argument of its insurer that there was an implied term requiring the employee to indemnify the employer. It rejected Lister's argument that there was an implied term requiring the employer to indemnify Lister. The policy consideration said to support the rule was expressed by Viscount Simonds in the following terms:³⁹⁸

... to grant the servant immunity from such action would tend to create a feeling of irresponsibility in the class of persons, from whom, perhaps more than any other, constant vigilance is owed to the community.

(b) The application of the rule

There are a number of exceptions to the application of the rule in *Lister v Romford Ice*.

(i) Common law exceptions

The rule does not apply where the loss or injury occurred in circumstances demonstrating a breach of some implied term by the employer, such as where the employer requires the employee to do something illegal.

In the Queensland case of *Kelly v Alford*,³⁹⁹ the plaintiff Kelly was injured by a vehicle driven by the defendant Alford in the course of his employment with South Queensland Meats. The vehicle was not registered and was therefore uninsured under the provisions of the (now repealed) *Motor Vehicles Insurance Act 1936* (Qld).⁴⁰⁰

As in *Lister v Romford Ice*, the facts gave rise to the question of indemnity between the employer, who was vicariously liable for the plaintiff's injuries, and the negligent employee. However, a point of distinction between the two cases was that in *Kelly v Alford* the employee was required by the employer to do something illegal, namely, to take an uninsured vehicle on the road:⁴⁰¹

³⁹⁷ Id at 569.

³⁹⁸ Id at 579.

³⁹⁹ [1988] 1 Qd R 404.

⁴⁰⁰ This Act has been replaced by the *Motor Accident Insurance Act 1994* (Qld).

⁴⁰¹ [1988] 1 Qd R 404 per Connolly J (with whom Carter and de Jersey JJ agreed) at 410, 412.

... there was no doubt, as I read the 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. That term was relied upon by the servant in *Lister's* case but proved to be irrelevant as, in truth, nothing unlawful had occurred.

... Alford is entitled to a complete indemnity from South Queensland Meats against all such liability. It further follows that South Queensland Meats cannot be heard to claim an indemnity under the contract of service from Alford in circumstances in which it was a term of the same contract that there was in existence a policy of insurance indemnifying him against such liability.

It should also be noted that the application of *Lister v Romford Ice* is limited to circumstances where the employer's liability for the tort rests solely on being found vicariously liable. Consequently, where the employer is not free from blame, but is in breach of a personal duty owed to the injured party, the employer can be required to bear a proportion of the damages.⁴⁰²

(ii) Statutory restrictions

The effect of the decision in *Lister v Romford Ice* has been substantially restricted by Commonwealth legislation that curtails the circumstances in which an insurance company may exercise its right of subrogation in the name of an employer who is vicariously liable for a tort committed by an employee.⁴⁰³

Section 66 of the *Insurance Contracts Act 1984* (Cth) provides:

Subrogation to rights against employees

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.

402

Voli v Inglewood Shire Council (1963) 110 CLR 74 per Windeyer J at 100:

In the present case the Council was liable for the consequences of the architect's negligence. If the Council were liable only vicariously and were itself otherwise free of blame, it seems that it would be entitled to recover from the architect any sum that it was liable to pay, and in fact paid, to the appellant as damages. But the Council was not itself free from blame in the matter.

403

Section 66 of the *Insurance Contracts Act 1984* (Cth) does not prevent an employer who is vicariously liable for a tort committed by an employee from instituting proceedings against that employee. See p 84 of this Report.

The scope of the Commonwealth legislation is limited in a number of ways.

The protection afforded to an employee by the operation of section 66 is limited to damages for which an employer is vicariously liable and which have been met from a policy of insurance to which the Act applies.⁴⁰⁴

Further, section 66 does not restrict the right of an insurer to bring an action by way of subrogation against the employee of its insured if the employee's misconduct is either serious or wilful.⁴⁰⁵ The words "serious or wilful misconduct" are clearly intended to operate in the alternative. The misconduct does not have to be wilful to be serious or vice versa.⁴⁰⁶

What constitutes "serious misconduct" is a question of fact to be determined objectively in the circumstances of each case.

In *Boral Resources (Queensland) Pty Ltd v Pyke*,⁴⁰⁷ an employee, who had worked a 17 hour day, drove a heavy vehicle belonging to his employer while in a state of tiredness and intoxication, notwithstanding that the employer expressly forbade employees to drive its vehicles whilst intoxicated. The employee fell asleep whilst driving the vehicle and it overturned and was damaged. The majority of the Queensland Court of Appeal considered that the employee's actions amounted to serious misconduct.⁴⁰⁸ Thomas J, declining to explain the meaning of serious misconduct "by reference to the degree of gravity or otherwise",⁴⁰⁹ observed:⁴¹⁰

I do not think that double standards can be tolerated such that this drink driving conduct is not to be regarded as serious misconduct in the context of the employer's insurer exercising a remedy against him. From a wider community viewpoint, such conduct is seriously regarded, especially if damage is caused. If he had caused significant injury to anyone in consequence of driving in such circumstances, the fact that he had consumed liquor of that quantity would almost certainly have resulted in a significant increase in a custodial sentence ... Of course no one was injured; only the employer's vehicles suffered. But the intrinsic seriousness remains when one measures it in the context of his relationship with his employer.

404 Section 9 of the *Insurance Contracts Act 1984* (Cth) provides that certain contracts of insurance are exempt from the operation of the Act. These include contracts of marine or health insurance, motor vehicle third party insurance and workers' compensation insurance. The section was recently considered by the High Court in *Moltoni Corporation Pty Ltd v QBE Insurance Ltd* [2001] HCA 73 (13 December 2001).

405 *Insurance Contracts Act 1984* (Cth) s 66(b). The Act does not define the expression "serious or wilful misconduct".

406 See for example *Boral Resources (Queensland) Pty Ltd v Pyke* [1992] 2 Qd R 25 per Derrington J at 41.

407 [1992] 2 Qd R 25.

408 Id per Thomas J at 34-35 and per Ambrose J at 51.

409 Id at 33.

410 Id at 34.

Ambrose J noted:⁴¹¹

Where under the terms of employment specified conduct on the part of an employee is expressly prohibited and warrants instant dismissal it will normally be difficult, I should think, to describe that misconduct as being other than serious: the fact that that misconduct also constitutes a criminal offence attracting penalties of imprisonment and/or the imposition of a fine makes it impossible in my view to describe it as other than serious.

However, Derrington J, who dissented, considered that the gravity of the misconduct was a relevant consideration in determining whether an employee should be deprived of the benefit of the Act:⁴¹²

Because it is a substantial detriment to an employee to be deprived of the relief provided to employees generally by this section, and because the phrase is contained in an exception to the grant of relief, appropriate caution must be exercised in the construction of the essential phrase "serious or wilful misconduct". Further, because the remedy is predicated upon the employee's negligence, it follows that the quality of the misconduct which excludes it must be something significantly worse than that. For these reasons serious misconduct must imply the need for such a degree of gravity as to make it fair and just that the employee should be deprived of the benefit of the relief, providing that it is kept at a practical level consonant with the purpose of the exception. In this context it must be misconduct which materially increased the likelihood of loss in the way in which it was in fact sustained

For misconduct to be found to be wilful, the person must know that his or her conduct is wrong:⁴¹³

... it seems to me that it must mean the doing of something, or the omitting to do something, which it is wrong to do or to omit, where the person who is guilty of the act or the omission knows that the act which he is doing, or that which he is omitting to do, is a wrong thing to do or to omit; ...

Wilful misconduct also involves a disregard for the consequences of the behaviour:⁴¹⁴

There must be the doing of something which the person doing it knows will cause risk or injury, ... either in spite of warning or without care, regardless whether it will or will not cause injury ...

411 Id at 51.

412 Id at 42.

413 *Lewis v The Great Western Railway Company* (1877) 3 QBD 195 per Brett LJ at 210, cited with approval in *Boral Resources (Queensland) Pty Ltd v Pyke* [1992] 2 Qd R 25 per Thomas J at 33, per Derrington J at 43 and per Ambrose J at 51.

414 *Lewis v The Great Western Railway Company* (1877) 3 QBD 195 per Cotton LJ at 213.

The operation of section 66 has been criticised for allowing an insurer to maintain proceedings against its insured's employee where the conduct of the employee is "serious or wilful misconduct".⁴¹⁵

From an industrial relations standpoint what is required is a provision which insulates the employee from liability for loss arising out of or in the course of the employment. One may accept that public policy considerations may compel a democratically elected parliament to deny protection to those who incur liability through wilful wrongdoing or gross neglect of the safety of others, but 'wilful or serious misconduct' is not an appropriate statutory vehicle. ... What is required is a phrase which shifts concentration from conduct already branded as wrongful to the industrial basis on which the employer and the employee have conducted their relationship.

[In *Boral Resources (Queensland) Pty Ltd v Pyke*], where the employer's conduct had contributed much to the defendant's tiredness and (one suspects) to laying the foundation for the subsequent alcohol abuse, there is much to be said for the view that the employee should not be expected to pay for the (rather obvious) risk which eventuated.

(c) Criticisms of the rule

There has been considerable judicial and academic criticism of the rule in *Lister v Romford Ice*. It has been suggested that "there is no ground for regarding that case as determinative of industrial conditions at the other end of the world 30 years after it was decided".⁴¹⁶

The decision has been described as relating "to a different setting, in terms of time, place, social attitudes, and legislative context".⁴¹⁷ Further, the decision in *Lister v Romford Ice* was not unanimous, and it has been argued that there were considerations that supported each of the competing views, with cogent reasons advanced for their conclusion by the minority.⁴¹⁸

Some of the criticisms that have been put forward are discussed below.

⁴¹⁵ Hall DR, "No Skating 'round Romford Ice" (1990) 3 *AJLL* 301 at 302-303.

⁴¹⁶ *Rowell v Alexander Mackie College of Advanced Education* (1988) Aust Torts Reports ¶80-183 per Samuels JA (with whom Hope JA agreed) at 67,731.

⁴¹⁷ *AR Griffiths and Sons Pty Ltd v Richards* [2000] 1 Qd R 116 per Fitzgerald P at 123. See also *Interchase Corp Ltd v ACN 010 087 573 Pty Ltd (formerly known as Colliers Jardine (Qld) Pty Ltd)* [2001] QCA 191 (25 May 2001) per McMurdo P at [9]; *Wyllie v The ANI Corp Ltd* [2000] QCA 314 (4 August 2000) per McMurdo P at [15]-[17].

⁴¹⁸ *AR Griffiths and Sons Pty Ltd v Richards* [2000] 1 Qd R 116 per Fitzgerald P at 123.

(i) The rule is not conducive to good industrial relations

It has been recognised for many years that the application of the rule in *Lister v Romford Ice* has adverse implications for industrial relations between employers and employees. In *Morris v Ford Motor Co Ltd*,⁴¹⁹ Lord Denning MR made the following observation:⁴²⁰

If the [employee] himself is made to pay, he will feel much aggrieved. He will say to his employers: "Surely this liability is covered by insurance." He is employed to do his master's work, to drive his master's trucks, and to cope with situations presented to him by his master. The risks attendant on that work - including liability for negligence - should be borne by the master. The master takes the benefit and should bear the burden. The wages are fixed on that basis. If the servant is to bear the risk, his wages ought to be increased to cover it.

Lord Denning continued:⁴²¹

Everyone knows that risks such as these are covered by insurance. So they should be, when a man is doing his employer's work, with his employer's plant and equipment, and happens to make a mistake. To make the servant personally liable would not only lead to a strike. It would be positively unjust. *Lister v Romford Ice* was an unfortunate decision.

The decision in *Lister v Romford Ice* has been described as "clearly unsatisfactory, both in shifting a loss from a good to a bad distributor of that loss and in being likely to cause industrial unrest".⁴²² It has been pointed out that the effect of the decision is that, in practice, friendly employment relations can be disrupted by an insurer, a stranger to the workplace,⁴²³ and that the continued application of the rule leaves the way open for insurers to affect workplace relations.

In 1980 the Australian Law Reform Commission recommended reform of the law in this area as far as the principle of subrogation was concerned. In its report into insurance contracts, that Commission noted that "an insurer's right of subrogation is inconsistent with sound practice in the field of industrial relations".⁴²⁴

419 [1973] 1 QB 792.

420 *Id* at 798.

421 *Id* at 801.

422 Balkin RP and Davis JLR, *Law of Torts* (2nd ed, 1996) at 849.

423 Williams GL, "Vicarious Liability and the Master's Indemnity" (1957) 20 *MLR* 220 at 221.

424 Australian Law Reform Commission, Report, *Insurance Contracts* (ALRC 20, 1982) at 189. This recommendation was implemented by the enactment of s 66 of the *Insurance Contracts Act 1984* (Cth), which is discussed at pp 87-90 of this Report.

(ii) The rule does not represent the expectations of employers and employees

It has been suggested that the general expectation of both employers and employees is that, where an employee, during the course of his or her employment, commits a tort which causes loss or injury, the cost of the damage will be covered by insurance.⁴²⁵

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. ... 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. ... [I]n 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.

It has been suggested that premiums are fixed on this basis, not on the basis that the insurer may later gain a windfall indemnity from the insured's employee.⁴²⁶

(iii) The rule is harsh and unfair

It has also been suggested that it is unfair to make an employee pay the damages awarded against an employer, especially when an insurance policy is in place to cover such a loss.⁴²⁷

The rule can also operate unfairly against a plaintiff, in that, if the defendant employer has a right of indemnity against the employee, the court (especially a jury) may be unduly lenient towards the defendant.⁴²⁸ In its report on insurance contracts, the Australian Law Reform Commission noted:⁴²⁹

It is even possible that a third party claim in the original action might have the effect of depressing the award of damages to the injured person in case they should ultimately have to be paid by the uninsured third party.

Further, the rule gives rise to an anomaly. If the injured party sued the employee personally, the employer's insurance would usually cover the employee,⁴³⁰ but if the injured party sued the employer alone or jointly with the

⁴²⁵ *Marrapodi v Smith-Roberts* (Unreported, Supreme Court of the ACT, 27 June 1968, Fox J), noted in (1970) 44 *ALJ* 3. See also *Morris v Ford Motor Co Ltd* [1973] 1 QB 792 per Lord Denning MR at 798. See also Australian Law Reform Commission, Report, *Insurance Contracts* (ALRC 20, 1982) at 188.

⁴²⁶ *Romford Ice and Cold Storage Co Ltd v Lister* [1956] 2 QB 180 per Denning LJ at 192.

⁴²⁷ *Morris v Ford Motor Co Ltd* [1973] 1 QB 792 per Lord Denning MR at 798.

⁴²⁸ Parsons R, "Individual Responsibility versus Enterprise Liability" (1956) 29 *ALJ* 714 at 720.

⁴²⁹ Australian Law Reform Commission, Report, *Insurance Contracts* (ALRC 20, 1982) at 189.

⁴³⁰ See *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd* (1988) 165 CLR 107.

employee, then the insurer (being subrogated to the rights of the employer) could claim an indemnity from the employee (who is then not covered):⁴³¹

... if the injured person ... sues the employer either alone or jointly with the employee, the position of the employee is, apparently, much worse and the position of the insurance company, apparently, much better. For now the latter can indemnify itself for the money it finds by getting it back from the employee in the employer's name and the former, instead of getting the benefit of the insurance which his employer was to provide is, in the end, the one who foots the bill.

(d) The status of the rule in Queensland

The rule in *Lister v Romford Ice* still applies in Queensland,⁴³² subject to the common law and statutory restrictions on the application of the rule.⁴³³ However, certain State employees may be indemnified by the State, as a result of specific legislation or government policy, for liability they incur as a result of tortious conduct committed in the performance of their duties.

(i) State employees generally

There are a number of specific legislative provisions that grant certain State employees and officers an indemnity against personal liability incurred in the performance of their duties.⁴³⁴

In relation to other State employees,⁴³⁵ the Queensland Government policy stated in the guideline *Crown Acceptance of Legal Liability for Actions of Crown Employees*⁴³⁶ is that the State will accept full and sole responsibility for all claims including the cost of defending or settling them, in cases where the

431 *Lister v Romford Ice and Cold Storage Ltd* [1957] AC 555 per Lord Radcliffe at 590. This position has largely been altered by the *Insurance Contracts Act 1984* (Cth). Under s 66 of the Act, an insurer no longer has the right to be subrogated to the rights of the insured against the employee where the loss occurred in the course of employment and the conduct of the employee did not amount to serious or wilful misconduct. See pp 87-90 of this Report.

432 *AR Griffiths and Sons Pty Ltd v Richards* [2001] 1 Qd R 116 per Mackenzie and Helman JJ at 141-142.

433 See pp 86-90 of this Report.

434 See for example s 39 of the *Ambulance Service Act 1991* (Qld), which provides for an indemnity in respect of acts done or omitted to be done in good faith for the purposes of exercising the powers of an authorised officer under the Act.

435 According to the Queensland Government Guideline *Crown Acceptance of Legal Liability for Actions of Crown Employees*, the term "state employee" covers not only those who are employed in the Public Service but also staff employed by any Minister of the Crown, public officer, person, board, or corporate body acting for and on behalf of, or as the agent of, or as representing, the Crown or Her Majesty the Queen. Queensland Government Personnel Management Handbook. Document number M2 (1 February 1989). The Queensland Government is currently reviewing this policy.

436 Queensland Government Personnel Management Handbook. Document number M2 (1 February 1989).

State employee concerned has diligently and conscientiously endeavoured to carry out assigned duties.⁴³⁷

However, the policy itself does not have the force of law and does not abrogate the common law rule concerning the right of an employer to claim an indemnity from an employee under the principle of *Lister v Romford Ice*.

(ii) Members of the police service

The Government policy in relation to State employees does not apply to members of the police service.⁴³⁸ The personal liability of an officer, staff member, recruit or volunteer of the Queensland Police Service is the subject of a specific provision of the *Police Service Administration Act 1990* (Qld).

Section 10.5(5) of that Act provides:

If an officer, staff member, recruit or volunteer incurs liability in law for a tort committed by the officer, staff member, recruit or volunteer in the course of rendering assistance, directly or indirectly, to a person suffering, or apparently suffering, from illness or injury in circumstances that the officer, staff member, recruit or volunteer reasonably considers to constitute an emergency, and if the officer, staff member, recruit or volunteer acted therein in good faith and without gross negligence, the Crown is to indemnify and keep indemnified the officer, staff member, recruit or volunteer in respect of that liability.

The operation of the provision is quite limited in that it applies only where an officer, staff member, recruit or volunteer commits a tort in the course of rendering emergency assistance to a person, and acts in good faith and without gross negligence in rendering such assistance.

Where an officer, staff member, recruit or volunteer incurs liability for a tort in circumstances other than those prescribed by section 10.5(5), he or she has no entitlement to be indemnified by the State. Nevertheless, under section 10.6, the State may choose to pay the whole or part of the damages (other than punitive damages)⁴³⁹ or costs awarded against the officer, staff member or recruit, or the whole or part of the costs incurred by the officer, staff member or recruit in the proceedings.⁴⁴⁰ Under that section, the State may also pay the whole or part of a sum that an officer, staff member or recruit is liable to pay under a settlement of a claim.

⁴³⁷ Under the policy the State will “indemnify any officer who, as a consequence of the carrying out of his duties, has been the subject of a claim for defamation.” Queensland Government Guideline *Crown Acceptance of Legal Liability for Actions of Crown Employees*. Queensland Government Personnel Management Handbook. Document number M2 (1 February 1989). The Queensland Government is currently reviewing this policy.

⁴³⁸ Queensland Government Guideline *Crown Acceptance of Legal Liability for Actions of Crown Employees*. Queensland Government Personnel Management Handbook. Document number M2 (1 February 1989).

⁴³⁹ For a discussion of punitive damages see pp 47-48 and 57-58 of this Report.

⁴⁴⁰ Section 10.6 of the *Police Service Administration Act 1990* (Qld) does not refer to a volunteer.

Section 10.6 of the Act provides, in part:

- (1) The Crown may pay -
 - (a) the whole or part of damages, other than damages in the nature of punitive damages, and costs awarded against any officer, staff member or recruit, in proceedings with respect to a tort committed by the officer, staff member or recruit acting, or purporting to act, in the execution of duty; and
 - (b) the whole or part of costs incurred, and not recovered, by the officer, staff member or recruit in the proceedings.
- (2) If any officer, staff member or recruit is liable to pay a sum under a settlement of a claim that has, or might have, given rise to proceedings such as are referred to in subsection (1), the Crown may pay the whole or part of the sum.

...

Section 10.6 cannot, however, be regarded as providing a right to an indemnity, as the State is not under any obligation to make a payment under section 10.6(1) or (2). Moreover, where the State makes such a payment, it may bring proceedings to recover contribution from the officer, staff member or recruit in respect of the payment.⁴⁴¹

(e) The status of the rule in other jurisdictions

In a number of Australian jurisdictions, the common law in this area has been modified by legislation. Legislation in New South Wales, South Australia, and the Northern Territory has abrogated the right of an employer to claim an indemnity from an employee and has provided to the employee a statutory right of indemnity from the employer.⁴⁴²

In the United Kingdom, although there has not been any statutory abrogation of the rule, a similar, although more limited, effect has been achieved by agreement among insurers.⁴⁴³

(i) New South Wales

In New South Wales the rule in *Lister v Romford Ice* has been abrogated by statute. The New South Wales legislation prohibits an employer from obtaining an indemnity from an employee and makes provision for an

441 *Police Service Administration Act 1990* (Qld) s 10.6(3). That section is set out at p 104 of this Report.

442 *Employees Liability Act 1991* (NSW) s 3; *Wrongs Act 1936* (SA) s 27C; *Law Reform (Miscellaneous Provisions) Act* (NT) s 22A. See also the discussion of s 66 of the *Insurance Contracts Act 1984* (Cth) at pp 87-90 of this Report.

443 See pp 98-99 of this Report.

employee to seek an indemnity from an employer.⁴⁴⁴ The legislation also provides that an employer may not claim contribution from an employee for whose tort the employer is also liable. The relevant legislative provisions are found in the *Employees Liability Act 1991* (NSW).⁴⁴⁵ When the legislation was introduced, the then Attorney-General, the Honourable Mr Dowd, noted in his second reading speech:⁴⁴⁶

... there is a growing momentum in many jurisdictions to channel liability to the employer alone. It is not appropriate to abolish the right to sue a negligent employee, as an injured party would be denied a remedy in situations where an employer is insolvent or uninsured. However, by giving an employee a right to indemnity from the employer, the employee's exposure to liability is significantly reduced. The employer's liability is not increased as he or she is already vicariously liable for the employee and liability arising from the indemnity would be covered by existing insurance policies for vicarious liability.

The Act provides:

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.

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.

444 See pp 102-106 of this Report for a discussion of contribution.

445 Section 10 of this Act repealed the *Employee's Liability (Indemnification of Employer) Act 1982* (NSW), which previously regulated the same issues.

446 New South Wales, *Parliamentary Debates*, Legislative Assembly, 6 September 1990, 6778.

The protection offered by the Act does not apply if the conduct constituting the tort is “serious and wilful misconduct”. The Act gives greater protection to employees than section 66 of the *Insurance Contracts Act 1984* (Cth), which does not apply if the conduct constituting the tort is either serious or wilful misconduct.

(ii) South Australia

In South Australia section 27C of the *Wrongs Act 1936* (SA) provides:

Rights as between employer and employee

- (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.
- ...
- (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.

The reference to serious and wilful misconduct is the same as the New South Wales provision.

(iii) Northern Territory

In the Northern Territory section 22A of the *Law Reform (Miscellaneous Provisions) Act* (NT) provides:⁴⁴⁷

Rights in cases of vicarious liability

- (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

447

This provision was inserted by s 2 of the *Law Reform (Miscellaneous Provisions) Amendment Act 1984* (NT). Section 22A(1)(b) of the Northern Territory Act, which is in similar terms to s 27C(1)(b) of the South Australian legislation, was considered in *Santa Teresa Housing Association Inc v Jamieson* (1995) 120 FLR 315. In that case the Northern Territory Court of Appeal held that the employer was not required to indemnify the respondent employee (Jamieson) under s 22A because the respondent was entitled to an indemnity under the relevant motor accident legislation.

- (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.

...

- (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.

The reference to gross misconduct suggests misconduct that is serious, but not wilful. Gross misconduct has been described in a number of ways; for the most part it refers to misconduct that is reckless or culpable.⁴⁴⁸

(iv) The United Kingdom

The implications of the decision in *Lister v Romford Ice* were considered by an Inter-Departmental Committee appointed by the British Minister of Labour in March 1957, shortly after the House of Lords delivered its decision in that case.⁴⁴⁹ The Committee found in its Report, published in 1959, that “in practice the number of actions where employers (or their insurers) sought to indemnify themselves by recourse against employees, was negligible”.⁴⁵⁰ It noted that:⁴⁵¹

... as long ago as 1953 certain members of the British Insurance Association engaged in the employers’ liability market entered into a “gentleman’s agreement” under which they undertook that claims would not be instituted against the employees of an insured employer in respect of damages paid to a fellow employee without the prior consent of the employer. The only exception made to this agreement is where it transpires that there has been collusion or *wilful* misconduct by an employee. [original emphasis]

Although the Committee considered possible legislative reforms, its recommendation was to “enlarge the ambit of the ‘gentleman’s agreement’”.⁴⁵² The Committee’s further recommendation was that “trade unions might seek by collective bargaining agreements to secure insurance

448 See for example the references in *Stroud’s Judicial Dictionary of Words and Phrases* (4th ed, 1972) at 1194, where reference is made to “gross negligence” in terms of “wilful blindness” or “culpability”.

449 Gardiner G, “*Lister v The Romford Ice and Cold Storage Company Ltd* (Report of the Inter-Departmental Committee)” (1959) 22 *MLR* 652.

450 *Id* at 653.

451 *Id* at 653-654.

452 *Id* at 655.

cover for their members, the cost of which would be borne by the employers".⁴⁵³

The Association of British Insurers considered the Report of the Inter-Departmental Committee and issued a circular to all association members inviting the members:⁴⁵⁴

- (a) ... [to] confirm adherence to a revised "gentleman's agreement" as follows:

Employers' Liability Insurers agree that they will not institute a claim against the employee of an insured employer in respect of death of or injury to a fellow-employee unless the weight of evidence clearly indicates (1) collusion or (2) wilful misconduct, on the part of the employee against whom the claim is made. ...

The Inter-Departmental Committee's recommendation about extending the existing "gentleman's agreement" has been criticised.⁴⁵⁵

As a suggested solution of the problem posed by the *Lister* case, it is impracticable and illusory. A great many of such agreements would have to be made to cover the whole industrial field; and, if made, they would not be legally enforceable, while their true construction, in case of dispute, could prove elusive.

The agreement only covers injury caused to fellow employees. An employee who caused injury to a person who was not a fellow employee would not be able to take advantage of the protection offered by the agreement.⁴⁵⁶

(f) Indemnification of employer

New South Wales,⁴⁵⁷ South Australia⁴⁵⁸ and the Northern Territory⁴⁵⁹ have legislation that gives a right of subrogation to an employer where an employee is entitled to be indemnified under a policy of insurance. The South Australian and Northern Territory legislation also applies where the employee is entitled to be indemnified

453 Ibid.

454 British Insurance Association Circular to Members, 23 October 1959 (Circular No 89/59).

455 Editorial comment, (1959) 35 *NZLJ* 161 at 162. See also Gardiner G, "Lister v The Romford Ice and Cold Storage Company Ltd (Report of the Inter-Departmental Committee)" (1959) 22 *MLR* 652, where it was questioned whether "this rather peculiar method of law reform should be encouraged".

456 The agreement does not affect the liability of an employee to indemnify an employer who is uninsured.

457 *Employees Liability Act 1991* (NSW) s 6.

458 *Wrongs Act 1936* (SA) s 27C(2).

459 *Law Reform (Miscellaneous Provisions) Act* (NT) s 22A(2).

under a contract of indemnity. The South Australian provision is as follows:⁴⁶⁰

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.

(g) Submissions

(i) The rule in *Lister v Romford Ice*

The majority of the submissions received by the Commission in relation to the rule in *Lister v Romford Ice* supported its abrogation.⁴⁶¹ According to the Transport Workers' Union:⁴⁶²

... the rule in *Lister v Romford Ice* should be legislated out of existence along with any ability to claim contribution or indemnity from an employee. The Transport Workers' Union's view is that the law in Queensland does not offer the protection to employee drivers that it should. Employees should be able to work without being exposed to liability which arises from events which occur within the scope of the employment.

The Queensland Teachers' Union suggested that the rule in *Lister v Romford Ice* was inconsistent with contemporary views regarding the workplace.⁴⁶³

... it is appropriate that the law be changed so that employers no longer have a right of indemnity against employees in respect of torts committed by the employee for which the employer is vicariously liable. It is submitted that it is more consistent with contemporary approaches that the loss be borne by the employer and/or an insurance company.

The submission of the Queensland Police Union⁴⁶⁴ addressed the issue in light of the statutory modification of the rule made by the *Police Service Administration Act 1990* (Qld).⁴⁶⁵ The Queensland Police Union suggested that the terms of section 10.5(5) of the *Police Service Administration Act 1990*

⁴⁶⁰ *Wrongs Act 1936* (SA) s 27C(2). The Northern Territory provision is in similar terms. The New South Wales provision refers only to a policy of insurance. Section 6(2) of the *Employees Liability Act 1991* (NSW) provides that "insurance" includes "indemnity".

⁴⁶¹ Submissions 3, 5, 6, 7, 8, 12, 13.

⁴⁶² Submission 5.

⁴⁶³ Submission 3.

⁴⁶⁴ Submission 13.

⁴⁶⁵ Section 10.5(5) of the *Police Service Administration Act 1990* (Qld) requires the State to indemnify and keep indemnified any officer, staff member, recruit or volunteer, acting in good faith and without gross negligence, who incurs liability for a tort committed in the course of rendering assistance to a person suffering from illness or injury in circumstances that constitute an emergency.

(Qld) were too limited and gave insufficient protection to members of the police service.⁴⁶⁶ The Union expressed the concern that members of the police service could be required to indemnify the State, where the circumstances surrounding the commission of the tort were outside the scope of section 10.5(5):⁴⁶⁷

The Union considers that in view of the very nature of the duties and responsibilities of police officers, they are exposed increasingly to circumstances which may give rise to civil actions for damages against them and that except in circumstances where the officer has acted with gross negligence or has wilfully exceeded the scope of his authority, the Crown ought not to be entitled to an indemnity from the officer.

(ii) Models for reform

The majority of submissions that supported the abrogation of the rule in *Lister v Romford Ice* advocated using the *Employees Liability Act 1991 (NSW)* as the basis for legislative reform in Queensland.⁴⁶⁸ The Queensland Nurses' Union commented:⁴⁶⁹

The NSW legislation provides a direct and easily understandable drafting that is "user friendly" and offers a sound basis on which development can occur in Queensland.

Two respondents, although generally supportive of the New South Wales Act as an appropriate model, questioned its adequacy to protect employees in certain situations.⁴⁷⁰

The Transport Workers' Union expressed the view that the *Employees Liability Act 1991 (NSW)* is not adequate to cover all employees.⁴⁷¹

The legislation fails to adequately protect the employee where the employer is insolvent or not insured or otherwise unable to be made liable or where there are risks in that regard. ... These problems must be addressed so that there is no resort to the individual employee.

The submission of the Queensland Teachers' Union⁴⁷² addressed section 5(1) of the *Employees Liability Act 1991 (NSW)*, which provides that the Act does not apply to a tort committed by an employee if the conduct constituting the

466 Submission 13B.

467 Ibid.

468 Submissions 6, 7, 8, 12, 13.

469 Submission 8.

470 Submissions 3, 5.

471 Submission 5.

472 Submission 3.

tort was “serious and wilful misconduct”. The Queensland Teachers’ Union noted academic criticism of the notion of serious and wilful misconduct⁴⁷³ and submitted “that there ought not to be an exception” in any legislation proposed to abrogate the rule in Queensland.⁴⁷⁴

3. CONTRIBUTION

(a) The common law

At common law, it was not possible, where two tortfeasors were liable for the same damage, for one to seek a contribution from the other in respect of any damages payable to an injured party. As a result, if the injured party chose to claim against only one of the tortfeasors, that tortfeasor would bear the whole of the cost if the claim were successful.⁴⁷⁵ However, the common law has been altered by legislation that allows contribution amongst tortfeasors.

(b) The position in Queensland

(i) The *Law Reform Act 1995 (Qld)*

In Queensland the relevant provisions are now found in the *Law Reform Act 1995 (Qld)*.⁴⁷⁶ Section 6 of that Act provides:

Proceedings against, and contribution between, joint and several tortfeasors

Where damage is suffered by any person as a result of a tort (whether a crime or not) -

- (a) judgment recovered against any tortfeasor liable in respect of that damage shall not be a bar to an action against any other person who would, if sued, have been liable as a joint tortfeasor in respect of the same damage;
- (b) ...

⁴⁷³ Submission 3, referring to Hall DR, “No Skating ‘round Romford Ice” (1990) 3 *AJLL* 301. See pp 88-89 of this Report for a discussion of the term “serious and wilful misconduct”.

⁴⁷⁴ Submission 3.

⁴⁷⁵ *Merryweather v Nixon* (1799) 8 TR 186. See also Fleming JG, *The Law of Torts* (9th ed, 1998) at 292-293.

⁴⁷⁶ The provision was previously contained in the *Law Reform (Tortfeasors Contribution, Contributory Negligence, and Division of Chattels) Act 1952 (Qld)* s 5.

- (c) any tortfeasor liable in respect of that damage may recover contribution from any other tortfeasor who is, or would if sued have been, liable in respect of the same damage, whether as a joint tortfeasor or otherwise, so, however, that no person shall be entitled to recover contribution under this section from any person entitled to be indemnified by the person in respect of the liability in respect of which the contribution is sought.

The contribution is determined by the court on the basis of what is just and equitable having regard to the extent of that person's responsibility for the damage.⁴⁷⁷

Where one person is vicariously liable for a tort of another, both are liable for loss or injury resulting from the commission of the tort. As they are "liable in respect of the same damage", the contribution provisions apply. If a successful claim is made against either of them, the legislation allows the one who bears the cost of meeting the claim to seek contribution from the other. However, there is no right of contribution if the person from whom the contribution is sought is entitled to an indemnity from the person seeking the contribution.

For example, an employer who is vicariously liable for a tort committed by an employee is able to claim contribution from the employee, unless the employee is entitled to be indemnified by the employer.⁴⁷⁸ However, if an employer is entitled to be indemnified by an employee,⁴⁷⁹ the employee is unable to recover contribution from the employer towards compensation paid to a person who suffered loss or injury arising from a tort committed by the employee in the course of his or her employment.

(ii) State government policy

As noted earlier in this chapter,⁴⁸⁰ Queensland Government policy provides that the State will accept full and sole responsibility for all claims in cases where the State employee concerned has diligently and conscientiously endeavoured to carry out assigned duties. The policy recognises the fact that "many Crown employees have difficult and delicate duties and functions and that, in the diligent carrying out of them, they are exposed to claims for damages".⁴⁸¹ Where the State pays an amount in settlement of a claim, the

477 *Law Reform Act 1995* (Qld) s 7.

478 See pp 86-87 of this Report.

479 See pp 84-86 of this Report.

480 See pp 93-94 of this Report.

481 Queensland Government Guideline *Crown Acceptance of Legal Liability for Actions of Crown Employees*. Queensland Government Personnel Management Handbook. Document number M2 (1 February 1989). The Queensland Government is currently reviewing this policy.

policy indicates that it will not seek contribution from the employee.⁴⁸²

It is not desirable that such employees should be restricted in the carrying out of their duties and functions by any fear that they may have to make payment out of their own pockets in respect of any claim arising out of the due performance of these duties and functions. ... Where the Crown pays any money in settlement of any claim which has arisen as the result of a Crown employee endeavouring to carry out assigned duties in a conscientious and diligent manner, the Crown will not seek to exercise any claim for contribution from such employee.

(iii) Members of the police service

The Queensland Government Policy does not apply to members of the police service.⁴⁸³

As noted earlier in this chapter, section 10.6(1) of the *Police Service Administration Act 1990* (Qld) provides that the State may pay the whole or part of damages (other than punitive damages) and costs awarded against an officer, staff member or recruit who is sued in respect of a tort committed while acting, or purporting to act, in the execution of duty, or the whole or part of the costs incurred by the officer, staff member or recruit.⁴⁸⁴ Section 10.6(2) provides that the State may also pay a sum which such a person is liable to pay in the settlement of a claim of that kind.⁴⁸⁵ Where the State makes a payment, other than in circumstances covered by section 10.5(5),⁴⁸⁶ section 10.6(3) allows the State to seek contribution from the officer, staff member or recruit. Section 10.6(3) provides:

Except as provided by section 10.5(5), if the Crown has paid moneys by way of damages or costs in respect of a tort committed by any officer, staff member or recruit, or has paid moneys under a settlement referred to in subsection (2), the Crown may recover, in a court of competent jurisdiction, contribution from the officer, staff member or recruit in respect of that payment.

Section 10.6(4) provides that the State may recover “such amount as is found by the court to be just and equitable in the circumstances”.

The Queensland Police Union has expressed the view that the right of the State to claim contribution from a member of the police service pursuant to sections 10.6(3) and 10.6(4) should be limited.⁴⁸⁷

482 Ibid.

483 See p 94 of this Report.

484 See pp 94-95 of this Report.

485 See p 95 of this Report.

486 See the discussion of this provision at p 94 of this Report.

487 Submission 13.

(c) The position in New South Wales

Until it was repealed,⁴⁸⁸ the *Employee's Liability (Indemnification of Employer) Act 1982* (NSW) provided as follows:

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.

The New South Wales Court of Appeal held that the use of the word “indemnity” in the Act did not affect an employer’s right to contribution (even up to 100%) under the tortfeasors contribution legislation.⁴⁸⁹

However, the High Court unanimously reversed the decision of the Court of Appeal. The Court observed:⁴⁹⁰

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 his right to recover contribution from his 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 - a term arising out of the nature of the employment relationship - that grounded the employer’s right to indemnity by his employee. ... 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

488 See note 491 of this Report.

489 *Fairfield Municipal Council v McGrath* [1984] 2 NSWLR 247 per Glass JA (with whom Hutley JA agreed) at 251.

490 *McGrath v The Council of the Municipality of Fairfield* (1985) 156 CLR 672 per Mason, Wilson, Brennan, Deane and Dawson JJ at 676-677.

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 of the decision in *Lister v Romford Ice* was equally applicable regardless of whether the decision was based on an employer's entitlement to contribution from his employee as a concurrent tortfeasor or on an employer's entitlement to indemnity under a contractual term.

The *Employee's Liability (Indemnification of Employer) Act 1982 (NSW)* was subsequently repealed and replaced by the *Employees Liability Act 1991 (NSW)*.⁴⁹¹

Section 3 of the 1991 Act expressly addresses the issue of contribution and provides that, where an employee commits a tort for which the employer is also liable, the employee is not liable to indemnify the employer or to make contribution to any damages paid by the employer.⁴⁹²

4. LOSS OF SERVICES OF AN EMPLOYEE

The common law recognises an action in tort by an employer for the loss of an employee's services caused by the tort of a third party, including a co-employee.⁴⁹³ The action, which originated in a time when a master was said to have some proprietary interest in his or her domestic servants, is known as the action *per quod servitium amisit*.⁴⁹⁴

... the action per quod lies whenever the plaintiff and the person injured by the wrongdoing stood to one another at the time of the injury in the relation of master and servant.

Although the cause of action for the loss of an employee's services does not raise the issue of vicarious liability, it is examined in this Report because, where the injury to the employee is caused by a co-employee, it allows civil action to be taken by the employer against the employee.

It has been suggested that the action no longer serves any useful purpose.⁴⁹⁵ The arguments for its abolition, at least in respect of an action by an employer against an employee, are similar to the arguments supporting the abolition of the rule in *Lister v Romford Ice*.

491 *Employees Liability Act 1991 (NSW)* s 10.

492 This provision is set out at p 96 of this Report.

493 *Sydney City Council v Bosnich* (1968) 89 WN (NSW) 168.

494 *Commissioner for Railways (NSW) v Scott* (1959) 102 CLR 392 per Kitto J at 418. Taylor and Menzies JJ, at 427 and 437 respectively, agreed.

495 Balkin RP and Davis JLR, *Law of Torts* (2nd ed, 1996) at 599.

The action has also been criticised because it is derivative; the employer's cause of action relies upon a breach of duty owed by an employee, not to an employer, but to another employee.⁴⁹⁶ It is also said to be arbitrary because "an employer is able to claim, but a person in partnership with another is not permitted to bring an action".⁴⁹⁷ Finally, the action is said to be an inappropriate means of spreading a particular loss.⁴⁹⁸

Legislation in New South Wales prevents an employer from suing an employee for depriving an employer of the services of another employee. Section 4 of the *Employees Liability Act 1991* (NSW) provides:

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.

In his Second Reading speech concerning the legislation, the then Attorney-General, the Honourable Mr Dowd, noted:⁴⁹⁹

While there is no direct authority to confirm it, there is no reason why an action for loss of an employee's services should not be available against another employee. For this reason it is proposed to provide that no employee shall be liable in tort to his or her employer on the ground only of having deprived the employer of the services of a co-employee.

5. THE COMMISSION'S VIEW

(a) Indemnity - the rule in *Lister v Romford Ice*

(i) Abrogation of the rule

The Commission has considered the arguments supporting the abrogation of the rule in *Lister v Romford Ice*. In particular, the Commission is concerned that the right of an employer to an indemnity from an employee defeats the effect of vicarious liability in that it results in an employee becoming personally liable for the amount awarded by way of damages caused by the employee's tortious conduct during the course of the employment relationship.

496 *Ibid.*

497 *Id* at 600.

498 On this point Balkin RP and Davis JLR, *Law of Torts* (2nd ed, 1996) note at 600:

The employee is likely to be entitled to sick pay when he or she is unable to provide the services of employment for a wide range of reasons, and the cost of providing that pay will have been incorporated into the employer's cost structure, to be passed on to the consumers of its goods and services.

499 New South Wales, *Parliamentary Debates*, Legislative Assembly, 6 September 1990 at 6778.

The continuation of the common law principle that an employer who is found to be vicariously liable can seek an indemnity from a negligent employee is objectionable on other grounds. These are:

- that if the employee only were sued by the plaintiff, he or she might be able to benefit from any insurance policy held by the employer on behalf of the employee; but if sued jointly with the employer, the employee could become liable if the insurer exercises its right of subrogation;⁵⁰⁰
- that the existing law is contrary to the promotion of good industrial relations and harmony by virtue of the fact that employees are exposed to potential litigation by employers; and
- that Queensland employees are offered less protection than employees in some other Australian jurisdictions where the rule has been abrogated by statute.

The weight of the submissions received by the Commission also favoured abrogation of the rule.⁵⁰¹

(ii) Legislative reform

The Commission has given consideration to possible models for reform.

The Commission is not in favour of the “gentleman’s agreement” approach adopted in the United Kingdom. It considers that this approach could lead to uncertainty, since it relies on the good faith of insurers. It is also unsatisfactory, and potentially unfair, in that the agreement relates only to actions brought by insurers (in the name of an insured employer) against an employee for personal injury caused to a fellow employee, and does not affect the question of indemnity of an employer by an employee where an employer is uninsured or where the damage is outside the scope of the agreement.

For these reasons, and taking into account submissions made to the Commission, the Commission is of the view that legislation should be introduced to abrogate the rule in *Lister v Romford Ice and Cold Storage Co Ltd*⁵⁰² so that an employee who commits a tort in the course of or arising out of the employment relationship, is not liable to indemnify his or her employer for liability incurred by the employer for the tort of the employee.

⁵⁰⁰ Section 66 of the *Insurance Contracts Act 1984* (Cth) prohibits the insurance company from exercising a right of subrogation where the conduct of the employee was not serious or wilful misconduct. See pp 87-90 of this Report.

⁵⁰¹ See note 461 of this Report.

⁵⁰² [1957] AC 555.

Further, the Commission is of the view that an employer should be liable to indemnify an employee in respect of liability incurred for any tort committed by the employee during the course of, or arising out of, the employment relationship.

In the view of the Commission, the State should be in the same position in relation to its employees, including members of the police service, as any other employer. A State employee should not be liable to indemnify the State for liability incurred by the State as a result of a tort committed by the employee in the course and scope of the employment. Rather, the State, as employer, should be liable to indemnify a State employee who incurs liability for such a tort.

The Commission is also of the view that, in relation to persons in the service of the State,⁵⁰³ the liability of the person and of the State should be the same as if the person were a State employee and the individual's service were that of employment.

The Commission's recommendation is intended to ensure that an employer, including the State, who is vicariously liable for the tort of an employee is not able to shift the responsibility for paying compensation for the loss or injury resulting from the commission of the tort to the employee. The Commission acknowledges that there may nevertheless be cases where, because the employer is insolvent or uninsured,⁵⁰⁴ the employee's right to be indemnified by his or her employer will be of little value to the employee. However, the Commission is of the view that the introduction of a compulsory insurance scheme to cover injuries caused by tortious conduct in the workplace is outside the terms of this reference.⁵⁰⁵

(iii) Scope of the proposed legislation

The Commission has considered whether there should be any restrictions on the protection offered to employees under the recommended legislation. The Commission notes the view expressed in one submission⁵⁰⁶ that no restrictions should be placed on the protection afforded to employees. The Commission does not, however, consider it reasonable that an employer, or the employer's insurer, should be liable in all circumstances for a tort committed by an employee.

503 See pp 48-49 of this Report for a discussion of persons in the service of the State.

504 Submission 5. See p 101 of this Report.

505 Submission 2. The Commission notes the existence of a statutory compensation scheme in respect of physical injury arising out of the use of a motor vehicle. See the *Motor Accident Insurance Act 1994* (Qld).

506 Submission 3. See pp 101-102 of this Report.

In the Commission's view, an employee who engages in serious and wilful misconduct should not be shielded from the consequences of those intentional acts. The Commission considers that this view is consistent with good industrial and workplace practice and the expectations of employers and employees.

The Commission considers that the Commonwealth model, which does not protect an employee who commits a tort involving either serious or wilful misconduct,⁵⁰⁷ is too restrictive. For example, in relation to cases involving negligence, it limits the protection afforded to an employee to acts of negligence that can be categorised as non-serious. The Commonwealth legislation regulates insurance law.⁵⁰⁸ In the wider context of employment law, the Commission is of the view that a more extensive level of protection is needed.

For the same reason, the Commission does not support the reference in the Northern Territory legislation to "gross misconduct".⁵⁰⁹

The Commission is of the view that, in order to justify the exclusion of an employee, including a State employee, from protective legislation of the kind proposed, the conduct of the employee must amount to serious and wilful misconduct. A similar test should apply to persons in the service of the State.

(b) Contribution

The Commission considers that it would be absurd if the legislative provision to give effect to the view discussed above kept open the possibility that an employer could claim contribution (although not an indemnity) from an employee. The High Court recognised this when considering the earlier New South Wales legislation, which did not expressly remove an employer's right to claim contribution from an employee for whose tort the employer was vicariously liable.⁵¹⁰ To avoid such a situation, the Commission is of the view that the proposed legislation should specifically remove the right of an employer, including the State, to claim contribution from an employee for whose tort the employer is vicariously liable. This legislative provision should also apply to a person in the service of the State as if that person were a State employee and the individual's service with the State were that of employment.

507 See pp 87-90 of this Report.

508 Ibid.

509 See pp 97-98 of this Report.

510 *McGrath v The Council of the Municipality of Fairfield* (1985) 156 CLR 672, which is discussed at pp 105-106 of this Report.

For the reasons expressed above the Commission is also of the view that the legislative provision removing an employer's right to claim contribution from an employee should not apply if the employee's conduct is both serious and wilful.

(c) Members of the police service

The Commission is of the view that members of the police service should have the same level of protection from liability arising out of their employment relationship with the State as other employees.

(i) Indemnity by the State

The Commission recommends that a member of the police service should be indemnified in respect of liability arising from the commission of a tort where the tort was committed in the course and scope of his or her employment as a member of the police service, unless that conduct amounted to serious and wilful misconduct.

The current wording of section 10.5(5) of the *Police Service Administration Act 1990* (Qld) requires the State to indemnify a member of the police service where the liability of the member arises from a situation that involves the rendering of assistance in circumstances constituting an emergency.⁵¹¹ This raises the issue of whether, in the light of the Commission's general recommendation concerning the indemnification of an employee by an employer,⁵¹² it is necessary to retain section 10.5(5) of the *Police Service Administration Act 1990* (Qld).

The reference in the section to "rendering of assistance in circumstances constituting an emergency" is open to two interpretations. On a broad interpretation of the provision, the State would be obliged to indemnify a member of the police service in any circumstance where he or she incurred liability in tort in the course of rendering assistance, whether this was in the course of his or her duty as a member of the police service or otherwise, for example, at a social function. On a narrow interpretation of the provision, the State's obligation to indemnify a member of the police service would be limited to circumstances where the rendering of the assistance occurred in the course and scope of employment as a member of the police service.

The Commission's general recommendation would not require the State to indemnify a member of the police service in respect of a liability incurred in rendering assistance outside the course of duty as a member of the police

511 See p 94 of this Report.

512 See pp 107-109 of this Report. See also Recommendation 5.4 at p 115 of this Report and cl 3 of the draft legislation set out in Appendix 4 to this Report (proposed ss 11C (definition of "State employee") and 11J of the *Law Reform Act 1995* (Qld)).

service, that is, on the broader interpretation of section 10.5(5). Consequently, the Commission is of the view that it would be inappropriate to recommend the repeal of section 10.5(5).

In Chapter 3 of this Report, the Commission has recommended the repeal of section 10.5(2) of the Act, which provides that the State's liability for a tort committed by an officer, staff member, recruit or volunteer does not extend to the payment of punitive damages.⁵¹³ Given the Commission's view that the present restriction in respect of the payment of punitive damages by the State should be removed, there does not seem to be any justification for preventing the State from making a discretionary payment under section 10.6(1)(a) in respect of an award of punitive damages that has been made against an officer, staff member or recruit. The Commission is therefore of the view that the words “, other than damages in the nature of punitive damages,” should be omitted from section 10.6(1)(a).

(ii) Restriction of the State's right to an indemnity or to contribution

Section 10.6(3) of the *Police Service Administration Act 1990* (Qld) allows the State to seek contribution from an officer, staff member or recruit where the State has paid moneys by way of damages or costs in respect of a tort committed by that person, except where he or she has been indemnified under section 10.5(5).

The Commission has expressed the view above that an employer should not be able to claim an indemnity or contribution from an employee for whose tort the employer is vicariously liable. The Commission is therefore of the view that the right of the State to seek a contribution under section 10.6(3) should be limited to those cases where the State has made a discretionary payment under section 10.6(1) or 10.6(2) of the Act.

The Commission is also of the view that section 10.6 should be amended to make it clear that the State's right to recover contribution under that section does not limit or affect the provisions implementing the Commission's recommendations that an employer should not be able to claim an indemnity or contribution from an employee for whose tort the employer is vicariously liable.

(iii) The effect on a claim by the State of an officer's contributory negligence

In the course of its consideration of section 10.5 of the *Police Service Administration Act 1990* (Qld), the Commission has identified an anomaly which, in the view of the Commission, needs to be addressed. Section 10.5(3) of the *Police Service Administration Act 1990* (Qld) provides:

513

See the discussion of the Commission's view at pp 57-58 of this Report and Recommendation 3.6 at p 60 of this Report.

In proceedings upon a claim by the Crown for damages in respect of a tort, actions done or omissions made by an officer acting, or purporting to act, in the execution of duty as an officer may be relied on by the Crown as constituting contributory negligence, if the actions or omissions could have been so relied on if they had been done or made by a servant of the Crown in the course of employment. [emphasis added]

In the Commission's view this subsection was presumably intended to provide that, in a case where the Crown is the plaintiff and a police officer has contributed to the loss or damage suffered by the Crown, the defendant is entitled to rely on the contributory negligence of the officer and so reduce the damages awarded against him or her. The difficulty arises from the placement of the words "by the Crown" which suggest that the Crown, rather than the defendant, can rely on the acts of contributory negligence.

The previous provision, section 69B(2) of the *Police Act 1937* (Qld),⁵¹⁴ was expressed in similar terms to section 10.5(3) of the *Police Service Administration Act 1990* (Qld), except that the placement of the words "by the Crown" in section 69B(2) made it clear that it was the defendant who was entitled to rely on certain acts done by a member of the Police Force as constituting contributory negligence by the Crown. Section 69B(2) of the *Police Act 1937* (Qld) provided:

In proceedings by way of a claim by the Crown for damages in respect of a tort, acts done by a member of the Police Force in the performance, or purported performance, of his duties as such a member may be relied on as constituting contributory negligence by the Crown if the acts could have been so relied on if they had been done by an employee of the Crown in the course of his employment. [emphasis added]

The Commission acknowledges that the question of contributory negligence is outside the terms of this reference. However, in the view of the Commission, it is important to remove the existing ambiguity. The Commission therefore recommends that section 10.5(3) should be amended by placing the words "by the Crown" after the words "as constituting contributory negligence".

(d) Indemnification of employer

Legislation in New South Wales, South Australian and the Northern Territory provides that, where an employee is entitled under a policy of insurance to be indemnified in respect of liability for a tort, an employer who is proceeded against in respect of that tort may exercise the rights of the employee under that policy. The Commission notes that the South Australian and Northern Territory provisions extend to cases where the employee is entitled to be indemnified under a contract of indemnity.⁵¹⁵

514 This section was inserted by s 34 of the *Police Act Amendment Act 1978* (Qld).

515 See pp 99-100 of this Report.

The Commission is of the view that a provision such as the South Australian provision should be included in any proposed legislation. Such a provision should also apply to the State, in respect of a State employee or a person in the service of the State who is entitled to be indemnified under a policy of insurance or a contract of indemnity.

(e) Loss of services of an employee

Although this issue is not strictly within the terms of this reference, the view of the Commission is that the rule in Queensland in respect of an action by an employer against an employee for the loss of the services of another employee should be abolished.

Such a provision would complement the Commission's proposals concerning the limitation of actions by an employer against an employee arising out of the employment relationship, and would be consistent with other recommendations in this Report.

6. RECOMMENDATIONS

The Commission recommends that:

- 5.1** Legislation should be introduced to abrogate the rule in *Lister v Romford Ice and Cold Storage Co Ltd* [1957] AC 555 so that an employee, including a State employee, who commits a tort in the course of, or arising out of, the employment relationship is not liable to indemnify the employer, including the State, in relation to liability incurred by the employer for the tort of the employee, unless the conduct of the employee amounted to serious and wilful misconduct.⁵¹⁶
- 5.2** Legislation should be introduced to provide that an employee, including a State employee, who commits a tort in the course of, or arising out of, the employment relationship is not liable to pay contribution to the employer, including the State, in relation to liability incurred by the employer for the tort of the employee, unless the conduct of the employee amounted to serious and wilful misconduct.⁵¹⁷

⁵¹⁶ See cl 3 of the draft legislation (proposed ss 11G and 11I of the *Law Reform Act 1995* (Qld)).

⁵¹⁷ See cl 3 of the draft legislation (proposed ss 11G and 11I of the *Law Reform Act 1995* (Qld)).

5.3	The legislative provisions giving effect to Recommendations 5.1 and 5.2 should apply to an individual in the service of the State as if that individual were a State employee and the individual's service with the State were that of employment. ⁵¹⁸
5.4	Legislation should be introduced to provide that an employer, including the State, is liable to indemnify an employee, including a State employee, in relation to liability incurred for any tort committed by the employee during the course of, or arising out of, the employment relationship, unless the conduct of the employee amounted to serious and wilful misconduct, or the employee is otherwise entitled to an indemnity in relation to the liability. ⁵¹⁹
5.5	The legislative provision giving effect to Recommendation 5.4 should apply to an individual in the service of the State as if that individual were a State employee and the individual's service with the State were that of employment. ⁵²⁰
5.6	Section 10.5(3) of the <i>Police Service Administration Act 1990 (Qld)</i> should be amended by omitting the words "by the Crown" after the words "may be relied on" and inserting the words "by the Crown" after the words "as constituting contributory negligence". ⁵²¹
5.7	Section 10.6(1)(a) of the <i>Police Service Administration Act 1990 (Qld)</i> should be amended by omitting the words ", other than damages in the nature of punitive damages,". ⁵²²
5.8	Section 10.6(3) of the <i>Police Service Administration Act 1990 (Qld)</i> should be amended by omitting the words "Except as provided by section 10.5(5), if the Crown has paid moneys" and replacing them with the words "If the Crown has paid moneys under subsection (1)". ⁵²³

⁵¹⁸ See cl 3 of the draft legislation (proposed ss 11G, 11H and 11I of the *Law Reform Act 1995 (Qld)*).

⁵¹⁹ See cl 3 of the draft legislation (proposed ss 11G and 11J of the *Law Reform Act 1995 (Qld)*).

⁵²⁰ See cl 3 of the draft legislation (proposed ss 11G, 11H and 11J of the *Law Reform Act 1995 (Qld)*).

⁵²¹ See cl 5(2), (3) of the draft legislation.

⁵²² See cl 6(1) of the draft legislation.

⁵²³ See cl 6(2) of the draft legislation.

- 5.9** Section 10.6 of the *Police Service Administration Act 1990* (Qld) should be amended to provide that the section does not limit or affect the provisions implementing Recommendations 5.1, 5.2 and 5.4.⁵²⁴
- 5.10** Legislation should be introduced to provide that, if an employee, including a State employee, commits a tort in the course of, or arising out of, the employment relationship, and the employee is entitled under an insurance policy or contract of indemnity to be indemnified in relation to that liability, the employer, including the State, is subrogated to the employee's rights under that policy or contract in relation to liability incurred by the employer arising from the commission of the tort.⁵²⁵
- 5.11** The legislative provision giving effect to Recommendation 5.10 should apply to an individual in the service of the State as if that individual were a State employee and the individual's service with the State were that of employment.⁵²⁶
- 5.12** Legislation should be introduced to provide that an employee, including a State employee, is not liable in tort to his or her employer, including the State, only because the employee has deprived the employer of the services of any other employee.⁵²⁷

⁵²⁴ See cl 6(3) of the draft legislation.

⁵²⁵ See cl 3 of the draft legislation (proposed ss 11K and 11M of the *Law Reform Act 1995* (Qld)).

⁵²⁶ See cl 3 of the draft legislation (proposed ss 11K, 11L and 11M of the *Law Reform Act 1995* (Qld)).

⁵²⁷ See cl 3 of the draft legislation (proposed s 11N of the *Law Reform Act 1995* (Qld)).

APPENDIX 1

RESPONDENTS TO THE DISCUSSION PAPER

Australian Association of Speech and Hearing (Queensland Branch)

Australian Council of Trade Unions (Queensland Branch)

Bartlett, HM

Briton, J (former Queensland Anti-Discrimination Commissioner)

Department of Family and Community Services (now Families, Youth and
Community Care Queensland)

Hill & Taylor Solicitors & Attorneys on behalf of the Queensland Teachers' Union

Insurance Council of Australia Limited (Queensland Branch)

McCorkell, RC

Queensland Nurses' Union

Queensland Police Service

Queensland Police Union of Employees

Reidy & Tonkin Solicitors on behalf of the Transport Workers' Union Qld

Thomas, IP

White, PT (Barrister-at-Law)

APPENDIX 2

QUEENSLAND LEGISLATION

Police Service Administration Act 1990

10.5 Liability for tort generally

- (1) The Crown is liable for a tort committed by any officer, staff member, recruit or volunteer, acting, or purporting to act, in the execution of duty as an officer, a staff member, recruit or volunteer, in like manner as an employer is liable for tort committed by the employer's servant in the course of employment.
- (1A) The Crown is to be treated for all purposes as a joint tortfeasor with the officer, staff member, recruit or volunteer who committed the tort.
- (2) In no case does the Crown's liability for a tort committed by any officer, staff member, recruit or volunteer extend to a liability to pay damages in the nature of punitive damages.
- (3) In proceedings upon a claim by the Crown for damages in respect of a tort, actions done or omissions made by an officer acting, or purporting to act, in the execution of duty as an officer may be relied on by the Crown as constituting contributory negligence, if the actions or omissions could have been so relied on if they had been done or made by a servant of the Crown in the course of employment.
- (4) For the purposes of this section, an action done or omission made by an officer acting, or purporting to act, in the capacity of a constable is taken to have been done or made by the officer acting, or purporting to act, in the execution of duty as an officer.
- (5) If an officer, staff member, recruit or volunteer incurs liability in law for a tort committed by the officer, staff member, recruit or volunteer in the course of rendering assistance, directly or indirectly, to a person suffering, or apparently suffering, from illness or injury in circumstances that the officer, staff member, recruit or volunteer reasonably considers to constitute an emergency, and if the officer, staff member, recruit or volunteer acted therein in good faith and without gross negligence, the Crown is to indemnify and keep indemnified the officer, staff member, recruit or volunteer in respect of that liability.
- (6) In this section

“**volunteer**” means a person appointed by the commissioner to perform duties for the service on an unpaid voluntary basis on conditions decided by the commissioner.

10.6 Payment and recovery of damages

- (1) The Crown may pay -
 - (a) the whole or part of damages, other than damages in the nature of punitive damages, and costs awarded against any officer, staff member or recruit, in proceedings with respect to a tort committed by the officer, staff member or recruit acting, or purporting to act, in the execution of duty; and
 - (b) the whole or part of costs incurred, and not recovered, by the officer, staff member or recruit in the proceedings.

- (2) If any officer, staff member or recruit is liable to pay a sum under a settlement of a claim that has, or might have, given rise to proceedings such as are referred to in subsection (1), the Crown may pay the whole or part of the sum.
- (3) Except as provided by section 10.5(5), if the Crown has paid moneys by way of damages or costs in respect of a tort committed by any officer, staff member or recruit, or has paid moneys under a settlement referred to in subsection (2), the Crown may recover, in a court of competent jurisdiction, contribution from the officer, staff member or recruit in respect of that payment.
- (4) In proceedings for contribution under subsection (3) the amount of contribution recoverable is such amount as is found by the court to be just and equitable in the circumstances.

WorkCover Queensland Act 1996

12 Who is a “worker”

- (1) A “**worker**” is an individual who works under a contract of service.
- (2) Also, a person mentioned in schedule 2, part 1 is a “**worker**”.
- (3) However, a person mentioned in schedule 2, part 2 is not a “**worker**”.

...

32 Who is an “employer”

- (1) An “employer” is a person who employs a worker and includes -
 - (a) a government entity that employs a worker; and
 - (b) a deceased employer’s legal personal representative.
- (2) Also, a person mentioned in schedule 2A is an “employer”.
- (3) A reference to an employer of a worker who sustains an injury is a reference to the employer out of whose employment, or in the course of whose employment, the injury arose.

Schedule 2

Who is a worker

Part 1 - Persons who are workers

1. A person who works under a contract, or at piecework rates, for labour only or substantially for labour only.
2. A person who works a farm as a sharefarmer if -
 - (a) the sharefarmer does not provide and use in the sharefarming operations farm machinery driven or drawn by mechanical power; and
 - (b) the sharefarmer is entitled to not more than 1/3 of the proceeds of the sharefarming operations under the sharefarming agreement with the owner of the farm.

3. A salesperson, canvasser, collector or other person (“**salesperson**”) paid entirely or partly by commission, if the commission is not received for or in connection with work incident to a trade or business regularly carried on by the salesperson, individually or by way of a partnership.
4. A contractor, other than a contractor mentioned in part 2, section 4 of this schedule, if -
 - (a) the contractor makes a contract with some one else for the performance of work that is not incident to a trade or business regularly carried on by the contractor, individually or by way of a partnership; and
 - (b) the contractor -
 - (i) does not sublet the contract; or
 - (ii) does not employ a worker; or
 - (iii) if the contractor employs a worker, performs part of the work personally.
5. A person who is party to a contract of service with another person who lends or lets on hire the person’s services to someone else.
6. A person who is party to a contract of service with a labour hire agency or a group training organisation that arranges for the person to do work for someone else under an arrangement made between the agency or organisation and the other person.
7. A person who is party to a contract of service with a holding company whose services are let on hire by the holding company to another person.

Part 2 - Persons who are not workers

1. A person who performs work under a contract of service with -
 - (a) a corporation of which the person is a director; or
 - (b) a trust of which the person is a trustee; or
 - (c) a partnership of which the person is a member; or
 - (d) the Commonwealth, a Commonwealth authority or a licensed corporation under the *Safety Rehabilitation and Compensation Act 1988* (Cwlth).
2. A person who performs work under a contract of service as a professional sportsperson while -
 - (a) participating in a sporting or athletic activity as a contestant; or
 - (b) training or preparing for participation in a sporting or athletic activity as a contestant; or
 - (c) performing promotional activities offered to the person because of the person’s standing as a sportsperson; or
 - (d) engaging on any daily or other periodic journey in connection with the participation, training, preparation or performance.

3. A member of the crew of a fishing vessel if -
 - (a) the member's entitlement to remuneration is contingent upon the working of the vessel producing gross earnings or profits; and
 - (b) the remuneration is wholly or mainly a share of the gross earnings or profits.
4. A person who, in performing work under a contract, other than a contract of service, supplies and uses a motor vehicle for driving tuition.
5. A person participating in an approved program or work for unemployment payment under the *Social Security Act 1991* (Cwlth), section 601 or 606.⁵²⁸

Schedule 2A

Persons who are employers

1. A person who lends or lets on hire the services of a worker who is party to a contract of service with that person continues to be the worker's employer while the worker's services are lent or let on hire.
2. If a labour hire agency or group training organisation arranges for a worker who is party to a contract of service with the agency or organisation to do work for someone else, the agency or organisation continues to be the worker's employer while the worker does the work for the other person under an arrangement made between the agency or organisation and the other person.
3. If a holding company lets on hire the services of a worker who is party to a contract of service with the holding company, the holding company continues to be the worker's employer while the worker's services are let on hire.
4. The owner of the farm is the employer of a person who works the farm as a sharefarmer, and any worker employed by the sharefarmer, if -
 - (a) the sharefarmer does not provide and use in the sharefarming operations farm machinery driven or drawn by mechanical power; and
 - (b) the sharefarmer is entitled to not more than 1/3 of the proceeds of the sharefarming operations under the sharefarming agreement.
5. A person by whom commission is payable to a salesperson, canvasser, collector or other person (a "**salesperson**"), who is paid entirely or partly by commission, is the employer of the salesperson if the commission is not received for or in connection with work incident to a trade or business regularly carried on by the salesperson, individually or by means of a partnership.
6. A person is the employer of a contractor (other than a contractor mentioned in schedule 2, part 2, section 4), and any worker employed by the contractor, if -
 - (a) the person makes a contract with the contractor for the performance of work that is not incident to a trade or business regularly carried on by the contractor, individually or by means of a partnership; and

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Social Security Act 1991 (Cwlth), section 601 (Activity test) or 606 (Newstart Activity Agreements - terms).

-
- (b) the contractor -
 - (i) does not sublet the contract; or
 - (ii) does not employ a worker; or
 - (iii) if the contractor employs a worker, performs part of the work under the contract personally.
7. If a corporation is a worker's employer and an administrator is appointed under the Corporations Act to administer the corporation, the corporation continues to be the worker's employer while the corporation is under administration.

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 an 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 the servant's service for his or her master or is an incident of the servant's service (whether or not it was a term of his or her contract of service that the servant perform the function); or
 - (b) is directed to or is incidental to the carrying on of any business, enterprise, undertaking or activity of the servant's 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 the person's service with the Crown or is an incident of the person's service (whether or not it was a term of the person's appointment to the service of the Crown that the person 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 the person on the person's own account; or
 - (b) carried on by any partnership, of which the person 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

DRAFT *LAW REFORM (VICARIOUS LIABILITY) BILL 2001*

This Appendix contains a draft bill, prepared by the Office of the Queensland Parliamentary Counsel, for implementing the recommendations made by the Commission in Chapters 3 and 5 of this Report.

Queensland



**LAW REFORM (VICARIOUS LIABILITY)
BILL 2001**

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Draft

11M Employer subrogated to rights of employee under insurance
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Draft

2001

A BILL

FOR

**An Act to reform the law concerning particular liability of employers
and employees, and for other purposes**

The Parliament of Queensland enacts—	1
PART 1—PRELIMINARY	2
Clause 1 Short title	3
This Act may be cited as the <i>Law Reform (Vicarious Liability) Act 2001</i> .	4
PART 2—AMENDMENT OF LAW REFORM ACT 1995	5
Clause 2 Act amended in pt 2	6
This part amends the <i>Law Reform Act 1995</i> .	7
Clause 3 Insertion of new pt 3A	8
After part 3—	9
<i>insert—</i>	10
‘PART 3A—LIABILITY OF EMPLOYERS AND EMPLOYEES	11 12
<i>‘Division 1—Preliminary provisions</i>	13
‘11A Part prevails	14
‘This part has effect despite—	15
(a) any other Act or law in force immediately before the commencement of this section; and	16 17
(b) the provisions, whether express or implied, of any agreement entered into after the commencement of this section.	18 19

‘11B Part binds all persons	1
‘This part binds all persons including the State and, so far as the legislative power of the Parliament permits, the Commonwealth and the other States.	2 3 4
‘Division 2—Definitions	
‘11C Definitions for pt 3A	6
‘In this part—	7
“employee” includes a State employee.	8
“employer” , for a State employee, means the State.	9
“individual in the service of the State” does not include—	10
(a) a State employee; or	11
(b) an individual whose service of the State involves the conduct of a business, enterprise, undertaking or activity—	12 13
(i) carried on by the individual on the individual’s own account; or	14 15
(ii) carried on by a partnership, of which the individual is a member, for the partnership.	16 17
“member of the Queensland Police Service” means—	18
(a) a police officer within the meaning of the <i>Police Service Administration Act 1990</i> ; or	19 20
(b) a police recruit within the meaning of that Act; or	21
(c) a staff member within the meaning of that Act; or	22
(d) an individual appointed by the commissioner of the police service to perform duties for the police service on an unpaid voluntary basis on conditions decided by the commissioner.	23 24 25
“State employee” means—	26
(a) a public service employee; ¹ or	27
(b) a member of the Queensland Police Service; or	28

1 See *Public Service Act 1996*, section 9.

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(c) an individual employed by a Minister in the Minister’s capacity as a Minister; or	1 2
(d) an individual employed by a board or entity acting for the State.	3
<i>‘Division 3—Vicarious liability of employers for particular torts</i>	4
‘11D Vicarious liability for employee performing independent function	5 6
‘(1) This section applies if an employee, other than a State employee, commits a tort in the performance or purported performance of an independent function.	7 8 9
‘(2) The employee’s employer is vicariously liable for the tort to the same extent, if any, that the employer would be vicariously liable for the tort if it had not been committed in the performance or purported performance of an independent function.	10 11 12 13
‘(3) Subsection (2) applies except so far as an Act otherwise expressly provides.	14 15
‘(4) In this section—	16
“independent function” , for an employee, means a function conferred on the employee, whether or not as the holder of an office, by the common law or statute and performed independently of the will of the employee’s employer.	17 18 19 20
‘11E Vicarious liability of the State	21
‘(1) This section applies if—	22
(a) a State employee commits a tort in the course of, or arising out of, the State employee’s employment; or	23 24
(b) a State employee commits a tort in the performance or purported performance of an independent function; or	25 26
(c) an individual in the service of the State commits a tort in the performance or purported performance of a function conferred on the individual, including an independent function.	27 28 29
‘(2) The State is vicariously liable for the tort to the same extent, if any, that an employer would be vicariously liable for the tort if—	30 31

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(a) the tort had been committed by an employee, other than a State employee; and	1 2
(b) for a tort committed in the performance or purported performance of an independent function, the tort had not been committed in the performance or purported performance of an independent function.	3 4 5 6
‘(3) Subsection (2) applies except so far as an Act otherwise expressly provides.	7 8
‘(4) In this section—	9
“ independent function ”, for a State employee or an individual in the service of the State, means a function conferred on the State employee or individual, whether or not as the holder of an office, by the common law or statute and performed independently of the will of the State.	10 11 12 13
‘11F Vicarious liability for lent employee	14
‘(1) This section applies if—	15
(a) an employer lends or lets on hire an employee’s services to another person; and	16 17
(b) the employee commits a tort while there continues to be a contract of service between the employer and the employee.	18 19
‘(2) The employer is vicariously liable for the tort to the same extent, if any, that the employer would be vicariously liable for the tort if the employer had not lent or let on hire the employee’s services to the other person.	20 21 22 23
<i>‘Division 4—Indemnity and contribution</i>	24
‘11G Application of div 4	25
‘(1) This division applies if, after the commencement of this section, an employee commits a tort in the course of, or arising out of, the employee’s employment for which the employee’s employer is also liable, whether vicariously or otherwise.	26 27 28 29
‘(2) However, this division does not apply if the conduct constituting the tort was serious and wilful misconduct.	30 31

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‘11H Application to individual in the service of the State	1
‘This division applies to an individual in the service of the State as if—	2
(a) the individual were a State employee; and	3
(b) the individual’s service with the State were employment.	4
‘11I Employee not liable to indemnify or contribute if employer also liable	5 6
‘(1) The employee is not liable to indemnify, or to pay any contribution to, the employer in relation to the liability incurred by the employer for the tort.	7 8 9
‘(2) In this section—	10
“ contribution ” includes a contribution as joint tortfeasor or otherwise.	11
‘11J Employer to indemnify employee	12
‘(1) The employer is liable to indemnify the employee in relation to liability incurred by the employee for the tort.	13 14
‘(2) Subsection (1) does not apply if the employee is otherwise entitled to an indemnity in relation to the liability.	15 16
<i>‘Division 5—Subrogation</i>	17
‘11K Application of div 5	18
‘This division applies if, after the commencement of this section, an employee commits a tort in the course of, or arising out of, the employee’s employment for which the employee’s employer is also liable, whether vicariously or otherwise.	19 20 21 22
‘11L Application to individual in the service of the State	23
‘This division applies to an individual in the service of the State as if—	24
(a) the individual were a State employee; and	25
(b) the individual’s service with the State were employment.	26

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‘11M Employer subrogated to rights of employee under insurance policy or contract of indemnity	1 2
‘(1) If the employee is entitled under an insurance policy or a contract of indemnity to be indemnified in relation to liability incurred by the employee for the tort, the employer is subrogated to the employee’s rights under the policy or contract in relation to liability incurred by the employer arising from the commission of the tort.	3 4 5 6 7
‘(2) In this section—	8
“insurance policy” includes an indemnity policy.	9
<i>‘Division 6—Loss of employee’s services</i>	
‘11N Employee not liable for loss of services of co-employee	10 11
‘An employee is not liable in tort to the employee’s employer only because the employee has deprived the employer of the services of another employee of the employer.’	12 13 14
PART 3—AMENDMENT OF POLICE SERVICE ADMINISTRATION ACT 1990	
Clause 4 Act amended in pt 3	15 16
This part amends the <i>Police Service Administration Act 1990</i> .	17 18
Clause 5 Amendment of s 10.5 (Liability for tort generally)	19
(1) Section 10.5(1) to (2)—	20
<i>omit, insert—</i>	21
‘(1) The <i>Law Reform Act 1995</i> , section 11E ² provides for the Crown’s liability for particular torts committed by an officer, staff member, recruit or volunteer.	22 23 24

2 *Law Reform Act 1995*, section 11E (Vicarious liability of the State)

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‘(2) The <i>Law Reform Act 1995</i> , section 11J ³ provides for the Crown’s liability to indemnify an officer, staff member, recruit or volunteer in relation to liability incurred for particular torts.’	1 2 3
(2) Section 10.5(3), ‘by the Crown’, second mention— <i>omit.</i>	4 5
(3) Section 10.5(3), after ‘negligence’— <i>insert—</i> ‘by the Crown’.	6 7 8
(4) Section 10.5(4), ‘the purposes of this section’— <i>omit, insert—</i> ‘subsection (3)’.	9 10 11
Clause 6 Amendment of s 10.6 (Payment and recovery of damages)	12
(1) Section 10.6(1)(a), ‘, other than damages in the nature of punitive damages,’— <i>omit.</i>	13 14 15
(2) Section 10.6(3), from ‘Except’ to ‘moneys’— <i>omit, insert—</i> ‘If the Crown has paid moneys under subsection (1)’.	16 17 18
(3) Section 10.6— <i>insert—</i>	19 20
(5) To remove doubt, it is declared that nothing in this section limits or affects the operation of the <i>Law Reform Act 1995</i> , part 3A, division 4. ⁴ .	21 22
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3 *Law Reform Act 1995*, section 11J (Employer to indemnify employee)

4 *Law Reform Act 1995*, part 3A (Liability of employers and employees), division 4 (Indemnity and contribution), particularly sections 11G (Application of div 4), 11I (Employee not liable to indemnify or contribute if employer also liable) and 11J (Employer to indemnify employee).